

Video Conferencing Technology in the Criminal Courtroom: A Review of Scholarly Literature, National Policies and Guidance, and Popular Media Coverage

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Articles and Reports

	Title	Author	Type	Year	Summary	Link
1.	The Impact of Video Proceedings on Fairness and Access to Justice in Court	Alicia Bannon & Janna Adelstein	Report from the Brennan Center for Justice	2020	Remote technology raises critical questions about litigants' rights and access to justice and what courts/others can do to mitigate harm. Existing research suggests caution as well as the need for more research.	Find here.
2.	Remote Criminal Justice	Jenia I. Turner	Article in Texas Tech Law Review	2020	Survey responses suggest that, on the whole, online proceedings can save time and resources for participants in criminal cases and can provide broader access to the courts for the public. Respondents also noted dangers, particularly in contested or evidentiary hearings or trials.	Find here.

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	Title	Author	Type	Year	Summary	Link
3.	How Video Changes the Conversation: Social Science Research on Communication Over Video and Implications for the Criminal Courtroom	Lisa Bailey Vavonese et al.	Report from the Center for Court Innovation	2020	There is very little empirical research on the use and impact of video in courtroom. A scan of the social science research shows that communicating over video can alter an interaction. Given the high stakes of the criminal courtroom, policy makers and system actors must be hypervigilant when making decisions about video's continued use following COVID-19, particularly when an individual's liberty is at risk.	Find here.
4.	Court Appearances in Criminal Proceedings Through Telepresence	Camille Gourdet et al.	Report from NIJ's Priority Criminal Justice Needs Initiative	2020	Findings from 12-member panel workgroup convened in November 2018. Advantages of telepresence include efficiency and reduced trauma for victims, and potential disadvantages include negative impacts for the defendant on outcomes and the attorney-client relationship, and infringement of constitutional rights. More research is needed to assess the findings as well as best practices for setup of technology, data security, and training.	Find here.
5.	Charm City Televised & Dehumanized: How CCTV Bail Reviews Violate Due Process	Edie Fortuna Cimino et al.	Article in University of Baltimore Law Forum	2014	Examination of the use of video for bail hearings in Baltimore City, MD. Author contends that defendants have a constitutional right to be present at bail hearings (6 th Amendment right to counsel) and that a defendant's absence is a violation of a defendant's right to confrontation.	Find Here.

	Title	Author	Type	Year	Summary	Link
6.	Private Attorney- Client Communications and the Effect of Videoconferencing in the Courtroom	Eric T. Bellone	Article in Journal of Int'l Commercial Law and Technology	2013	Discussion on the impact of video on private attorney-client communications. Focused on instances where the attorney is in the courtroom and the defendant appears remotely. The author highlights concern with the effect on trust between attorney and client and defendants' confidence in their attorney.	Find here.
7.	Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions	Shari Seidman Diamond et al.	Article in Journal of Criminal Law and Criminology	2010	Researchers examined the pattern of bail decisions in Cook County, IL for eight years prior to video and eight years following, and found a sharp increase in the average amount of bail set with video and no change in the amount set in-person.	Find here.

Resolutions from National Associations

	Title	Author	Type	Year	Summary	Link
1.	Conference of Chief Justices (CCJ)/ Conference of State Court Administrators (COSCA)	Proposed by CCJ/COSCA working group on 07/30/2020	Resolution	2020	Resolved that CCJ/COSCA urges courts to adopt remote-first or remote-friendly approaches when moving court processes forward. In support of Guiding Principles for Post-Pandemic Court Technology.	Find here.
2.	Guiding Principles for Post-Pandemic Court Technology				Recommendation from CCJ/COSCA that state courts consider six key principles as they embrace technology.	Find here.

	Title	Author	Type	Year	Summary	Link
3.	American Bar Association (ABA)	Annual Meeting 2020, House of Delegates	Resolution	2020	Resolved that the ABA urges a measured approach to video during COVID 19, reintroduce in-person court options as soon as safely feasible, and study the impacts and take steps to halt, alter, or review if studies suggest prejudicial effect or disparate impact.	Find here.

Toolkits and Practice Guides

	Title	Author	Type	Year	Summary	Link
1.	Remote Hearing Toolkit	United Nations Institute for Training and Research	Resource	2020	An interactive toolkit to help stakeholders to conduct a thorough decision-making and planning process before adopting the use of video or audio conferencing for court hearings when in-person is not feasible. Including whether and how to use technology.	Find here.
2.	SRL One Page Remote Hearings Sample Instructions	National Center for State Courts	Resource	2020	Instructions for the self-represented litigant on how to prepare and present at virtual court proceedings.	Find here.
3.	Things to remember in video court	National Association of Public Defenders	Resource	2020	A checklist for defense attorneys.	Find here.
4.	Is Virtual Justice Really Justice?	Incarcerations Nations Network	Resource	2020	A guide for practitioners and advocates on the use of remote court technology during the COVID-19 global pandemic.	Find here.

Popular Media Coverage

	Title	Author	Type	Year	Summary	Link
1.	How Do I Defend People Now?	Chrissy Madjar et al.	Publication, The Marshall Project	2020	Four public defenders recount their difficulties providing representation during the pandemic.	Find here.
2.	Judges are split on whether virtual hearings have reduced the number of no-shows	Anna-Leigh Firth	Publication, National Judicial College	2020	Of the 363 responses from Alumni, roughly half of the judges said court attendance improved with virtual court and the other half said it stayed the same or got worse.	Find here.
3.	Virtual Criminal Justice May Make the System More Equitable	Lucy Lang	Publication, Wired	2020	Argues that courts should not return to “business as usual” following the pandemic and instead consider making innovative practices permanent.	Find here.
4.	The Perils of ‘Zoom Justice’	Sarah Esther Lageson	Publication, Wired	2020	Examines the unintended consequences of “digital punishment” -- a phenomenon where the collection and release of digital criminal justice information creates permanent online stigmatization for people arrested and processed through courts.	Find here.
5.	Virtual Courtrooms Prove to Be Both Curse and Blessing	Steven Lerner	Publication, Law 360	2021	Discusses advantages and disadvantages to virtual court proceedings.	Find here.



The Impact of Video Proceedings on Fairness and Access to Justice in Court

Increasing use of remote video technology poses challenges for fair judicial proceedings. Judges should adopt the technology with caution.

By **Alicia Bannon and Janna Adelstein** PUBLISHED SEPTEMBER 10, 2020

Introduction

The Covid-19 pandemic has disrupted court operations across the country, prompting judges to postpone nonessential proceedings and conduct others through video or phone.¹ Even as courts have begun to reopen, many are also continuing or testing new ways to expand the use of remote technology.² At the same time, public health concerns are leading some legal services providers and other advocates to oppose the return to in-person proceedings.³ Beyond the current moment, several court leaders have also suggested that expanded use of remote technology should become a permanent feature of our justice system.⁴

Remote technology has been a vital tool for courts in the midst of a public health crisis. But the use of remote technology — and its possible expansion — also raises critical questions about how litigants' rights and their access to justice may be impacted, either positively or negatively, and what courts and other stakeholders can do to mitigate any harms.

This paper collects and summarizes existing scholarship on the effects of video technology in court proceedings. Federal courts, immigration courts, and state courts have long used video technology for certain kinds of proceedings.⁵ While the available scholarship on the use of video proceedings is limited, existing research suggests reason for caution in expanding the use of these practices, as well as the need for further research on their potential effects.

For Example:

- One study of criminal bail hearings found that defendants whose hearings were conducted over video had substantially higher bond amounts set than their in-person counterparts, with increases ranging from 54 to 90 percent, depending on the offense.⁶
- A study of immigration courts found that detained individuals were more likely to be deported when their hearings occurred over video conference rather than in person.⁷
- Several studies of remote witness testimony by children found that the children were perceived as less accurate, believable, consistent, and confident when appearing over video.⁸
- In three out of six surveyed immigration courts, judges identified instances where they had changed credibility assessments made during a video hearing after holding an in-person hearing.⁹

Research also suggests that the use of remote video proceedings can make attorney-client communications more difficult. For example, a 2010 survey by the National Center for State Courts found that 37 percent of courts using videoconferencing had no provisions to enable private communications between attorneys and their clients when they were in separate locations.¹⁰ Remote proceedings can likewise make it harder for self-represented litigants to obtain representation and other forms of support by separating them from the physical courthouse. A study of immigration hearings found that detained immigrants who appeared in person were 35 percent more likely to obtain counsel than those who appeared remotely.¹¹

At the same time, other research suggests that remote video proceedings may also enhance access to justice under some circumstances. For example, a Montana study found that the use of video hearings allowed legal aid organizations to reach previously underserved parts of the state.¹² Organizations such as the Conference of Chief Justices have called for the expanded use of video or telephone proceedings in civil cases, particularly for

self-represented and low-income litigants, as a way of reducing costs for those who, for example, may need to take time off work to travel to court.¹³

One challenge in interpreting this research is that court systems hear a wide range of cases, both civil and criminal, and the use of videoconferencing may pose widely disparate challenges and benefits for litigants in different types of cases. Courts are involved in adjudicating everything from evictions to traffic violations, from multimillion-dollar commercial disputes to felony cases. In some instances, litigants are detained in jails or detention centers. In others, they may be self-represented. Courts hold preliminary hearings, arraignments, settlement negotiations, scheduling conferences, arguments on legal motions, jury trials, and much more.

At its core, this review of existing scholarship underscores the need for broad stakeholder engagement in developing court policies involving remote proceedings, as well as the need for more research and evaluation as courts experiment with different systems.

Impact of Video Proceedings on Case Outcomes

A handful of studies have directly assessed whether replacing certain in-person proceedings with videoconferences impacted substantive outcomes in criminal, civil, or immigration proceedings. Several other studies have sought to evaluate the impact of using video on factors that are likely to affect substantive outcomes, such as credibility assessments by juries or other factfinders, and communication between attorneys and their clients.

Video Proceedings and Substantive Outcomes

One study by law and psychology professor Shari Seidman Diamond and coauthors, published in the *Journal of Criminal Law and Criminology*, looked at the impact of using closed-circuit television during bail hearings in Cook County, Illinois. The study found that judges imposed substantially higher bond amounts when proceedings occurred over video.¹⁴

In 1999, Cook County began using closed-circuit television for most felony cases, requiring defendants to remain at a remote location during bail hearings. A 2008 analysis of over 645,000 felony bond proceedings held between January 1, 1991 and December 31, 2007 found that after the closed-circuit television procedure was introduced, the average bond amount for impacted cases rose by 51 percent — and increased by as much as 90 percent for some offenses. By contrast, there were no statistically significant changes in bond amounts for those cases that continued to have live bail hearings.¹⁵ These disparities persisted over time. The release of this study, which was prepared in connection with a class action lawsuit challenging Cook County’s practices, caused the county to voluntarily return to live bail hearings.¹⁶

The authors theorized several explanations for the difference in bond amounts in Cook County. Among other things, they pointed to the picture quality and the video setup, which gave the appearance that the defendant was not making eye contact. In addition, they suggested that the defendant’s remote location made it difficult for their attorney to gather information in advance of the hearing or consult with their client during the hearing. The authors also pointed out that the video was in black and white, and that litigants with darker skin were difficult to see on camera. Finally, they raised the question of whether some aspect of appearing in person affects a person’s believability.¹⁷

Another study by law professor Ingrid Eagly looked at the use of video technology to adjudicate immigration proceedings remotely, finding that detained respondents were more likely to be deported when their proceedings occurred over videoconference.¹⁸ Video hearings are now a common feature in immigration court, and have been used regularly since the 1990s.¹⁹ The use of videoconferencing, even without the petitioner’s consent, is specifically authorized by statute.²⁰ According to the Transactional Records Access Clearinghouse Immigration Center at Syracuse University, from October through December 2019, one out of every six final hearings deciding an immigrant’s case was held by video.²¹ Eagly examined outcomes for detained immigrants in immigration court, comparing those who participated via video to those who participated in person.²² Eagly used a nationwide sample of nearly 154,000 cases, in which immigration judges reached a decision on the merits during fiscal years 2011 and 2012.²³

Eagly found what she described as a “paradox”: detained immigrants whose proceedings occurred over video were more likely to be deported, but *not* because judges denied their claims at higher rates. Rather, these respondents were less likely to take advantage of procedures that might help them. Detained individuals who

appeared in person were 90 percent more likely to apply for relief, 35 percent more likely to obtain counsel, and 6 percent more likely to apply only for voluntary departure, as compared to similarly situated individuals who appeared by video. These results were statistically significant, even when controlling for other factors that could influence case outcomes.²⁴

At the same time, among those individuals who actually applied for various forms of relief, there was no statistically significant difference in outcome after controlling for other factors. However, because video participants were *less likely* to seek relief or retain counsel, video cases were still significantly more likely to end in removal.²⁵ Eagly argued that “[t]elevideo must therefore be understood as having an indirect relationship to overall substantive case outcomes—one linked to the disengagement of respondents who are separated from the traditional courtroom setting.”²⁶

Eagly relied on interviews and court observations to explore why video proceedings led to less engagement by respondents. She suggested that respondents may have been less likely to participate fully in video proceedings due to logistical hurdles requiring advanced preparation, such as the need to mail an application for relief in advance of the hearing, rather than bringing one to court and physically handing over a copy. She also highlighted the difficulties that video proceedings pose in allowing individuals to communicate effectively and confidentially with their attorney. Finally, she found that respondents often found it difficult to understand what was happening during video proceedings, and that many perceived a video appearance as unfair and not a real “day in court,” an assertion which has also been made by the American Bar Association Commission on Immigration.²⁷

A few studies have also examined the impact of video testimony on jury trials, with mixed results. One study by psychology professor Holly Orcutt and coauthors examined the impact of remote testimony by children in sexual abuse cases. The authors created a simulation involving a fake crime with children and an adult actor. The children then testified on their experiences within the experiment during a mock trial,²⁸ using actors and mock jurors. The child witnesses testified either in person or via one-way closed-circuit television.²⁹

Orcutt found that when children testified via closed-circuit television, the mock jurors rated them as less honest, intelligent, and attractive, and concluded that their testimony was less accurate. Mock jurors were also less likely to vote to convict the defendant (accused by the child witness), when the child testified by closed-circuit television.³⁰ Thus, closed-circuit testimony “appeared to result in a more negative view of child witnesses as well as a small but significant decrease in the likelihood of conviction [of the defendant].”³¹ However, after jurors deliberated, there was no statistically significant impact of video versus live testimony on the verdict.³² It is possible that study participants had a specific skepticism about remote testimony by children in abuse cases due to assumptions about why a child might not testify in person. However, this study also raises the possibility that remote witness testimony is generally less likely to be seen as credible, disadvantaging litigants and raising fairness concerns in cases where testimony is likely to be critical to a party’s case.

On the other hand, a series of studies from the 1970s and 1980s based on reenacted trials generally found that videotaped trials had no impact on outcomes. For example, in a reenacted trial involving an automobile personal injury case, staffed by actors, there was no statistically significant difference in the mean amount awarded by the jury, or in the jury’s retention of information, between the in-person and videotaped trials.³³ However, several caveats apply. First, these studies did not address the use of remote jurors, or jurors who interacted with each other over video.³⁴ Also relevant is that the technologies available to conduct remote proceedings today are vastly different than those used in studies in the 1970s and 80s. Finally, another limitation of these studies is that they do not address how less than ideal technological conditions may impact

court dynamics. For example, a study of immigration courts by Booz Allen Hamilton for the Department of Justice determined that technological glitches had disrupted cases to such an extent that due process concerns may arise.³⁵

Lastly, the Administrative Conference of the United States has studied the use of video conferencing by federal executive agencies in administrative hearings. According to an analysis by the Bureau of Veteran Affairs, there was no evidence that video proceedings for veterans benefits adjudications had an impact on outcomes: “the difference in grants [for veterans’ benefits claims] between video hearings and in-person hearings has been within one percent” over the five-year period preceding the 2011 report.³⁶ The study also found that these hearings had increased productivity for Veterans Law Judges and supporting counsel by eliminating the need for travel to and from hearings.

Other Effects on Litigants

Video and Perceptions of Credibility

In addition to studies that directly assess the relationship between video proceedings and outcomes, such as conviction or deportation rates, other research has looked at whether video testimony by a witness has an impact on how they are perceived by factfinders. Because credibility determinations are often central to case outcomes, the effect of video appearance on credibility has important implications for the overall fairness of remote proceedings.

In addition to the Orcutt study discussed previously, several other studies have looked at the impact of video testimony by children on their perceived credibility in the context of sexual abuse cases, finding that video testimony had an impact on jurors’ perceptions of the child’s believability. For example, an analysis involving mock trials with actors where a child testified either in-person or via closed-circuit television found that testimony over video lowered jurors’ perception of a child’s accuracy and believability.³⁷ Similarly, in a Swedish simulation where different jurors watched the child testimony either live or via video, jurors perceived the live testimony in more positive terms and rated the children’s statements as more convincing than the video testimony. Live observers also had a better memory of the children’s statements.³⁸

Other research suggests that technological limitations may affect immigration judges’ ability to assess credibility in video proceedings. For example, in a 2017 U.S. Government Accountability Office report on immigration courts, judges in three of the six surveyed courts identified instances where they had changed credibility assessments made during a video hearing after holding a subsequent in-person hearing:

For example, one immigration judge described making the initial assessment to deny the respondent’s asylum application during a [video teleconference] hearing in which it was difficult to understand the respondent due to the poor audio quality of the [video teleconference]. However, after holding an in-person hearing with the respondent in which the audio and resulting interpretation challenges were resolved, the judge clarified the facts of the case, and as a result, decided to grant the respondent asylum. Another immigration judge reported being unable to identify a respondent’s cognitive disability over [video teleconference], but that the disability was clearly evident when the respondent appeared in person at a subsequent hearing, which affected the judge’s interpretation of the respondent’s credibility.³⁹

Psychology research also provides theoretical support for the concern that individuals who appear by video may face disadvantages. For example, psychology professor Sara Landstrom, who studied video testimony by children, has described the “vividness effect,” whereby testimony that is more emotionally interesting and proximate in a sensory, temporal, or spatial way is generally perceived by observers as more credible and is better remembered. Landstrom notes, “it can be argued that live testimonies, due to face-to-face immediacy, are perceived [by jurors] as more vivid than, for example, video-based testimonies, and in-turn are perceived more favourably, considered more credible and are more memorable.”⁴⁰

Similarly, drawing from communications and social psychology research, law professor Anne Bowen Poulin argued, “[s]tudies reveal that people evaluate those with whom they work face-to-face more positively than those with whom they work over a video connection. When decisionmakers interact with the defendant through the barrier of technology, they are likely to be less sensitive to the impact of negative decisions on the defendant.”⁴¹

Technology choices may also have unintended consequences. For example, research by G. Daniel Lassiter and coauthors have documented a camera perspective bias in the context of videotaped confessions, finding that observers were more likely to believe a confession was voluntary when the camera was focused only on the defendant during a videotaped interrogation.⁴² Poulin has also noted that space constraints may necessitate the use of close-up shots during some video hearings, which can exaggerate features, obfuscate the perception of a person’s size and age, and obscure body language.⁴³

Effects on Attorney-Client Communications and Relationship

Another question raised by the use of video proceedings is whether they impact communication and other aspects of the relationship between attorneys and their clients, who are frequently separated during remote proceedings. For example, in a 2010 survey by the National Center for State Courts, 37 percent of courts that used video proceedings reported that they had no provisions to enable private communications between an attorney and client when they were in separate locations.⁴⁴ Poulin also noted that even when a secure phone line for private attorney-client communication is provided, nonverbal communication is likely to be difficult, and it may be hard for a client to catch their attorney’s attention with a question or to provide relevant information.⁴⁵

Similarly, Diamond’s Cook County study on the impact of video proceedings on bail observed that separating attorneys and clients made it harder for them to quickly confer during a bail hearing. She noted that such a communication challenge could be consequential in a bail hearing: a defendant may be able to provide “mitigating details regarding past convictions that will greatly assist counsel... Obviously, such communications must occur immediately if counsel is to be able to make use of his client’s information during a fast-paced bail hearing.”⁴⁶

A study by the advocacy organization Transform Justice surveyed lawyers, magistrates, probation officers, intermediaries, and other officials about the use of remote proceedings in the United Kingdom. Fifty-eight percent of respondents thought that video hearings had a negative impact on defendants’ ability to participate in hearings, and 72 percent thought that video hearings had a negative impact on defendants’ ability to communicate with practitioners and judges.⁴⁷ Survey respondents indicated that they believed the following groups were the most negatively impacted by video hearings: defendants with limited English proficiency, unrepresented defendants, and children under 18.⁴⁸

These findings were echoed in Florida’s experience with remote video proceedings for juvenile detention hearings. In 2001, the Florida Supreme Court repealed an interim rule that had been in effect from 1999 through 2001 that authorized remote juvenile hearings.⁴⁹ In repealing the rule, the Court detailed public defenders’ concerns that “there was no proper opportunity for meaningful, private communications between the child and the parents or guardians, between the parents or guardians and the public defender at the detention center, and between a public defender at the detention center and a public defender in the courtroom.”⁵⁰ The court observed that “[a]t the conclusion of far too many hearings, the child had no comprehension as to what had occurred and was forced to ask the public defender whether he or she was being released or detained.”⁵¹

Additional Access to Justice Considerations

Another question raised by remote video proceedings is how their use impacts the public's access to justice in civil cases, where there is generally no right to counsel and where other safeguards for litigants are weaker than in criminal cases.

Access to Counsel and Other Resources in Civil Cases

One critical issue is the extent to which videoconferencing increases or diminishes burdens for self-represented litigants in arenas like housing or family court. Understanding the relationship between video proceedings and access to justice can inform courts' use of video both now and in the future, and help identify areas where courts should invest in additional resources or support for litigants.

The Conference of Chief Justices has encouraged judges to “promote the use of remote audio and video services for case hearings and case management meetings” in civil cases as part of a broader set of reforms to promote access to justice.⁵² The Conference cites, among other things, that video proceedings can help mitigate the costs borne by litigants who might have to travel far distances or take time off from work to attend in-person court proceedings.⁵³ Notably, the Conference of Chief Justices' proposal calls for combining video proceedings with enhanced services for self-represented litigants, including internet portals and stand-alone kiosks to facilitate access to court services, simplified court forms, and real-time court assistance services over the internet and phone.

A report by the Self-Represented Litigation Network similarly observed that videoconferencing technology can reduce the time and expenses associated with traveling, transportation, childcare, and other day-to-day costs that individuals incur when they go to court. The report also noted the potential costs of such technology, including the possibility that remote appearances may lessen the accuracy of factfinding and reduce early opportunities to settle cases.⁵⁴

There is only limited research on the benefits and harms of video proceedings with respect to access to the courts. Eagly's study of immigration court hearings found that detained immigrants who appeared in person were 35 percent more likely to obtain counsel than those who appeared remotely, highlighting the role that courthouses often play in connecting self-represented individuals with resources, including representation.⁵⁵

On the other hand, a 2007 study on the use of videoconference technology in Montana, which included interviews and court observations, found that the use of video court appearances in both civil and criminal hearings enabled legal aid organizations to serve previously underserved parts of the state.⁵⁶ Montana, one of the largest and least populated states, had only 84 lawyers in the entire eastern portion of the state in 2004.⁵⁷ The study concluded that introducing video hearings means that “legal aid has a presence in counties from which they would be absent if video were not there as an option.”⁵⁸ Video proceedings also opened up greater opportunities for pro bono representation. The report endorsed the use of the video technology in Montana, while urging caution in ensuring that the technology was “used with sensitivity to overall access to justice goals,” including recognizing that there are cases that may not be appropriate for video appearances, such as those involving lengthy proceedings.⁵⁹ The study also acknowledged that there are still unanswered questions about how to properly cross-examine a witness over video and that the potential issues with such examinations could be more significant when dealing with an individual's credibility or integrity.⁶⁰

Beyond the use of videoconferencing, another study looked at an online case resolution system for minor civil infractions and misdemeanors. This online system did not use video; rather, individuals had the option to use an online portal to communicate with judges, prosecutors, and law enforcement at any time of day. The study found that the system saved time, significantly reduced case duration, and reduced default rates (where individuals lose cases by not contesting their claims).⁶⁴ The author highlighted the costs associated with going to court for relatively low-stakes proceedings: “Physically going to court costs money, takes time, creates fear and confusion, and presents both real and perceived risks.”⁶² To the extent that video proceedings may similarly reduce some of the costs of going to the courthouse, this study suggests that in lower-stakes proceedings, the use of video can save time compared to attending in-person proceedings, and can enable more individuals to engage with the system rather than defaulting their claims. However, it also highlights that videoconferencing is not the only way to conduct proceedings remotely, and that in some contexts online systems and other technologies have functioned well.⁶³

Additional Consideration for Marginalized Communities

Other research raises potential equity concerns about the broad use of video proceedings, particularly for marginalized communities and in cases where individuals are required to participate by video. These concerns underscore the need for additional research and evaluation as courts experiment with remote systems, as well as the need for courts to consult with a wide array of stakeholders when developing policies for video proceedings.

For instance, there is a substantial digital divide associated with access to the internet and communication technology. One critical unanswered question is whether and how video proceedings may exacerbate existing inequalities. According to studies by the Pew Research Center, there are substantial disparities in access to internet broadband and computers according to income and race.⁶⁴ Americans who live in rural communities are also less likely to have access to broadband internet.⁶⁵ The same is true for people with disabilities, who may also require special technology in order to engage in online activities such as remote court proceedings.⁶⁶

Technology disparities potentially pose significant hurdles to the widespread use of video court proceedings for marginalized communities, particularly when Covid-19 has led to the closure of many offices and libraries. The pandemic has also caused a massive spike in unemployment, which may hinder litigants’ abilities to pay their phone and internet bills.⁶⁷ Because there is currently a dearth of research on how the digital divide impacts access to video proceedings, courts and other stakeholders should conduct their own studies before committing to the use of video hearings in the long term.

Other research has identified challenges that self-represented litigants face in navigating the legal system, including the need for training and support offered in multiple languages.⁶⁸ In some states, as many as 80 to 90 percent of litigants are unrepresented.⁶⁹ Another critical research question is the extent to which courts are able to provide adequate support remotely, particularly in jurisdictions where courthouses have been the principal place where individuals going to court connect with resources.

A final question is how remote technology affects access to justice for individuals who do not speak English or have limited English proficiency. This is a particular concern in the judicial context because research suggests that dense court language can be difficult to communicate via translation to non-English speakers.⁷⁰

Research related to the use of remote translation in areas such as telemedicine has been mixed as to whether remote translation impacts quality and satisfaction.⁷¹ And while there is limited research on remote translation in courts, a study by the Legal Assistance Foundation of Metropolitan Chicago and the Chicago Appleseed Fund for Justice found that approximately 30 percent of litigants in immigration court who used an interpreter appeared to misunderstand what was happening, either due to misinterpretation or inadequate interpretation.⁷² The study lacked a control group, making it difficult to assess the role that remote video immigration proceedings played in translation difficulties, but the report's authors suggested that, based on their observation of these proceedings, videoconferences exacerbated translation difficulties.⁷³

Conclusion

Though video conferencing technology has been a valuable tool during the Covid-19 pandemic, existing scholarship suggests reasons to be cautious about the expansion or long-term adoption of remote court proceedings. More research is necessary, both about the potential impact of remote technology on outcomes in a diverse range of cases, as well as the advantages and disadvantages with respect to access to justice. In the meantime, as courts develop policies for remote proceedings, they should consult with a broad set of stakeholders, including public defenders and prosecutors, legal services providers, victim and disability advocates, community leaders, and legal scholars.

Endnotes

¹ Brennan Center for Justice, *Courts' Responses to the Covid-19 Crisis*, last updated September 10, 2020, <https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis>.

² Daniel Siegel, "Miami, Orlando Headline Fla. Courts' Remote Trial Experiment," *Law360*, June 4, 2020, <https://www.law360.com/articles/1279653/miami-orlando-headline-fla-courts-remote-trial-experiment>; and

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⁴ Lyle Moran, "How Hosting a National Pandemic Summit Aided the Nebraska Courts System with its Covid-10 Response," *Legal Rebels Podcast*, May 13, 2020, https://www.abajournal.com/legalrebels/article/rebels_podcast_episode_052; and Katelyn Kivel, "How the Coronavirus Revolutionized Michigan's Courts," *The Gander Newsroom*, July 14, 2020, <https://gandernewsroom.com/2020/07/14/coronavirus-revolutionized-courts/>.

⁵ Shari Seidman Diamond et al., "Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions," *Journal of Criminal Law and Criminology* 100 (2010): 877-878, 900; Ingrid V. Eagly, "Remote Adjudication in Immigration," *Northwestern University Law Review* 109 (2015): 934; and Mike L. Bridenback, *Study of State Trial Courts Use of Remote Technology*, National Association for Presiding Judges and Court Executive Officers, 2016, 12, <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf>.

⁶ Diamond et al., "Efficiency and Cost," 893.

⁷ Eagly, "Remote Adjudication," 966; and Frank M. Walsh and Edward M. Walsh, "Effective Processing or Assembly-Line Justice - The Use of Videoconferencing in Asylum Removal Hearings," *Georgetown Immigration Law Journal* 22 (2008): 271-72.

⁸ Holly K. Orcutt et al., "Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials," *Law and Human Behavior* 25 (2001): 357-8, 366. However, it is important to note that these studies are simulated experiments and not observations of actual court proceedings, so outcomes might have differed if video proceedings were used and examined in an actual court hearing. Also worth noting is that the judge, bailiff, and attorneys questioning the children were in the room with the children testifying; the children only appeared by CCTV to the mock jurors.

⁹ Government Accountability Office, *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, 2017, 55, <https://www.gao.gov/assets/690/685022.pdf>.

¹⁰ Eric Bellone, "Private Attorney- Client Communications and the Effect of Videoconferencing in the Courtroom," *Journal of International Commercial Law and Technology* 8 (2013): 44-45.

¹¹ Eagly, "Remote Adjudication," 938.

¹² Richard Zorza, *Video Conferencing for Access to Justice: An Evaluation of the Montana Experiment*, Legal Services Corporation, 2007, 1, 3, <https://docplayer.net/3126017-Video-conferencing-for-access-to-justice-an-evaluation-of-the-montana-experiment-final-report.html>.

¹³ National Center for State Courts, *Call to Action: Achieving Civil Justice for All*, 2016, 37-38 <https://iaals.du.edu/publications/call-action-achieving-civil-justice-all>.

¹⁴ Diamond et al., "Efficiency and Cost," 897.

¹⁵ Diamond et al., "Efficiency and Cost," 896.

¹⁶ Diamond et al., "Efficiency and Cost," 870.

¹⁷ Diamond et al., "Efficiency and Cost," 884-85, 898-900.

¹⁸ An earlier analysis by Frank and Edward Walsh in the *Georgetown Immigration Law Journal* likewise found disparities in outcomes in asylum cases. The study, which looked at fiscal years 2005 and 2006, found that "the grant rate for asylum applicants whose cases were held in person is roughly double the grant rate for the applicants whose cases were heard via [video]." Walsh and Walsh, "Effective

Processing,” 271. These differences were statistically significant, and the authors found similar and statistically significant differences when controlling for whether the applicant was represented by counsel. However, according to Eagly, most immigration hearings were not coded for whether they were conducted in person or by video prior to 2007, undercutting the reliability of the findings. Eagly, 946. Nor did the study identify the basis by which some asylum applicants were designated for video conference, suggesting the possibility of confounding variables. Nevertheless, the striking difference in asylum rates highlights the need for further research.

¹⁹ “Video Hearings in Immigration Court FOIA,” American Immigration Council, last modified August 11, 2016, accessed May 14, 2020, <https://www.americanimmigrationcouncil.org/content/video-hearings-immigration-court-foia>.

²⁰ See 8 U.S.C. § 1229a(b)(2)(A)(iii); see also 8 C.F.R. § 1003.25(c) (“An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person.”).

²¹ TRAC Immigration, “Use of Video in Place of In-Person Immigration Court Hearings,” January 28, 2020, <https://trac.syr.edu/immigration/reports/593/>.

²² Eagly, “Remote Adjudication,” 933.

²³ Eagly, “Remote Adjudication,” 960.

²⁴ Among other things, Eagly controlled for the type of proceeding and charge, the respondent’s nationality, whether they are represented by counsel, their judge, and the year the proceedings took place. Eagly, “Remote Adjudication,” 938.

²⁵ Eagly looked at two samples, a national sample and a subset of locations that she called the Active Base Sample. She found that “in the National Sample, 80 percent of in-person respondents were ordered removed, compared to 83 percent of televideo respondents. In the Active Base City Sample, 83 percent of in-person respondents were ordered removed, compared to 88 percent of televideo respondents.” The disparities in outcomes were statistically significant. Eagly, “Remote Adjudication,” 966.

²⁶ Eagly, “Remote Adjudication,” 938.

²⁷ Eagly, “Remote Adjudication,” 978, 984, 989. A 2019 report from the American Bar Association, which issued recommendations for reforming the immigration system, argued that based on its 2010 findings, the use of video conferencing technology can undermine the fairness of proceedings by making it more difficult to establish credibility and thus argue one’s case. The report goes on to suggest limiting the use of video to nonsubstantive hearings. See American Bar Association Commission on Immigration, *2019 Update Report: Reforming the Immigration System*, 2019, 18, https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf.

²⁸ Some children experienced the fake crime and some did not. In addition, some children were asked to modify their testimony to falsely indicate that a crime had taken place. Orcutt et al., “Detecting Deception in Children’s Testimony,” 343.

²⁹ Orcutt et al., “Detecting Deception in Children’s Testimony,” 339-372.

³⁰ Orcutt et al., “Detecting Deception in Children’s Testimony,” 357, 363.

³¹ Orcutt et al., “Detecting Deception in Children’s Testimony,” 366.

³² Orcutt et al., “Detecting Deception in Children’s Testimony,” 358.

³³ Gerald Miller, “Televised Trials: How Do Juries React,” *Judicature* 58 (December 1974): 242-246. The jurors in Miller’s study thought they were rendering a verdict in an actual trial. A similar study likewise found no statistically significant difference in juror attributions of negligence or the amount awarded by jurors in simulated video and in-person trials. The mode of presenting expert witnesses did affect pre-deliberation award, information retention, and source credibility, but not in a straightforward manner. The plaintiff’s witness was more effective in obtaining favorable awards when he appeared live, while the defendant’s witness was more effective in reducing the award (advantaging the defendant) when he appeared on videotape. The study suggested that “The most plausible explanation for this difference could be the variations in the communication skills of the two witnesses across presentational modes.” Gerald R. Miller, Norman E. Fontes, and Gordon L. Dahnke, “Using Videotape in the Courtroom: A Four-Year Test Pattern,” *University of Detroit Journal of Urban Law* 55 (Spring 1978): 668. See also Gerald R. Miller, Norman E. Fontes, and Arthur Konopka, *The Effects of Videotaped Court Materials on Juror Response* (East Lansing: Michigan State University Press, 1978).

³⁴ For additional research on simulated trials, see David F. Ross et al., “The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse,” *Law and Human Behavior*, 18, (1994): 553-566; and Tania E. Eaton et al., “Child-Witness and Defendant Credibility: Child Evidence Presentation Mode and Judicial Instructions,” *Journal of Applied Social Psychology*, 31 (2001): 1845-1858. However, in these studies, mock jurors watched videotapes of trials involving either live or videotaped testimony, so their findings are of limited utility for comparing videotaped and live trials.

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- ³⁵ Booz Allen Hamilton, *Legal Case Study: Summary Report*, 2017, 23, <https://www.aila.org/casestudy>.
- ³⁶ Funmi E. Olorunnipa, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, Administrative Conference of the United States, 2011, 24, <https://perma.cc/B3VS-FQAY>.
- ³⁷ Gail S. Goodman et al., "Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions," *Law and Human Behavior* 22 (1998): 195-96.
- ³⁸ Sara Landstrom, "Children's Live and Videotaped Testimonies: How Presentation Mode Affects Observers' Perception, Assessment and Memory," *Legal and Criminological Psychology* 12 (2007): 344-45.
- ³⁹ Government Accountability Office, *Actions Needed to Reduce Case Backlog*, 55.
- ⁴⁰ Landstrom, "Children's Live and Videotaped Testimonies," 335. See also Richard E. Nisbett and Lee Ross, L. Human Inference: Strategies and Shortcomings of Social Judgment. (Englewood Cliffs, NJ: Prentice-Hall, 1980).
- ⁴¹ Anne Bowen Poulin, "Criminal Justice and Videoconferencing Technology: The Remote Defendant," *Tulane Law Review* 78 (2004): 1118.
- ⁴² G. Daniel Lassiter et al., "Videotaped Confessions: Panacea or Pandora's Box?" *Law and Policy* 28 (2006): 195-201.
- ⁴³ Poulin, "Criminal Justice and Videoconferencing," 1121-1122.
- ⁴⁴ Bellone, "Client Communications and the Effect of Videoconferencing," 44-45.
- ⁴⁵ Poulin, "Criminal Justice and Videoconferencing," 1130.
- ⁴⁶ Diamond et al., "Efficiency and Cost," 881-882.
- ⁴⁷ Penelope Gibbs, *Defendants on video — conveyor belt justice or a revolution in access?*, Transform Justice, 2017, 16, http://www.transformjustice.org.uk/wp-content/uploads/2017/10/TJ_Disconnected.pdf.
- ⁴⁸ Gibbs, *Defendants on video*, 10, 26.
- ⁴⁹ Due to the Covid-19 pandemic, the Florida Supreme Court temporarily authorized video proceedings for juvenile delinquency proceedings (including juvenile detention hearings). See Florida Supreme Court, "Chief Justice Issues Emergency Order Expanding Remote Hearings and Suspending Jury Trials into Early July Statewide," May 4, 2020, <https://www.floridasupremecourt.org/News-Media/Court-News/Chief-Justice-issues-emergency-order-expanding-remote-hearings-and-suspending-jury-trials-into-early-July-statewide>.
- ⁵⁰ *Amendment to Fla. Rule of Juvenile Procedure 8.100(A)*, 796 So. 2d 470, 473 (Fla. 2001).
- ⁵¹ *Amendment to Fla. Rule of Juvenile Procedure 8.100(A)*, 796 So. 2d 470, 473 (Fla. 2001).
- ⁵² National Center for State Courts, *Call to Action*, 37.
- ⁵³ National Center for State Courts, *Call to Action*, 37-38.
- ⁵⁴ John Greacen, *Remote Appearances of Parties, Attorneys, and Witnesses*, Self-Represented Litigation Network, 2017, 3-4; and see also Camille Gourdet et al., *Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology*, RAND Corporation, 2020, 4-5, https://www.rand.org/pubs/research_reports/RR3222.html (discussing advantages and disadvantages of remote proceedings in criminal cases).
- ⁵⁵ Eagly, "Remote Adjudication," 960.
- ⁵⁶ Zorza, *Video Conferencing for Access to Justice*.
- ⁵⁷ Zorza, *Video Conferencing for Access to Justice*. For context, the overall population in this 47,500 square mile region was between 10 to 14 percent of the state's total in 2004. See Larry Swanson, "Montana is One State with Three Changing Regions," *Belgrade News*, February 28, 2019, http://www.belgrade-news.com/news/feature/montana-is-one-state-with-three-changing-regions/article_cc6ccb66-3b82-11e9-881c-8f20afd84778.html#:~:text=The%20Central%20Front%20region%20has,of%20the%20total%20in%201990.
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⁵⁸ Zorza, *Video Conferencing for Access to Justice*, 12.

⁵⁹ Zorza, *Video Conferencing for Access to Justice*, 13.

⁶⁰ Zorza, *Video Conferencing for Access to Justice*, 18.

⁶¹ J.J. Prescott, "Improving Access to Justice in State Courts with Platform Technology," *Vanderbilt Law Review* 70 (2017): 2028-2034.

⁶² Prescott, "Improving Access to Justice," 1996.

⁶³ See also Maximilian A. Bulinski and J.J. Prescott, "Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency," *Michigan Journal of Race and Law* 21 (2016). OCR systems involve transitioning some everyday court proceedings, such as civil infraction citations, outstanding failure-to-pay or failure-to-appear warrants, and some misdemeanors to be settled online, sometimes via videoconference.

⁶⁴ 29 percent of adults with household incomes below \$30,000 did not own a smartphone, 44 percent did not have home broadband services, and 46 percent did not own a traditional computer. Households with incomes of \$100,000 almost universally had access to these technologies. Monica Anderson and Madhumitha Kumar, "Digital Divide Persist Even as Lower-Income Americans Make Gains in Tech Adoption," *Pew Research Center*, May 7, 2019, <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/>. Only 66 percent and 61 percent of Black and Latino Americans respectively have access to a home broadband compared to 79 percent of white Americans. Andrew Perrin and Erica Turner, "Smartphones Help Blacks, Hispanics Bridge Some — But Not All — Digital Gaps with Whites," *Pew Research Center*, August 20, 2019, <https://www.pewresearch.org/fact-tank/2019/08/20/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/>.

⁶⁵ Andrew Perrin, "Digital Gap Between Rural and Nonrural America Persists," *Pew Research Center*, May 31, 2019, <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/>.

⁶⁶ Disabled Americans are about 20 percentage points less likely than those without a disability to say that they have access to home broadband internet or own a computer, smartphone, or tablet. Monica Anderson and Andrew Perrin, "Disabled Americans are Less Likely to Use Technology," *Pew Research Center*, April 7, 2017, <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/>.

⁶⁷ Rachel Dissell and Jordyn Grzelewski, "Phone, Internet Providers Extend Service Yet Some Still Disconnected from Lifelines During Coronavirus Pandemic," *Cleveland.com*, April 8, 2020, <https://www.cleveland.com/coronavirus/2020/04/phone-internet-providers-extend-service-yet-some-still-disconnected-from-lifelines-during-coronavirus-pandemic.html>. See also NORC at the University of Chicago, "Most Working Americans Would Face Economic Hardship If They Missed More than One Paycheck," press release, May 16, 2019, <https://www.norc.org/NewsEventsPublications/PressReleases/Pages/most-working-americans-would-face-economic-hardship-if-they-missed-more-than-one-paycheck.aspx>.

⁶⁸ Phil Malone et al., *Best Practices in the Use of Technology to Facilitate Access to Justice Initiatives: Preliminary Report*, Berkman Center for Internet and Society at Harvard University, 2010, 6-7, 14-19, Appendix A, https://cyber.harvard.edu/sites/cyber.harvard.edu/files/A2J_Report_Final_073010.pdf.

⁶⁹ Jessica Steinberg, "Demand Side Reform in the Poor People's Court," *Connecticut Law Review*, 47 (2015): 741.

⁷⁰ Charles M. Grabau and Llewellyn Joseph Gibbons, "Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation," *New England Law Review* 30 (1996): 237-244, 255—60. See also Ashton Sappington, "Implied Consent and Non-English Speakers," *John Marshall Law Journal* 5 (2012): 638.

⁷¹ Ann Chen Wu et al., "The Interpreter as Cultural Educator of Residents: Improving Communication for Latino Parents," *Archives of Pediatrics and Adolescent Medicine* 160 (2006): 1145-50; C. Jack, "Language, Cultural Brokerage and Informed consent — Will Technological Terms Impede Telemedicine Use?" *South African Journal of Bioethics and Law* 7 (2014): 14, 16-17; and Imo S. Momoh, *Cultural Competence Plan*, Contra Costa County Mental Health Services, 2010, 78, 101-108, 114, https://cchealth.org/mentalhealth/pdf/2010_cultural_competence_plan.pdf.

⁷² The Legal Assistance Foundation of Metropolitan Chicago and the Chicago Appleseed Fund for Justice, *Videoconferencing in Removal Hearings: A Case Study of the Chicago Immigration Court*, 2005, 8, http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf.

⁷³ The Legal Assist. Found. of Metropolitan Chicago and the Chicago Appleseed Fund for Justice, *Videoconferencing in Removal Hearings*, 13.

REMOTE CRIMINAL JUSTICE

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I. INTRODUCTION

Our criminal justice system is facing unprecedented challenges during the coronavirus pandemic. The virus has spread rapidly through many detention facilities and prisons, where social distancing is practically impossible.¹ In jail, detainees awaiting trial are exposed to the risk of serious illness and even death.² At the same time, courts across the country have suspended jury trials and many other in-person court proceedings as they cannot easily or consistently ensure social distancing and other safety measures.³ Courts have also postponed criminal cases for weeks or months, raising concerns about compliance with the Constitution's speedy trial guarantee.⁴ While some judges have released a greater share of pretrial detainees during the pandemic, hundreds of thousands of pretrial detainees remain in jail with no clear trial date in sight.⁵

A number of non-trial proceedings—including bail, plea, and sentencing hearings—have continued to take place, even as trials have been postponed.⁶ To protect the health of those involved, however, these proceedings are now typically conducted remotely through online

1. Megan Wallace et al., *COVID-19 in Correctional and Detention Facilities — United States, February–April 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 587 (2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm?s_cid=mm6919e1_w.

2. *Id.*

3. See generally NAT'L CTR. FOR STATE CTS., *Coronavirus and the Courts*, <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Nov. 17, 2020) (tracking state court responses to the coronavirus pandemic).

4. E.g., Jordan S. Rubin, *Coronavirus Containment Collides with U.S. Constitutional Rights*, BLOOMBERG U.S. L. WK. (Mar. 31, 2020), <https://news.bloomberglaw.com/us-law-week/coronavirus-containment-collides-with-u-s-constitutional-rights>.

5. PRISON POL'Y INITIATIVE, *Responses to the COVID-19 Pandemic*, <https://www.prisonpolicy.org/virus/virusresponse.html> (last updated Nov. 6, 2020) (tracking releases of jail inmates and prisoners in response to the pandemic); Zhen Zeng, *Jail Inmates in 2018*, U.S. DEP'T OF JUST. at 5, tbl. 3 (Mar. 2020), <https://www.bjs.gov/content/pub/pdf/ji18.pdf> (reporting that 490,000 inmates in jail had not yet been convicted). This has placed additional pressure on defendants who are detained for relatively minor offenses to plead guilty in order to be released on time served or probation and avoid the risk of contracting the virus in jail. Thea Johnson, *Crisis and Coercive Pleas*, J. CRIM. L. & CRIMINOLOGY ONLINE (forthcoming 2020).

6. NAT'L CTR. FOR STATE CTS., *supra* note 3.

videoconferencing platforms such as Zoom and Microsoft Teams.⁷ In Texas, one court even held the first virtual criminal jury trial in the country.⁸

In some ways, the ability to conduct online hearings has been a welcome alternative to delaying criminal dispositions or attempting to hold hearings in person during the pandemic. During the pandemic, online proceedings help protect public health and have the advantages of convenience and efficiency. Attorneys and participants save time by not having to travel to or wait in courtrooms, courts benefit from more reliable scheduling, and all appreciate the ability to dispose of cases more promptly.⁹

Yet remote proceedings also introduce new challenges. They can inhibit effective communication between defense attorneys and their clients¹⁰ and make it difficult for defendants to hear, observe, and understand the proceedings.¹¹ The use of video may also hinder the parties from effectively confronting witnesses and presenting evidence, and it can prejudice the court's perceptions of the defendant and witnesses.¹² Virtual proceedings may be a necessity during the pandemic, but they are not without problems and difficulties.

This coronavirus-induced expansion of online criminal proceedings invites us to assess more systematically their advantages and disadvantages. To begin such an assessment, I conducted a survey of Texas state and federal judges, prosecutors, and defense attorneys, asking about their experiences with remote proceedings before and during the pandemic.¹³ Texas was one of the first states to adopt video proceedings during the pandemic so it is a useful case study.¹⁴ The federal system also authorized such proceedings relatively early in the pandemic, and its experience serves as a valuable comparison point.¹⁵

7. See *infra* Part III.A. In this Article, the term “remote proceedings” is used to encompass proceedings conducted via closed-circuit television or other videoconference technology, including modern, online-based video platforms. Because remote proceedings during the pandemic were conducted through online-based video platforms, the terms “online proceedings,” “virtual proceedings,” “video[conference] proceedings,” and “remote proceedings” are used interchangeably to represent proceedings conducted remotely, via an online video platform. During the early days of remote proceedings, however, video technology was typically not online-based, so the discussion of state laws on videoconferencing and of older studies of video proceedings uses “remote proceedings” and “video[conference] proceedings” to denote this past practice.

8. Justin Jouvenal, *Justice by Zoom: Frozen Video, a Cat—and Finally a Verdict*, WASH. POST (Aug. 12, 2020), https://www.washingtonpost.com/local/legal-issues/justice-by-zoom-frozen-video-a-cat--and-finally-a-verdict/2020/08/12/3e073c56-dbd3-11ea-8051-d5f887d73381_story.html.

9. See *infra* Part II.B.1.

10. See *infra* notes 130–138 and accompanying text.

11. See *infra* notes 139–143 and accompanying text.

12. See *infra* notes 146–153 and accompanying text.

13. See *infra* Part III.B.

14. First Emergency Order Regarding the COVID-19 State of Disaster, Supreme Court Misc. Docket No. 20-9042 & Court of Criminal Appeals Misc. Docket No. 20-007 (Mar. 13, 2020), at 1–2, <https://www.txcourts.gov/media/1446056/209042.pdf> (authorizing the use of remote proceedings on March 13, 2020).

15. Judiciary Provisions, CARES ACT, § 15002(a), <https://www.uscourts.gov/sites/default/files/>

Understanding the advantages and disadvantages of video proceedings is relevant beyond the context of the current public health emergency. Most states permitted limited use of videoconferencing in criminal proceedings even before the COVID-19 outbreak.¹⁶ As many commentators have observed, and survey respondents overwhelmingly agreed, the criminal justice system is likely to expand its reliance on video proceedings after the pandemic is over.¹⁷ To ensure that this choice is made in an informed manner, that remote proceedings are compatible with constitutional requirements, and that they are no less fair, accurate, or legitimate than in-person proceedings, it is critical that we examine how these proceedings have operated so far.

The survey responses suggest that, on the whole, videoconference technology can save time and resources for the participants at many stages of a criminal case, even though online proceedings are in some respects more cumbersome.¹⁸ Survey participants also generally believe that the technology can be used fairly and effectively during uncontested and non-evidentiary pretrial proceedings, such as initial appearances and status hearings.¹⁹ Many also applaud the greater transparency that comes from broadcasting hearings online.²⁰

Concerns grow, however, when it comes to contested hearings and trials. Respondents noted a range of challenges with conducting online jury trials or adversarial evidentiary hearings, including the ability to present evidence, to confront witnesses, and to select juries.²¹ Notably, defense attorneys appear to be much more skeptical of video proceedings than judges and prosecutors.²² They are more likely to believe that the online format harms the fairness and accuracy of the proceedings and favors the prosecution.²³ Not surprisingly, defense attorneys are less likely than the

judiciary_provisions_cares_act_0.pdf (authorizing the use of remote proceedings in criminal cases and signed into law on March 27, 2020).

16. See *infra* Part II.A.

17. See, e.g., Hon. Brandon Birmingham, *Three Ways COVID-19 Makes the Criminal Courts Better*, DALL. EXAMINER (May 8, 2020), <https://dallasexaminer.com/editorial/local-commentaries/three-ways-covid-19-makes-the-criminal-courts-better/>; Lyle Moran, *How Hosting a National Pandemic Summit Aided the Nebraska Courts System with Its COVID-19 Response*, ABA J. (May 13, 2020, 6:00 AM), https://www.abajournal.com/legalrebels/article/rebels_podcast_episode_052; LaVendrick Smith, *Dallas County Judges Hear Criminal Cases via Video as Coronavirus Spreads*, DALL. MORNING NEWS (Apr. 14, 2020, 4:27 PM), <https://www.dallasnews.com/news/courts/2020/04/15/dallas-county-judges-hear-criminal-cases-via-video-as-coronavirus-spreads/>; *Pandemic a 'Natural Experiment' for Reducing Incarceration, Prosecutors Say*, ASU NOW (May 7, 2020), <https://asunow.asu.edu/20200507-arizona-impact-pandemic-natural-experiment-reducing-incarceration-prosecutors-say>.

18. See *infra* notes 260–288 and accompanying text.

19. See *infra* notes 351–353 and accompanying text.

20. See *infra* notes 289–292 and accompanying text.

21. See *infra* Part III.B.4.

22. See *infra* Part III.B.4 & Tables 3, 4. Only a minority of defense attorneys stated that they would wish to see video proceedings being used after the pandemic is over, whereas a majority of judges, and an even larger percentage of prosecutors, would like to see the continued use of video proceedings. See Table 5.

23. See *infra* Part III.B.4 & Table 4.

other two groups to want to see video proceedings used regularly after the pandemic is over.²⁴ Some differences also emerged between federal and state respondents. Federal judges and prosecutors are less likely than their state counterparts to favor using videoconferencing for criminal proceedings after the pandemic is over.²⁵

Based on the survey responses, analysis of scholarship and case law on video proceedings, and data from observations of virtual proceedings, I conclude with several recommendations. Online videoconferencing can meet important needs of the criminal justice system in public health emergencies by allowing courts to process cases more safely and promptly. Even during such emergencies, however, judges must take additional measures to ensure that the technology does not undermine the constitutionality and fairness of the proceedings.

After the coronavirus crisis subsides, videoconferencing could still be used effectively in certain non-evidentiary or uncontested proceedings, such as status conferences and hearings on purely legal questions.²⁶ Online technology can also help expand the frequency of attorney–client consultations in criminal cases.²⁷ But after the pandemic is over, states should be wary of using online platforms to conduct other criminal proceedings on a regular basis. This is especially true in the cases of trials and contested evidentiary hearings, which are ill-suited to the remote format. If courts do decide to use such technology in those contexts, they must take special precautions to protect defendants’ constitutional rights and the integrity of the process.²⁸

II. REMOTE CRIMINAL JUSTICE BEFORE THE PANDEMIC

In many jurisdictions, videoconference technology has been used for select criminal proceedings for a few decades. Some accounts date the first remote criminal proceeding back to 1972, when an Illinois court held a bail hearing by video phone.²⁹ Since then, as online tools have made videoconference technology more broadly available and more sophisticated, most states and the federal government have allowed video proceedings for at least some criminal proceedings.³⁰ Looking beyond the United States, video proceedings have also been widely used for some time in Australia,

24. *See infra* Table 5.

25. *See infra* Table 5.1. The difference between federal and state judges’ responses to this question falls just below the threshold of statistical significance, which is set at 0.05.

26. *See infra* Part IV.

27. *See infra* notes 388–391 and accompanying text.

28. *See infra* Part IV.B.

29. Camille Gourdet et al., *Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology*, RAND CORP., at 3 (2020), <https://doi.org/10.7249/RR3222>.

30. *Id.*

Canada, New Zealand, and the United Kingdom, primarily in an effort to save costs and expedite proceedings.³¹ This Section lays out the legal framework for using videoconference technology in criminal proceedings in the United States and then discusses arguments for and against the practice.

A. State and Federal Law on Videoconferencing in Criminal Cases

1. Statutory Rules

Most American jurisdictions today permit the use of video technology for initial appearances and arraignments in felony cases.³² Some have additionally permitted video hearings to other stages of the criminal process, including hearings used to determine pretrial release, the validity of a guilty plea, and sentences.³³ In some jurisdictions, videoconferencing proceedings are often reserved for defendants detained before trial, where the benefit to the state is perceived to be the greatest, as videoconferencing reduces the costs of transporting inmates to the courthouse.³⁴ When it comes to

31. See, e.g., *Courts (Remote Participation) Act 2010* (N.Z. Legis.), <http://www.legislation.govt.nz/act/public/2010/0094/latest/DLM2600709.html> (last updated May 16, 2020); CAROLYN MCKAY, THE PIXELATED PRISONER: PRISON VIDEO LINKS, COURT ‘APPEARANCE’ AND THE JUSTICE MATRIX 5, 12–19 (2018) (discussing Australia, Canada, New Zealand, U.K., and other jurisdictions); Anne Wallace, ‘Virtual Justice in the Bush’: *The Use of Court Technology in Remote and Regional Australia*, 19 J.L., INFO. & SCI. 1, 4 (2008); Penelope Gibbs, *Defendants on Video – Conveyor Belt Justice or a Revolution in Access?*, TRANSFORM JUST. (Oct. 2017), <https://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>.

32. See, e.g., FED. R. CRIM. P. 5, 10; ARIZ. R. CRIM. P. 1.5; DEL. SUPER. CT. CRIM. R. 10; FLA. R. CRIM. P. 3.130, 3.160; N.C. GEN. STAT. §§ 15A-511, 15A-941; see also Video Conferencing Survey, NAT’L CTR. FOR STATE CTS. (2010), https://www.ncsc.org/_data/assets/image/0023/16682/q21-png.png (survey of court administrators in the fifty states finding that videoconferencing was most commonly used for arraignments and initial appearances in 2010).

33. See, e.g., ARIZ. R. CRIM. P. 1.5 (permitting videoconferencing with the consent of the defendant for a range of proceedings); ARK. R. CRIM. P. 8.7 (permitting videoconferencing for pretrial release); CAL. PENAL CODE § 977 (permitting videoconferencing with the consent of the defendant for a range of proceedings); COLO. R. CRIM. P. 43 (permitting videoconferencing with the consent of the defendant for a range of proceedings); GA. UNIF. SUPER. CT. R. 9.2 (authorizing videoconferencing for a range of proceedings); HAW. R. PENAL P. 43 (permitting videoconferencing with the consent of the defendant for a range of proceedings); LA. CODE CRIM. PROC. art. 562 (permitting videoconferencing with the consent of the defendant for a range of proceedings); MICH. R. CRIM. P. 6.006 (permitting videoconferencing for a range of proceedings); MINN. R. CRIM. P. 1.05 (permitting videoconferencing with the consent of the defendant for a range of proceedings); Gourdet et al., *supra* note 29, at 4 (“The NCSC’s 2010 Video Conferencing Survey found that more than half of the jurisdictions using telepresence technology reported using it for initial appearances and criminal arraignments, whereas less than 20 percent reported its use in motion hearings or court trials.”).

34. See, e.g., ALASKA R. CRIM. P. 38.2 (requiring the use of videoconferencing for in-custody defendants and making it optional for others); ARK. R. CRIM. P. 8.7 (permitting use of videoconferencing for defendants “confined in a jail, prison, or other detention facility”); DEL. SUPER. CT. CRIM. R. 10 (permitting videoconferencing for incarcerated defendants); 725 ILL. COMP. STAT. 5/106D-1 (noting that court may permit videoconferencing for defendants in “custody or confinement”); LA. CODE CRIM. PROC.

misdemeanors, on the other hand, where the constitutional right to be present does not apply, jurisdictions have generally authorized the use of videoconference more broadly.³⁵ Finally, even where rules have not expressly authorized videoconference proceedings, courts have often used their own discretion to conduct such proceedings.³⁶

Several constitutional rights may be at issue when criminal proceedings occur via video. These include the right to be present at critical stages of the proceeding and to participate in one's defense, the right to effective representation, the right to confront witnesses, the right to a public trial, and the right to a fair and impartial jury trial. The application of these rights to video proceedings has not been extensively litigated, and the law in different jurisdictions reflects somewhat different interpretations. The next Section discusses this diversity of approaches and some of the patterns that emerge from it.

2. Constitutional Limits

a. The Right to Be Present

The Supreme Court has held that defendants have a constitutional right to be present in the courtroom at any critical stage in felony cases.³⁷ While not expressly mentioned in the U.S. Constitution, the right to be present is seen as an inherent element of due process.³⁸ As the Court explained in *Snyder v. Massachusetts*, the defendant has a right “to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.”³⁹ Presence is required “to the extent that a fair and just hearing would be thwarted by his

art. 562 (permitting videoconferencing for persons “confined in a jail, prison, or other detention facility”); MISS. CODE § 99-1-23.

35. See, e.g., FED. R. CRIM. P. 43(b)(2) (providing that the defendant need not be physically present if “[t]he offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant’s written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing”).

36. See, e.g., William R. Simpson Jr. et al., *The Invalidity of a Plea of Guilty to a Criminal Offense Made by Video Teleconferencing When the Defendant Is Not Present in Open Court*, 34 U. ARK. LITTLE ROCK L. REV. 383, 383 (2012); compare NAT’L CTR. FOR STATE CTS., *supra* note 32, with Video Conferencing Survey, NAT’L CTR. FOR STATE CTS. (2010), https://www.ncsc.org/_data/assets/image/0023/16727/q22-png.png (indicating that many courts have used videoconference proceedings without express statutory authorization).

37. See *United States v. Gagnon*, 470 U.S. 522, 526–27 (1985); Wayne LaFave et al., *Presence of the Defendant: Origins and Scope of the Right to Be Present*, 6 CRIM. PROC. § 24.2(a) (4th ed.). Some states have extended this right to misdemeanor cases. See, e.g., CAL. PENAL CODE § 977(a)(2); KY. R. CR. P. 8.28.

38. *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934). Some state constitutions explicitly guarantee criminal defendants “the right to appear and defend in person and by counsel.” ILL. CONST. art. I, § 8; CALIF. CONST. art. I, § 15.

39. *Snyder*, 291 U.S. at 105–06.

absence, and to that extent only.”⁴⁰ On the other hand, the right does not apply if “presence would be useless, or the benefit but a shadow.”⁴¹ Accordingly, courts have held that certain non-evidentiary or uncontested proceedings—status conferences or hearings to determine legal questions—can be conducted in the absence of the defendant.⁴² By contrast, critical stages of the process—arraignment, bail, plea, voir dire, trial, and sentencing—generally require the defendant’s presence unless it is voluntarily, intelligently, and knowingly waived.⁴³

The question of whether virtual presence is an adequate substitute for physical presence under the Due Process Clause remains open. The Supreme Court has not determined whether the use of videoconferencing might thwart “a fair and just hearing” or whether the benefits of physical presence are too hypothetical or marginal to trigger due process protection.⁴⁴ The case law and statutes of different jurisdictions reflect this uncertainty.

Some states and the federal government require physical, not merely virtual, presence at all critical stages of criminal proceedings. As the Illinois Supreme Court explained, physical presence in the courtroom “contribut[es] a dignity essential to ‘the integrity of the trial’ process.”⁴⁵ Likewise, a Michigan appeals court noted that the use of video “may color a viewer’s assessment of a person’s credibility, sincerity, and emotional depth,” and place “individuals who appear in court via video conferencing . . . at risk of receiving harsher treatment from judges or other adjudicators.”⁴⁶ In light of these concerns about the effects of video technology, many courts and

40. *Id.* at 107–08.

41. *Id.* at 106–07.

42. *E.g.*, *Kentucky v. Stincer*, 482 U.S. 730, 745–47 (1987) (holding that the defendant had no right to be present at a hearing to determine competency of children witnesses); *Small v. Endicott*, 998 F.2d 411, 416 (7th Cir. 1993) (holding that the defendant had no right to be present at a conference dealing with assignment and scheduling issues); *United States v. Shukitis*, 877 F.2d 1322, 1329–30 (7th Cir. 1989) (holding that the defendant had no right to be present at a hearing to address violations of the court’s witness sequestration order); *United States v. Nelson*, No. 17-CR-00533-EMC-1, 2020 WL 3791588, at *4, *6–7 (N.D. Cal. July 7, 2020) (holding that the defendant had no right to be present at a pretrial *Daubert* hearing); *State v. Wilson*, 171 P.3d 501, 505–06 (Wash. App. Ct. 2007) (holding that the defendant had no right to be present during in-chambers questioning of juror because his ability to contribute to a fair or just hearing was purely hypothetical).

43. *See, e.g.*, *People v. Lindsey*, 772 N.E.2d 1268, 1276 (Ill. 2002); *State ex rel. Shetsky v. Utecht*, 36 N.W.2d 126, 128 (Minn. 1949); *LaFave et al.*, *supra* note 37. *But cf.* Peter J. Henning, *Defendant’s Right to Be Present*, 3B FED. PRAC. & PROC. CRIM. § 721 (4th ed. 2020) (“It is doubtful whether defendant has a constitutional right to be present at the arraignment . . .”).

44. *See Snyder*, 291 U.S. at 106–08.

45. *People v. Stroud*, 804 N.E.2d 510, 515 (Ill. 2004) (citing *People v. Guttendorf*, 309 Ill. App. 3d. 1044, 1047 (Ill. App. Ct. 2000) (holding that for plea hearings, the right to be present requires that the defendant be physically present unless the defendant waives that right); *see also* *Scott v. State*, 618 So. 2d 1386, 1388 (Fla. Dist. Ct. App. 1993) (noting that remote sentencing and plea hearings are valid only upon the defendant’s waiver of the right to be present).

46. *People v. Heller*, 891 N.W.2d 541, 544 (Mich. Ct. App. 2016).

legislatures have concluded that the defendant must consent before videoconferencing is used for certain criminal proceedings.⁴⁷

Yet other states permit courts to use videoconferencing even without the defendant's consent, either in select proceedings⁴⁸ or more broadly.⁴⁹ Some reason that, at least in non-evidentiary proceedings, fairness is not compromised by the use of video because no witnesses are examined or evidence discussed.⁵⁰ Other states permit nonconsensual remote proceedings even more broadly, on the theory that video appearance is the functional equivalent of physical presence, at least when the technology meets certain minimal standards.⁵¹

In brief, the question of whether remote proceedings comply with due process remains unsettled. The answer depends in part on the nature of the proceeding and the contribution that the defendant can make to its fairness. It also depends on the nature of the technology employed and whether its use might impair fair process. As Part II.B explains, empirical studies on this question remain inconclusive. But several studies do suggest that, at least under certain circumstances, the use of video does prejudice the court's perceptions, the parties' ability to cross-examine witnesses, and the defendant's participation in the proceedings.⁵² Further research can help us identify more accurately whether and when video technology can be used without undermining the fairness of criminal proceedings. Until then, the constitutionally safer course for critical stages of the criminal process—from

47. See, e.g., *State v. Anderson*, 896 N.W.2d 364, 374 (Wis. Ct. App. 2017) (interpreting the statutory right to be present to mean physical presence in the context of a plea hearing); *Heller*, 891 N.W.2d at 543 (interpreting the constitutional right to be present to mean physical presence in the context of sentencing); *Stroud*, 804 N.E.2d at 515 (holding that for plea hearings, the right to be present requires that the defendant be physically present unless the defendant waives that right); see also CAL. PENAL CODE § 977; KAN. STAT. ANN. §§ 22-3205, 22-2802; MINN. R. CRIM. P. 1.05; MISS. CODE ANN. § 99-1-23.

48. See, e.g., ARIZ. R. CRIM. P. 1.5 (requiring defendant's consent for some proceedings but not others); ARK. R. CRIM. P. 8.7; FLA. R. CRIM. P. 3.130, 3.160; *People v. Lindsey*, 772 N.E.2d 1268, 1278–79 (Ill. 2002); *Commonwealth v. Ingram*, 46 S.W.3d 569, 571–72 (Ky. 2001); *Larose v. Superintendent, Hillsborough Cnty. Corr. Admin.*, 702 A.2d 326, 329 (N.H. 1997); *State v. Phillips*, 656 N.E.2d 643, 664 (Ohio 1995); *In re Rule 3.160(a)*, FLA. R. CRIM. P., 528 So. 2d 1179, 1180 (Fla. 1988); *Commonwealth v. Terebieniec*, 408 A.2d 1120, 1123–24 (Pa. Super. Ct. 1979).

49. See, e.g., ALASKA R. CRIM. P. 38.2; GA. UNIF. SUPER. CT. R. 9.2.

50. See, e.g., *Phillips*, 656 N.E.2d at 664. Some have argued that no due process concerns arise at arraignment because “[n]o judicial decisions are made” and the process is “largely ceremonial and perfunctory” requiring “little or no need for on-the-spot consultations between the defendant and his lawyer.” Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 880 (2010). This, however, assumes that no decisions on bail are made at arraignment, which is not always the case. See, e.g., *Ronnie Thaxton, Injustice Telecast: The Illegal Use of Closed-Circuit Television Arraignments and Bail Bond Hearings in Federal Court*, 79 IOWA L. REV. 175, 180 (1993).

51. See, e.g., OHIO CRIM. R. 43(a)(2); *Ingram*, 46 S.W.3d at 571–72; *Phillips*, 656 N.E.2d at 664–65.

52. See *infra* Part II.B.2.

arraignment to sentencing—is to use video proceedings only with the defendant’s consent.

b. The Right to Counsel

Videoconferencing can also affect the ability of counsel to provide effective representation to the defendant. Effective representation includes the ability to confer with counsel before and during the proceedings.⁵³ Many video platforms do not permit the defendant and counsel to confer privately in the course of a remote hearing.⁵⁴ For such consultation to occur, proceedings have to be stopped, and the lawyer has to call the client by phone, typically from a separate room.⁵⁵ If the defendant is detained, the detention center must also ensure a private setting for the conversation with counsel.

Many state rules already require that videoconference arrangements permit defendant and counsel to consult confidentially.⁵⁶ These rules recognize that private communication is essential for the defendant to be able to participate in his own defense and for counsel to provide effective representation. As one court observed, “[w]ithout any procedure whereby defendant could communicate privately with his attorney, defendant’s Sixth Amendment right to counsel was more than impaired, it was obliterated.”⁵⁷ Because surveys of court administrators reveal difficulties with ensuring private consultation with counsel during videoconference proceedings, courts must remain attentive to the issue.⁵⁸ Because the Sixth Amendment

53. See, e.g., *Geders v. United States*, 425 U.S. 80, 88–89 (1976).

54. More modern, online-based videoconference technology such as Zoom provides easier ways for counsel and client to communicate privately, reducing somewhat the concerns about the application of the right to counsel. See *infra* Part III.B.4.

55. See *infra* note 136 and accompanying text.

56. See, e.g., ALASKA R. CRIM. P. 38.2; ARIZ. R. CRIM. P. 1.5; ARK. R. CRIM. P. 8.7; CAL. PENAL CODE § 977; COLO. R. CRIM. P. 43; CONN. PRACTICE BOOK §§ 44-10, 44-10A; GA. UNIF. SUPER. CT. R. 9.2; 725 ILL. COMP. STAT. ANN. § 5/106D-1; LA. CODE CRIM. PROC. ANN. art. 562; MINN. R. CRIM. P. 1.05; PENN. R. CRIM. P. 119; WYO. R. CRIM. P. 43.1; see also MD. RULES 4-231 (stating that the right to counsel may not be infringed if videoconferencing is used). While a confidential communication line is generally all that state rules demand from videoconference arrangements to comply with the right to counsel, some rules are more protective. In Minnesota, for felony plea and sentencing proceedings, the rules require counsel and the defendant to be at the same video terminal site. MINN. R. CRIM. P. 1.05 (Subd. 7)(1)(a), (b). For other proceedings, the defendant and counsel can be in separate places only if “unusual or emergency circumstances specifically related to the defendant’s case exist, or the defendant and the defendant’s attorney consent to being at different terminal sites, and only if all parties agree on the record and the court approves.” *Id.*

57. *Schiffer v. State*, 617 So. 2d 357, 358 (Fla. Dist. Ct. App. 1993); see also *Seymour v. State*, 582 So. 2d 127, 128 (Fla. Dist. Ct. App. 1991) (“It is of vital importance that a defendant have the opportunity to engage in personal and private conference with his counsel to resolve the numerous problems and misunderstandings that can develop during the course of pre-trial proceedings.”).

58. See, e.g., Video Conferencing Survey, NAT’L CTR. FOR STATE CTS. (2010), https://www.ncsc.org/_data/assets/image/0022/16663/q27-png.png; https://www.ncsc.org/_data/assets/pdf_file/0015/17160/q27a.pdf (reporting that fourteen percent of court administrators surveyed responded that their jurisdiction had no provision for ensuring privacy

guarantees the right to *effective* assistance of counsel, states must also ensure that technological glitches do not prevent counsel from adequately representing their clients in remote proceedings.⁵⁹

c. The Right to Confront Witnesses

If witness testimony is presented during a virtual criminal trial, the Confrontation Clause is also relevant to the decision whether to permit videoconferencing.⁶⁰ The Clause protects the defendant's right to face his accusers in person, and the Supreme Court has held that it generally forbids the use of video testimony at trial.⁶¹ Courts have reasoned that videoconferencing makes it more difficult for the parties to cross-examine the witness effectively and increases the risk that the witness will not tell the truth: "The Constitution favors face-to-face confrontations to reduce the likelihood that a witness will lie. . . . 'It is always more difficult to tell a lie about a person "to his face" than "behind his back."'"⁶²

In *Maryland v. Craig*, the Supreme Court carved out an exception to the requirement of face-to-face confrontation and authorized the use of video testimony by a child witness where in-person testimony in front of the defendant would traumatize the child.⁶³ The Court held that video testimony may be permitted when the state presents a substantial interest, such as protecting the mental health of a child witness, and the use of video testimony is necessary to protect that interest.⁶⁴ Applying this standard, lower courts have held that neither the witness's convenience nor the state's interest in resolving a case more efficiently is the kind of substantial interest that permits the use of remote testimony.⁶⁵ On the other hand, a number of courts have held that protecting a witness's safety and protecting a witness's physical or mental health are valid state interests that can justify the use of video

between defendant and counsel when defendant is appearing remotely from a detention facility, and that many more responded that it was not possible to ensure privacy in those settings).

59. See *infra* notes 155–156 and accompanying text.

60. Federal case law limits the application of the Confrontation Clause to the trial stage. See *Barber v. Page*, 390 U.S. 719, 725 (1968); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987). In Texas, appellate courts are currently split on whether the Confrontation Clause applies to suppression hearings. Compare *Curry v. State*, 228 S.W.3d 292, 298 (Tex. App.—Waco 2007, pet. ref'd), with *Vanmeter v. State*, 165 S.W.3d 68, 74–75 (Tex. App.—Dallas 2005, pet. ref'd). Nationwide, however, there is a near unanimous consensus that the Confrontation Clause does not apply outside the trial stage. For a discussion, see, *State v. Zamzow*, 892 N.W.2d 637, 642–49 (Wis. 2017).

61. *Maryland v. Craig*, 497 U.S. 836, 846–47 (1990); *Coy v. Iowa*, 487 U.S. 1012, 1019–20 (1988).

62. *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005) (quoting *Coy*, 487 U.S. at 1019); see also *State v. Rogerson*, 855 N.W.2d 495, 504 (Iowa 2014) ("This social pressure to tell the truth can be diminished when the witness is far away rather than physically present with the defendant in the courtroom.").

63. *Craig*, 497 U.S. at 857.

64. *Id.*

65. *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006); *State v. Rogerson*, 855 N.W.2d 495, 507 (Iowa 2014); *State v. Smith*, 308 P.3d 135, 138 (N.M. Ct. App. 2013).

testimony.⁶⁶ Even when a state interest is compelling enough to permit remote testimony, courts must still “ensure[] the reliability of the evidence by subjecting it to rigorous adversarial testing,” such as by having the witness be under oath, be “subject to full cross-examination, and [be] able to be observed by the judge, jury, and defendant as they testif[y].”⁶⁷

In a recent case, *People v. Jemison*, the Michigan Supreme Court held that the Supreme Court’s decision in *Crawford v. Washington* significantly narrowed *Craig*’s approach to video testimony.⁶⁸ Under *Jemison*’s interpretation, *Craig* must therefore be limited to the specific context of child witnesses who might be traumatized by in-person testimony; outside that context, the Clause does not permit video testimony “unless a witness is unavailable and the defendant had a prior opportunity for cross-examination.”⁶⁹ At present, however, the Michigan Supreme Court’s approach to video testimony remains an outlier among courts.⁷⁰ Because the Supreme Court did not explicitly narrow or overrule *Craig*, lower court decisions still tend to follow its approach and permit remote testimony if necessary to protect certain compelling state interests.⁷¹

Whatever limits the Confrontation Clause imposes on remote testimony, these do not apply to nontrial proceedings, including preliminary, suppression, plea, sentencing, or parole and probation revocation hearings.⁷² Instead, during nontrial proceedings, where videoconferencing is most likely to be used, only the Due Process Clause constrains the use of remote

66. See, e.g., *Horn v. Quarterman*, 508 F.3d 306, 320 (5th Cir. 2007); *United States v. Benson*, 79 Fed. App’x 813, 820–21 (6th Cir. 2003); *Lipsitz v. State*, 442 P.3d 138, 144 (Nev. 2019); *Kramer v. State*, 277 P.3d 88 (Wyo. 2012); *People v. Wrotten*, 923 N.E.2d 1099, 1103 (N.Y. 2009); *Bush v. State*, 193 P.3d 203, 215–16 (Wyo. 2008); *Stevens v. State*, 234 S.W.3d 748, 782–83 (Tex. App.—Fort Worth 2007); see also Francis A. Weber, *Complying with the Confrontation Clause in the Twenty-First Century: Guidance for Courts and Legislatures Considering Videoconference-Testimony Provisions*, 86 TEMP. L. REV. 149, 155–56 (2013).

67. *Craig*, 497 U.S. at 857.

68. *People v. Jemison*, No. 157812, 2020 WL 3421925 (Mich. June 22, 2020) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

69. *Id.*

70. Although about a dozen other courts have noted the tension between *Craig* and *Crawford*, most have either distinguished *Crawford*, by limiting its holding to prior out-of-court statements, or have simply concluded that *Craig* survives *Crawford* because the Supreme Court has not suggested that *Craig* is overruled. See, e.g., *Yates*, 438 F.3d at 1314 n.4; *United States v. Wandahsega*, 924 F.3d 868, 879 (6th Cir. 2019); *State v. Henriod*, 131 P.3d 232, 237–38 (Utah 2006); *State v. Stock*, 256 P.3d 899, 904 (Mont. 2011). For an argument that *Crawford* did overrule *Craig*, see *People v. Jemison*, Brief by Amicus Curiae Richard D. Friedman in Support of Defendant-Appellant, Case No. 157812, at 6–7 (Jan. 3, 2020) [hereinafter Friedman Amicus Brief].

71. See *supra* notes 62–66 and accompanying text; see also Michael D. Roth, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 194–95 (2000); Weber, *supra* note 66, at 155–56.

72. See *supra* note 60; see also *Peters v. State*, 984 So. 2d 1227, 1233–35 (Fla. 2008).

testimony, requiring courts to assess and safeguard the basic reliability of such testimony.⁷³

Finally, even when the Confrontation Clause does apply, a defendant can waive its protections.⁷⁴ To encourage such waivers, some states have adopted notice-and-demand statutes, which permit the prosecution to use remote testimony if it gives sufficient notice to the defense about the proposed testimony, and the defense fails to object within a specified time.⁷⁵

d. The Right to a Public Trial

The use of videoconference proceedings may also touch on the right to a public trial, which belongs to both the defendant and the public.⁷⁶ The right is seen as critical to the fairness of criminal proceedings: “The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”⁷⁷ Public access to criminal proceedings is also important to the legitimacy of those proceedings because it “fosters an appearance of fairness, thereby heightening public respect for the judicial process.”⁷⁸

The right to a public trial can be restricted if necessary to further an overriding state interest, such as protecting the safety of a testifying witness;⁷⁹ ensuring a fair trial;⁸⁰ and during the pandemic, protecting public

73. See *Morrissey v. Brewer*, 408 U.S. 471, 487–89 (1972); *United States v. Clark*, 475 F.2d 240, 246 (2d Cir. 1973); *Peters v. State*, 984 So. 2d 1227, 1233–35 (Fla. 2008); see also *State v. Zamzow*, 892 N.W.2d 637, 642–49 (Wis. 2017) (acknowledging this point, but noting that the constraints imposed by the Due Process Clause at the pretrial stage are less demanding than at the trial stage). See generally Christine Holst, *The Confrontation Clause and Pretrial Hearings: A Due Process Solution*, 2010 U. ILL. L. REV. 1599, 1624–25 (2010).

74. See, e.g., Weber, *supra* note 66, at 162 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314 n.3 (2009)).

75. *Id.* at 162–63 (discussing IDAHO R. CRIM. P. 43.3(2-3) and adding that the Supreme Court in *Melendez-Diaz* approved such notice-and-demand statutes).

76. The Sixth Amendment gives the defendant the right to a public trial. U.S. CONST. amend. VI. The public also has a right to access the courts based on the First Amendment. U.S. CONST. amend. I; *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980) (“These expressly guaranteed freedoms [of speech, press, and assembly] share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court.”). The right has been extended to cover a range of non-trial proceedings as well. See Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. (forthcoming 2021) (discussing the First and Sixth Amendment rights to a public trial and the proceedings to which they apply).

77. *In re Oliver*, 333 U.S. 257, 270 (1948).

78. *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982); see also *In re Oliver*, 333 U.S. at 270 n.24.

79. E.g., *Moss v. Colvin*, 845 F.3d 516, 521 (2d Cir. 2017); *United States v. Simmons*, 797 F.3d 409, 414 (6th Cir. 2015).

80. *Waller v. Georgia*, 467 U.S. 39, 45 (1984).

health.⁸¹ As the Supreme Court has explained, however, “the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.”⁸² Partial closures of the court, where only some members of the public are excluded or where exclusions occur for only part of the proceeding, can be imposed for a “substantial reason,” such as protecting the welfare of a testifying child witness or protecting sensitive information from being disclosed.⁸³

The use of video proceedings need not curtail public access. For example, states can accommodate the right to a public trial by broadcasting remote proceedings online or on television monitors installed in the courtroom and accessible to the public.⁸⁴ Some state rules expressly require courts using remote proceedings to make the necessary technological accommodations to comply with the right to a public trial.⁸⁵ Partial closures of a remote proceeding—for example, providing a link to a video proceeding to only some members of the public, or interrupting the video feed for a portion of a proceeding—can be justified if necessary to protect the safety and welfare of witnesses or prevent disclosure of sensitive information.⁸⁶

e. The Right to a Fair and Impartial Jury

Before the pandemic, no state rules provided for remote jury trials.⁸⁷ Because virtual jury trials have been authorized during the pandemic, however, this Section briefly addresses their constitutionality. In a nutshell, there are serious questions whether remote jury trials can be conducted constitutionally—not only because of the Confrontation Clause and due process concerns discussed earlier, but also because of the Sixth Amendment right to a fair and impartial jury.

81. Stephen E. Smith, *The Right to a Public Trial in the Time of COVID-19*, 77 WASH. & LEE L. REV. ONLINE 1, 6–7 (2020), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol77/iss1/1>.

82. *Waller*, 467 U.S. at 48.

83. *United States v. Osborne*, 68 F.3d 94, 99 (5th Cir. 1995); *see also* Smith, *supra* note 81, at 8 (noting that “the ‘substantial reasons’ courts have approved as justifying partial courtroom closures are quite similar to the ‘overriding interests’ that have supported valid complete closures”).

84. *United States v. Gutierrez-Calderon*, No. 2016-0009, 2019 WL 3859753, at *11 (D.V.I. Aug. 16, 2019); *Swain v. Larose*, No. 3:15 CV 942, 2016 WL 8674570, at *13 (N.D. Ohio July 29, 2016), *report and recommendation adopted*, No. 3:15 CV 942, 2016 WL 4486853 (N.D. Ohio Aug. 26, 2016); *Rollness v. United States*, No. C10-1440-RSL, 2013 WL 4498684, at *18 (W.D. Wash. Aug. 21, 2013).

85. *See, e.g.*, ARIZ. R. CRIM. P. 1.5; COLO. R. CRIM. P. 43; DEL. SUPER. CT. CRIM. R. 10; GA. UNIF. SUPER. CT. R. 9.2; MINN. R. CRIM. P. 1.05.

86. OFF. OF CT. ADMIN., BACKGROUND AND LEGAL STANDARDS—PUBLIC RIGHT TO ACCESS TO REMOTE HEARINGS DURING COVID-19 PANDEMIC (2020), <https://www.txcourts.gov/media/1447316/public-right-to-access-to-remote-hearings-during-covid-19-pandemic.pdf>.

87. *Cf. Jovenal*, *supra* note 8 (noting that the first virtual jury trial was held during the pandemic); *see infra* note 190 and accompanying text (discussing emergency orders authorizing remote jury trials during the pandemic).

The right to a fair and impartial jury trial means that the parties must have adequate opportunity to select jurors who will have an open mind about the case and will not be biased against either party. To the extent that the use of video technology prevents the parties from assessing the credibility of jurors effectively, this can undermine the right to a fair and impartial jury.⁸⁸

The Sixth Amendment has also been interpreted to mean that jurors must make their decisions based on the evidence presented in court and free of extrinsic influence.⁸⁹ In ordinary jury trials, courts have already had to manage the risk that jurors would base their verdict on outside research or discussion.⁹⁰ The risk has increased in the age of the Internet and social media, as jurors have increasingly been “tweeting, . . . conducting factual research online, looking up legal definitions, investigating likely prison sentences for a criminal defendant, visiting scenes of crimes via satellite images, blogging about their own experiences and sometimes even reaching out to parties and witnesses through ‘Facebook friend’ requests.”⁹¹ Courts have also already had to police juror distraction, which can further prevent jurors from basing their verdict on the evidence presented at trial.⁹²

The problems of distraction and outside influence, however, are likely to be worse in remote proceedings:

During a virtual trial, the jurors will be at their own homes with access to the internet and various other resources while the trial is proceeding and during their deliberations. Although the [c]ourt will likely admonish the jurors to solely rely on the evidence they hear in the case, the ease of access and less formal setting provided by a virtual jury trial increases the likelihood that a juror will do his or her own extraneous research on matters presented at trial and present that information to the other jurors. . . . regardless of the admonishments from the [c]ourt, the jurors will [also] likely have a hard time focusing on a virtual trial, thus diminishing their ability to provide fair and thorough deliberation of the facts.⁹³

Some measures that courts have taken to address these problems during live proceedings (e.g., instructions and admonitions to stay focused and to

88. For further discussion of this issue, see Anna Offit, *Benevolent Exclusion*, WASH. L. REV. (forthcoming 2021); Jessica A. Roth, *The Constitution Is on Pause in America’s Courtrooms*, ATLANTIC (Oct. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/constitution-pause-american-courtrooms/616633/>.

89. *E.g.*, *United States v. Olano*, 507 U.S. 725, 738 (1993); *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *United States v. Schwarz*, 283 F.3d 76, 97 (2d Cir. 2002).

90. *See United States v. Fumo*, 655 F.3d 288, 332 (3d Cir. 2011), *as amended* (Sept. 15, 2011).

91. *Id.* (citing David P. Goldstein, *The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct*, 24 GEO. J. LEGAL ETHICS 589 (2011)).

92. Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673, 2732 (1996) (describing a survey which found that “sixty-nine percent of the judges reported cases in which jurors had fallen asleep” during portions of a trial).

93. *State’s Objection to a Virtual Trial, State v. Ward*, No. 1620963 (July 15, 2020, Cnty. Crim. Ct. No.1, Tarrant Cnty., TX) (on file with author).

avoid outside influence) can be used in remote proceedings as well.⁹⁴ But in general, the remote format makes it difficult for courts to police juror misbehavior. Courts conducting remote trials are not able to sequester the jurors or enforce a ban on electronic devices.⁹⁵ Furthermore, given the purely online interactions during the trial, fellow jurors are much less likely to witness or be privy to any misconduct by a juror, further reducing the court's ability to detect and address such misconduct. Distraction and outside influence therefore remain serious obstacles to the ability of courts to hold virtual jury trials consistent with the Sixth Amendment.⁹⁶

B. Policy Considerations

In many respects, the law on videoconferencing recognizes that the decision to use video in lieu of in-person proceedings in criminal cases involves a weighing of individual rights and state interests.⁹⁷ It is therefore important—both to promote sound policy and to ensure that videoconferencing complies with the Constitution—to understand the effects that the procedure has on these rights and interests. While empirical research on these questions is still scarce, a number of advantages and disadvantages have been identified by scholars, courts, and policymakers.

1. Advantages of Remote Proceedings

Video proceedings are often adopted because of their perceived efficiency and cost savings.⁹⁸ While the switch to remote proceedings requires an upfront investment in technology, over time, the turn to virtual hearings is said to save time and resources for the parties involved.⁹⁹ Video proceedings can save costs for counties by eliminating the need to transport detained defendants from the jail to the courtroom.¹⁰⁰ In rural areas, they also

94. See Nancy S. Marder, *Jurors and Social Media: Is a Fair Trial Still Possible?*, 67 SMU L. REV. 617, 646, 654 (2014).

95. *Id.* at 646.

96. 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, I-8 (2020) (discussing how distractions and technological mishaps stand in the way of a fair, remote jury trial); Roth, *supra* note 88.

97. See *supra* notes 39–50 and accompanying text.

98. Gourdet et al., *supra* note 29, at 4; Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1098–1101 (2004).

99. Poulin, *supra* note 98, at 1099–1101.

100. *Id.* at 1099; Larose v. Superintendent, Hillsborough Cnty. Corr. Admin., 702 A.2d 326, 329 (N.H. 1997) (finding that “the State made an offer of proof that the teleconferencing procedure saved the State thousands of dollars in transportation and security fees”); Citizens’ Econ. Efficiency Comm’n, *Video Arraignment 2.0: Streaming Justice* 10 (2019), http://eec.lacounty.gov/Portals/EEC/Reports/202_0619_VideoArraignmentReport.pdf (finding that in Los Angeles County, “transporting inmates from jails to the courthouse costs the county [tens of] millions of dollars in transportation and security expenses every year” and the county “spent approximately \$63 million in 2016–17 to manage a complex transportation

save time and money for defendants and defense attorneys who often have to travel long distances to get to a courthouse.¹⁰¹ One study of videoconference proceedings in Montana found that “use of video court appearances in both civil and criminal hearings enabled legal aid organizations to serve previously underserved parts of the state.”¹⁰²

Videoconference proceedings can also improve safety in the transportation of detained defendants to the courtroom by “removing the harm or disturbances that inmates may pose to other defendants, court staff, law enforcement personnel, or civilians.”¹⁰³ Furthermore, the use of video technology can reduce certain discomforts associated with the process of being transported to the courtroom, such as “numerous body searches, handcuffs, and long waiting periods in court holding facilities.”¹⁰⁴

Remote proceedings are also said to expedite the processing of cases by giving judges greater flexibility and predictability in scheduling criminal proceedings, and moving cases along more speedily.¹⁰⁵ Online proceedings are also said to reduce delays that might arise when a participant is “subject to traffic delays, or subject to physical limitations that make travel difficult.”¹⁰⁶ On the whole, the expectation is that when videoconferencing is used, “more cases can be handled in the available amount of time with the available court personnel.”¹⁰⁷ To the extent that videoconferencing results in a quicker disposition of cases, it benefits society by allowing defendants, victims, and their families to move on with their lives, and by reducing detention costs.¹⁰⁸

Finally, videoconferencing technology can make it easier for victims, witnesses, and defendants to participate in the criminal process.¹⁰⁹ Experts are more likely to be available when hearings are scheduled via video and do not require travel to the jurisdiction.¹¹⁰ Witnesses and victims who live far

program that included labor, equipment, maintenance, repair, and fuel to transport 723,000 inmate trips to local courts”).

101. Robin Davis et al., *Research on Videoconferencing at Post-Arrest Release Hearings: Phase I Final Report*, ICF INT’L 5 (May 29, 2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248902.pdf>.

102. Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court* 9, BRENNAN CTR. JUST. (2020), <https://www.brennancenter.org/sites/default/files/2020-09/The%20Impact%20of%20Video%20Proceedings%20on%20Fairness%20and%20Access%20to%20Justice%20in%20Court.pdf> (citing Richard Zorza, *Video Conferencing for Access to Justice: An Evaluation of the Montana Experiment*, 1, 3 (2007)).

103. Citizens’ Econ. Efficiency Comm’n, *supra* note 100, at 11; Gourdet et al., *supra* note 29, at 4.

104. Citizens’ Econ. Efficiency Comm’n, *supra* note 100, at 11; *see also* Poulin, *supra* note 98, at 1100–01 (describing the economic benefits of video proceedings).

105. Gourdet et al., *supra* note 29, at 9.

106. *Id.* at 11.

107. Poulin, *supra* note 98, at 1100.

108. Gourdet et al., *supra* note 29, at 5; Clair Shubik-Richards et al., *Philadelphia’s Less Crowded, Less Costly Jails: Taking Stock of a Year of Change and the Challenges That Remain*, PHILA. RSCH. INITIATIVE (July 20, 2011), <https://www.issuelab.org/resources/13204/13204.pdf>.

109. Davis et al., *supra* note 101, at 13; Gourdet et al., *supra* note 29, at 5.

110. Davis et al., *supra* note 101, at 13.

from the courthouse or who have demanding work or child care schedules are also more likely to take part via video.¹¹¹ Likewise, witnesses who might be intimidated in the defendant's presence may be more open to testify remotely.¹¹² Finally, videoconferencing is also likely to be more convenient for defendants who are out on bond, and it can therefore reduce their failure to appear rates.¹¹³

While courts, policymakers, and some scholars have enumerated some of these advantages of video proceedings, empirical studies of the frequency and value of the benefits remain limited.¹¹⁴ Two larger studies—one on videoconference proceedings in U.S. immigration courts and one on videoconference criminal proceedings in England—found that videoconferencing did expedite the resolution of cases.¹¹⁵ A report on video arraignments for misdemeanor cases in Dade County, Florida, also found that the use of videoconferencing improved the efficiency of judges.¹¹⁶ Yet it is unclear whether these benefits apply equally well across different types of criminal proceedings and across different U.S. jurisdictions. Some studies have found that a resolution of a case via video can take longer in some instances, in part because of technological problems and in part because it is easier to adjourn the hearing and reconvene on another date.¹¹⁷

Several studies have found that videoconferencing does lead to substantial savings in the costs of transporting inmates to the courthouse.¹¹⁸ For example, the use of video arraignment in Los Angeles County was estimated to help the county save a large percentage of the “approximately \$63 million [spent] in 2016-17 to manage a complex transportation program

111. Gourdet et al., *supra* note 29, at 5, 10.

112. *Id.* at 5, 10–11.

113. See, e.g., Matthew Terry et al., *Virtual Court Pilot: Outcome Evaluation*, MINISTRY JUST. (Dec. 2010), <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>; National Center for State Courts, *Will Remote Hearings Improve Appearance Rates?* (May 13, 2020), <https://www.ncsc.org/newsroom/at-the-center/2020/may-13>.

114. See, e.g., Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 LAW & POL'Y 211, 225 (2006).

115. Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 962–63 (2015) (noting this effect of videoconferencing on immigration proceedings); Terry et al., *supra* note 113, at 18 (finding that virtual proceedings reduced the time between the charge and the first hearing).

116. Jeffrey M. Silbert et al., *The Use of Closed Circuit Television for Conducting Misdemeanor Arraignments in Dade County, Florida*, 38 U. MIA. L. REV. 657, 661 (1984); see also Hon. Ronald T.Y. Moon, *1995 State of the Judiciary Address*, HAW. B.J., Jan. 1996, at 25, 28 (noting that a pilot video arraignment project in Hawaii reduced case processing time by at least 50 percent).

117. MCKAY, *supra* note 31, at 154–55; Nigel Fielding et al., *Video Enabled Justice Evaluation*, SUSSEX POLICE AND CRIME COMMISSIONER & UNIVERSITY OF SURREY 98–99 (May 2020), <https://www.sussex-pcc.gov.uk/media/4862/vej-final-report-ver-12.pdf>.

118. Citizens' Econ. Efficiency Comm'n, *supra* note 100, at 10; Moon, *supra* note 116, at 25, 28 (reporting that in a video arraignment pilot program in Hawaii, “the DPS has saved 2,400 hours of staff time, which translates to \$45,000 annually”); Terry et al., *supra* note 113, at 9; see also Warner A. Eliot, *The Video Telephone in Criminal Justice: The Phoenix Project*, 55 U. DET. J. URB. L. 721, 754 (1978) (finding that regular usage of “videophone” in criminal arraignments and consultations with counsel in Phoenix would result in net savings).

that included labor, equipment, maintenance, repair, and fuel to transport 723,000 inmate trips to local courts.”¹¹⁹ Video arraignments could save additional resources by improving security and thus reducing workers’ compensation claims filed by county employees who were injured by an inmate in the course of transportation to the courtroom.¹²⁰ The same study also recognized, however, that the program carried various administrative costs, which may not outweigh the benefits in smaller counties with fewer inmates.¹²¹

Likewise, a study of a pilot video program in England found that despite savings in transportation costs and in police time (the latter resulting from fewer failures to appear by defendants), the program was an overall net financial burden, mainly because of the high costs of running the video platform.¹²² Notably, the calculation did not even factor in the costs of purchasing and installing the technology, which were significant.¹²³ At the same time, the authors did note that the video program could result in savings over time, if it were used in a jurisdiction with a higher volume of cases.¹²⁴

In a 2010 National Center for State Courts survey of court administrators in the fifty states, a majority of respondents stated that videoconferencing had saved time, staff hours, and fuel costs for their courts and other state agencies.¹²⁵ But assessments of the time and costs saved varied widely, and many respondents noted that they could not estimate a dollar amount or percentage of savings from videoconferencing.¹²⁶ Moreover, the same survey found that “insufficient funding” was the most common obstacle to the implementation of a videoconferencing system, suggesting that, at least at the outset, the costs of implementation may outweigh the benefits.¹²⁷

The evidence on whether videoconferencing saves time or resources for *defense attorneys* is not conclusive. A 1970s study of the use of videophone in arraignments and in consultations between detainees and defense counsel found that the procedure saved travel time for the attorneys and led to

119. Citizens’ Econ. Efficiency Comm’n, *supra* note 100, at 10.

120. *Id.* at 11.

121. *Id.* at 7–8 (noting that phase one of a video arraignment pilot project “incurred one-year expenditures of \$188,000, with ongoing expenditures estimated at \$52,600” and additional staff hours for the LAPD). *But cf.* Thaxton, *supra* note 50, at 183–84 (reporting that after introducing video arraignments in the late 1970s, Philadelphia found that using video arraignments did not result in overall cost reductions, but shifted the cost to different agencies).

122. Terry et al., *supra* note 113, at 9.

123. *Id.* at 10.

124. *Id.*

125. Video Conferencing Survey, *supra* note 32, https://www.ncsc.org/__data/assets/image/0019/16732/q48-png.png.

126. *Id.* at https://www.ncsc.org/__data/assets/pdf_file/0021/17094/q51a.pdf.

127. *Id.* at https://www.ncsc.org/__data/assets/image/0026/16694/q7-png.png (finding that seventy-six percent of court administrator respondents identified “insufficient funding” as an “impediment or issue in the implementation” of videoconferencing); *see also* Davis et al., *supra* note 101, at 14 (noting that “videoconferencing is a substantial cost to jurisdictions to implement”).

increased consultation with clients.¹²⁸ Other studies, however, have found that videoconferencing can impose a heavier burden on attorney resources as attorneys have to travel farther to meet with detained clients for videoconference proceedings, and they spend more time overall in preparation for videoconference proceedings.¹²⁹

In brief, a range of factors, including the volume of cases, the scope of application of videoconferencing, and the location of the detention center and the courthouse, influence the efficiency of videoconferencing. More extensive and systematic studies are needed to determine whether and when the procedure yields net financial benefits, and how its costs and benefits are distributed.

2. Disadvantages of Remote Proceedings

While the use of videoconference technology may offer a range of benefits to society and to participants in criminal cases, it can also negatively affect defendants' constitutional rights and the search for truth. Concerns about these effects of videoconferencing fall in five broad areas.

First, the use of video can hurt the quality of defense representation both before and during a remote proceeding. Some surveys of attorneys and criminal defendants suggest that counsel may have difficulty establishing rapport with her client during video consultations, and this in turn can affect the ability to provide effective representation.¹³⁰ Video consultation can also harm the ability of counsel to prepare a client for a hearing because of the difficulties in reviewing relevant evidence over video.¹³¹ Likewise, without an in-person meeting, counsel may be less able to assess the client's competency or the voluntariness of the client's decisions about the case.¹³²

128. Eliot, *supra* note 118, at 736 (noting that "the average frequency of contact [with clients] increased by eighty-one percent during the period when the video telephone was available, compared with the average frequency in the four months prior to installation of the first video telephone").

129. Eagly, *supra* note 115, at 985–86; *see also* Davis et al., *supra* note 101, at 13 (noting that videoconferencing can incur additional costs of bringing defense attorneys to the detention facilities for the video proceeding and that this has to be balanced against the savings from transporting detainees to the courthouse); Fielding et al., *supra* note 117, at 96–97 (reporting statements by defense attorneys in England that video hearings required more preparation because it reduced the opportunity for courtroom hallway conversations with prosecutors and probation officers, and it required additional explanations of the video process for clients).

130. *See, e.g.*, MCKAY, *supra* note 31, at 114–15; Gibbs, *supra* note 31, at 11; Poulin, *supra* note 98, at 1129, 1144–47; Eric T. Bellone, Videoconferencing in the Courts: An Exploratory Study of Videoconferencing Impact on the Attorney-Client Relationship in Massachusetts 127–32, 135, 138, 158–60 (Mar. 1, 2015) (Ph.D. dissertation, Northeastern University). *But see* Brendan R. McDonald et al., *The Attorney-Client Working Relationship: A Comparison of In-Person Versus Videoconferencing Modalities*, 22 PSYCH., PUB. POL'Y & L. 200 (2016) (finding that misdemeanor defendant clients of law school clinic were generally satisfied with remote attorney consultations).

131. *See, e.g.*, MCKAY, *supra* note 31, at 114–15; Gibbs, *supra* note 31, at 11–12; Poulin, *supra* note 98, at 1144–47.

132. Poulin, *supra* note 98, at 1145, 1152.

Defense counsel's inability to consult with the client in person *during* the proceeding may further interfere with effective representation.¹³³ Traditionally, videoconference platforms have not provided a separate line for the attorney and client to consult confidentially.¹³⁴ A survey conducted by the National Center for State Courts in 2010 found that many courts had difficulties ensuring the privacy of lawyer-client communications during video proceedings.¹³⁵ Typically, if counsel and client needed to converse in private, counsel would need to leave a remote hearing and call on a separate phone line, which might discourage needed consultation.¹³⁶ Another challenge of videoconferencing is that counsel may not be able to intervene as promptly or effectively if the client acts disruptively or otherwise says something that might hurt him with the court.¹³⁷ Finally, if the defense attorney herself is participating remotely—for example, in order to be present with her client in the detention center—she may be distracted more easily, miss off-camera body language of witnesses or lawyers, and thus overlook important moments in the hearing.¹³⁸

Another concern is that defendants may not be able to fully hear, observe, or understand proceedings via video.¹³⁹ Technology can malfunction, leading to interruptions in sound or image.¹⁴⁰ Distractions in the background can also interfere with the ability to focus on the proceedings. And when defendants appear on video in detention, the coercive environment of the jail may negatively affect their perceptions and behavior during the proceeding.¹⁴¹

133. See, e.g., Fielding et al., *supra* note 117, at 64–65; Poulin, *supra* note 98, at 1129–30.

134. See, e.g., Poulin, *supra* note 98, at 1130.

135. Video Conferencing Survey, *supra* note 32, at https://www.ncsc.org/__data/assets/image/0028/16678/q28-png.png and https://www.ncsc.org/__data/assets/pdf_file/0020/17129/q28b.pdf.

136. See, e.g., Davis et al., *supra* note 101, at 18; Gourdet et al., *supra* note 29, at 6; Jolie McCullough & Emma Platoff, *Coronavirus Pauses Many Texas Court Proceedings. For Some, That Means More Time in Jail*, TEX. TRIB. (Mar. 19, 2020), <https://www.texastribune.org/2020/03/19/texas-courts-coronavirus-jury-trials-defense-attorneys/>.

137. Poulin, *supra* note 98, at 1126–27, 1130.

138. Van Patten v. Deppisch, 434 F.3d 1038, 1045 (7th Cir. 2006).

139. See, e.g., MCKAY, *supra* note 31, at 112–13; Gibbs, *supra* note 31, at 18; Poulin, *supra* note 98, at 1135–40.

140. See, e.g., Bannon & Adelstein, *supra* note 102, at 6 (citing study of immigration proceedings which found that repeated technological problems had raised due process concerns); Eagly, *supra* note 115, at 979–80 (reporting repeated technological malfunctions in remote immigration proceedings, which made it difficult for detainees to hear or understand the proceedings); Hillman, *supra* note, at 56 (“As with any implementation of technology, however, there have been instances where the technology failed during a hearing. Such failures include the inability of the defense attorney, defendant, and judge to hear and see one another, which may cause one of the parties to miss out on important information, both auditory and visual.”); Legal Education Foundation, *Briefing: Coronavirus Bill, Courts and the Rule of Law* 7 (Mar. 18, 2020), https://research.thelegaleducationfoundation.org/wp-content/uploads/2020/03/Recommendations-for-Coronavirus-Bill_V6.pdf (noting that “[t]he literature on the conduct of video hearings in the UK is replete with references to instance where the technology has failed”).

141. See Poulin, *supra* note 98, at 1134–35.

Given these hurdles of participating via video, defendants may become disengaged, and their passivity could lead to adverse outcomes for them.¹⁴² And even if the outcome is not affected, defendants—as well as their friends and family—may nonetheless perceive the process as less fair.¹⁴³ One study of English video proceedings found that “[w]hen given the choice, the majority of defendants refused to appear on video from the police station”; another found that 20%–25% of English criminal defendants felt that conducting hearings via video was not fair.¹⁴⁴ If videoconferencing also reduces public access, this can further diminish the fairness and perceived legitimacy of the proceedings—not only among defendants but also among the public at large.¹⁴⁵

Video hearings may also negatively affect the court’s perceptions of the defendant’s credibility: “[P]oor lighting could affect how well the judge can see the defendant onscreen and could affect the judge’s perception of that individual. . . . [The technology might make it] difficult for the judge to assess the defendant’s body language.”¹⁴⁶ Distortions based on lighting, the setting from which a defendant appears (often a jail cell), the audio feature of the videoconference platform, and even the camera angle may lead a judge to perceive a defendant as less credible or more dangerous.¹⁴⁷ The lack of family and friends visible in the courtroom—and ready to provide information or support as needed—can further hurt the defendant’s case before the court.¹⁴⁸

In other ways, too, video proceedings may fall short of advancing the search for truth. The parties may have trouble assessing the credibility of witnesses who are testifying remotely, and cross-examination may be less effective on video.¹⁴⁹ While judges and juries are generally not very accurate

142. See, e.g., McKay, *supra* note 31, at 108–12; Eagly, *supra* note 115, at 978; Fielding et al., *supra* note 117, at 69–71; Gibbs, *supra* note 31, at 18; Johnson & Wiggins, *supra* note 114, at 217; Poulin, *supra* note 98, at 1140–41.

143. Eagly, *supra* note 115, at 978 (finding that lawyers representing immigration detainees in videoconference proceedings report that the detainees often view video as less fair than in-person proceedings); Eliot, *supra* note 118, at 749 (reporting accounts by “a number of defendants” that they prefer to have the opportunity to present their case to the judge in person); Fielding et al., *supra* note 117, at 49, 102–04; Gourdet et al., *supra* note 29, at 8; Poulin, *supra* note 98, at 1158–59.

144. Gibbs, *supra* note 31, at 15.

145. See *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982); see also *In re Oliver*, 333 U.S. 257, 270 n.24 (1948).

146. Gourdet et al., *supra* note 29, at 7; see also Poulin, *supra* note 98, at 1118–24.

147. Davis et al., *supra* note 101, at 5–6 (noting that the audio feature of videoconferencing platforms often “cuts off low and high voice frequencies, which are typically used to transmit emotion”; this “removes critical emotional cues that can be used by judicial officers to determine a defendant’s remorse and character”); Gourdet et al., *supra* note 29, at 5; Poulin, *supra* note 98, at 1115–16.

148. Johnson & Wiggins, *supra* note 114, at 217; Poulin, *supra* note 98, at 1141.

149. *Wilkins v. Wilkinson*, No. 01AP-468, 2002 WL 47051, at *3 (Ohio Ct. App. Jan. 15, 2002) (“The absence of any apparent good cause coupled with Wilkins’ allegations that the camera was positioned in such a way to prevent Wilkins and his counsel from making eye contact with the witnesses, along with the camera freezing on several occasions, thereby preventing Wilkins and the hearing officer from observing the demeanor of the witnesses is sufficient to state a claim that the procedure used did not meet the minimal due process requirements”); Poulin, *supra* note 98, at 1148–50.

in evaluating the credibility of witnesses based on demeanor,¹⁵⁰ when the testimony occurs via video, the technology can further mar such assessments.¹⁵¹ Courts have also expressed concern that people are less likely to be truthful when testifying remotely: The theory is that witnesses are less likely to be forthcoming when they are not being directly watched by the judge and the defendant, and are not in the solemn atmosphere of the courtroom.¹⁵² Likewise, remote witnesses may be coached off-camera, distracted, or influenced by the testimony of other witnesses because it is difficult to police such behaviors on video.¹⁵³

Lawyers, judges, and jurors can likewise be distracted by events occurring on their computers or in the background.¹⁵⁴ Their access to the proceedings may also be interrupted by technological glitches, which can frustrate their ability to provide effective assistance or assess the evidence presented.¹⁵⁵ Finally, lawyers and factfinders may find it difficult to concentrate on video proceedings for a sustained period because of the higher cognitive load required to follow events on video.¹⁵⁶ These obstacles may impede effective representation by counsel and undermine the fairness of the proceedings.

As with the advantages of videoconferencing, the disadvantages of the procedure have not been systematically examined through empirical studies. Moreover, the studies that have been done have at times reached somewhat different conclusions. For example, research on the effects of videoconferencing on the attorney–client relationship has produced mixed results. One study, based on interviews with twenty Massachusetts attorneys, found that most of the interviewed attorneys were concerned about their ability to establish a trusting relationship with their clients via video and about the clients’ perceptions of videoconferencing proceedings as unfair.¹⁵⁷ By contrast, another study of the use of videoconferencing in attorney–client consultations in a misdemeanor defense law clinic in Texas found that clients did not perceive the video consultations more negatively than in-person

150. For a discussion of the social studies on demeanor evidence, see Susan Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, BUFF. L. REV. **8–15 (forthcoming 2021).

151. *Id.* at **16–19, *21–28 (discussing studies); see also *infra* notes 164–168 and accompanying text (discussing relevant studies).

152. See, e.g., *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988). Perhaps because this proposition is difficult to test empirically, I was not able to find empirical studies directly supporting or rejecting the theory. But there is some research suggesting deception is generally more likely in virtual than in-person settings. See Friedman Amicus Brief, *supra* note 70, at 10 n.7.

153. *Id.* at 1018–20; see also Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J. L. REF. 695, 713–14 (2002).

154. See Draper, *supra* note 96.

155. See *id.*

156. See *id.*; Bandes & Feigenson, *supra* note 150, at *23.

157. Bellone, *supra* note 130, at 127–32, 135, 138–39, 158–60.

consultations.¹⁵⁸ But the Texas study focused only on attorney-client consultations, whereas the Massachusetts study asked about videoconference proceedings more broadly. It is also possible that defense attorneys are generally more concerned about the effects of video proceedings than their clients.¹⁵⁹ Finally, since both of these studies relied on a small sample of respondents, further analysis would be helpful. Studies of remote consultations in the field of mental health suggest that such consultations yield positive results and are generally accepted by the participants, so it would be fruitful to conduct additional evaluations of tele-consultations in criminal cases.¹⁶⁰

Other empirical studies have raised concerns that video technology may impair the fairness and outcomes of criminal proceedings. Research of bail hearings conducted via closed circuit television in Cook County, Illinois, found that “average bond amounts rose substantially following the implementation of [the closed circuit television procedure].”¹⁶¹ Certain features of the videoconference program in Cook County—the low quality of the sound and image and the limited time given to defense attorneys to consult with clients before the video hearing—likely contributed to the negative effects that the program had on bail decisions.¹⁶² A more recent study from England found no negative impact of video technology on bail decisions; in fact, defendants who appeared on video were more likely to obtain bail than those who appeared in person.¹⁶³

But other studies also suggest that the use of video may have biasing effects. For example, research comparing child witnesses who testified via closed-circuit television with child witnesses who testified in person found that witnesses who testified on video were judged as less believable and less forthcoming.¹⁶⁴ Another study likewise found that mock jurors evaluated the in-person witnesses as more accurate and honest, and this assessment affected the verdict of the mock jurors.¹⁶⁵ Furthermore, studies have shown

158. McDonald et al., *supra* note 130, at 200.

159. Gourdet et al. *supra* note 29, at 10.

160. See, e.g., Rashid Bashshour et al., *The Empirical Evidence for Telemedicine Interventions in Mental Disorders*, 22 *TELEMED. J. & E-HEALTH* 87 (2016); Mostafa Langarizadeh et al., *Telemental Health Care, an Effective Alternative to Conventional Mental Care: A Systematic Review*, 25 *ACTA INFORM MED.* 240 (2017).

161. Diamond et al., *supra* note 50, at 897.

162. *Id.* at 884–85, 898–99.

163. See Fielding et al., *supra* note 117, at 99–100.

164. Johnson & Wiggins, *supra* note 114, at 221–22 (citing and discussing Gail Goodman et al., *Face-to-Face Confrontation: Effects of Closed Circuit Technology on Children’s Eyewitness Testimony*, 22 *LAW & HUM. BEHAV.* 165 (1998)); Sara Landström & Pär Anders Granhag, *In-Court Versus Out-of-Court Testimonies: Children’s Experiences and Adults’ Assessments*, 24 *APPL. COGNIT. PSYCH.* 941, 949 (2010) (finding that adult observers perceived children seen live as more forthcoming, more straightforward, and more natural than children seen via CCTV)

165. Johnson & Wiggins, *supra* note 114, at 221–22 (citing and discussing Gail Goodman et al., *Face-to-Face Confrontation: Effects of Closed Circuit Technology on Children’s Eyewitness Testimony*, 22 *LAW & HUM. BEHAV.* 165 (1998); Holly K. Olcutt et al., *Detecting Deception in Children’s Testimony*:

that “being able to see gestures can both aid the viewer’s comprehension and increase the viewer’s ratings of the likability of the person speaking.”¹⁶⁶ Likewise, a recent study found that the size of a video image strongly influences mock jurors’ evaluation of the evidence and the size of punishment imposed on the defendant by the mock jurors upon conviction.¹⁶⁷ This suggests that certain videoconference arrangements, which are not large enough or do not display a full body picture of the defendant or witnesses, may negatively affect the perceptions of the factfinder.¹⁶⁸

Some studies have found more neutral effects of the use of video technology on factfinders’ decisions. Two mock jury trial experiments—one from England and one from Australia—found no discernible effects of the use of video testimony on the verdict in rape cases.¹⁶⁹ But a more recent large-scale English study of actual jurors’ decision-making in rape cases has cast doubt on the representativeness of mock juries.¹⁷⁰ It therefore raises the question whether the findings of mock juror studies on the effects of video testimony are representative or reliable.

Similarly, two studies from noncriminal contexts—one of medical expert video testimony in mock civil cases and another of videoconferencing

Factfinders’ Ability to Reach the Truth in Open Court and Closed-Circuit Trials, 25 LAW & HUM. BEHAV. 339 (2001)). *But cf.* Landström & Granhag, *supra* note 164, at 950 (finding that adults observing children live were not better at distinguishing between lies and truth than adults observing children on CCTV); Fredric Lederer, *The Legality and Practicality of Remote Witness Testimony*, 20 PRAC. LITIGATOR 19, 21 (2009) (in a study of testimony by medical experts in civil personal injury trials, finding “no statistically significant difference in [the] verdict whether the experts were physically in the courtroom or elsewhere, at least so long as witness images are displayed life-size behind the witness stand, and the witness is subject to cross-examination under oath.”).

166. Johnson & Wiggins, *supra* note 114, at 222 (citing and discussing James E. Driskell & Paul H. Radtke, *The Effect of Gesture on Speech Production and Comprehension*, 45 HUM. FACTORS 445 (2003); Spencer D. Kelly & Leslie H. Goldsmith, *Gesture and Right Hemisphere Involvement in Evaluating Lecture Material*, 4 GESTURE 25 (2004)).

167. Wendy P. Heath & Bruce D. Grannemann, *How Video Image Size Interacts with Evidence Strength, Defendant Emotion, and the Defendant–Victim Relationship to Alter Perceptions of the Defendant*, 32 BEHAV. SCI. L. 496, 503 (2014) (finding that “an increase in video size resulted in strong evidence appearing stronger and weak evidence appearing weaker” and that “participants assigned shorter sentences to the defendant presented on a large as compared with a small screen”).

168. Johnson & Wiggins, *supra* note 114, at 222 (noting further that according to a 2001 report by the Federal Judicial Center, “the typical use of videoconferencing in the courts display[ed] only head shots of the participants”).

169. See Louise Ellison & Vanessa E. Munro, *A ‘Special’ Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials*, 23 SOC. & LEG. STUDIES 3 (2014); Natalie Taylor & Jacqueline Joudo, *The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study*, Australian Inst. Criminology Res. & Pub. Pol’y Ser. No. 68 (2005) (finding no impact of use of CCTV testimony on verdict in mock rape jury trial, but acknowledging that “some jurors in the CCTV condition expressed the view that they would have preferred the complainant to be physically in the courtroom”).

170. See Kapil Summan, *New Research Finds Jurors Do Not Subscribe to Rape Myths and Casts Doubt on Mock Jury Studies*, SCOTTISH LEGAL NEWS (Dec. 1, 2020), <https://scottishlegal.com/article/new-research-finds-jurors-do-not-subscribe-to-rape-myths-and-casts-doubt-on-mock-jury-studies>.

in immigration proceedings—found that the use of video had no significant effects on the factfinder’s decision.¹⁷¹ Yet the study on expert testimony did not examine whether the use of video may have affected the experts’ accuracy or truthfulness.¹⁷² And the analysis of immigration proceedings found that the use of video did have a significant negative effect on the engagement of litigants in the process, which in turn negatively affected the outcome: “Televideo litigants were less likely to retain counsel, pursue an application for permission to remain lawfully in the United States (known as relief), or seek the right to return voluntarily (known as voluntary departure).”¹⁷³ As a result, even though videoconferencing did not influence judges’ decisions, it nonetheless led to a higher rate of deportation as a result of greater disengagement from the process by the litigants.¹⁷⁴

The issue of disengagement and its effects on remote criminal case outcomes is worth examining further. A study of videoconferencing in criminal proceedings in England found that the use of the technology in pretrial proceedings led criminal defendants to be more passive and less likely to seek the aid of counsel, even though they were entitled to free legal representation.¹⁷⁵ The same research found that defendants who appeared via video were more likely to plead guilty than those who appeared in person, though the authors acknowledged that they may not have controlled for defendant characteristics that could have influenced the outcome.¹⁷⁶ The study also found that video hearings were more likely to result in a custodial sentence for defendants than in-person hearings, and this finding was replicated in a more recent analysis of English video proceedings.¹⁷⁷

In brief, several studies—albeit in different geographic or subject matter contexts—suggest that videoconferencing may negatively influence outcomes of the legal process, at least in certain circumstances.¹⁷⁸ Accordingly, further research of these questions in the context of U.S. criminal cases would be valuable as jurisdictions determine when and how video technology could be used fairly and effectively in criminal proceedings.

171. Lederer, *supra* note 165, at 21; Eagly, *supra* note 115, at 938 (finding “no statistically significant difference in grant rates for relief and voluntary departure applications across televideo and in-person detained cases”).

172. Lederer, *supra* note 165, at 21.

173. Eagly, *supra* note 115, at 937–38.

174. *Id.* at 938.

175. Terry et al., *supra* note 113, at 23.

176. *Id.* at 24–25.

177. Fielding et al., *supra* note 117, at 100–01; Terry et al., *supra* note 113, at 42–43.

178. Diamond et al., *supra* note 50, at 897; Eagly, *supra* note 115, at 937–38; Fielding et al., *supra* note 117, at 100–01; Terry et al., *supra* note 113, at 42–43; *see supra* notes 164–168 and accompanying text.

III. REMOTE CRIMINAL JUSTICE DURING THE PANDEMIC

In ordinary times, concerns about the costs or legality of videoconferencing may have dissuaded jurisdictions from introducing the technology more broadly.¹⁷⁹ Yet the emergency presented by the coronavirus pandemic in 2020 sharply altered the landscape. As public health concerns about the spread of the disease forced governments to shut down in-person operations whenever feasible, courts increasingly turned to online video proceedings in civil and criminal cases.

During the last major pandemic—the 1918 influenza outbreak—some judges closed courtrooms entirely, while others held criminal proceedings outdoors and required masks as a means of preventing the spread of the disease.¹⁸⁰ A century later, in response to the coronavirus, most state and federal courts suspended jury trials to protect public health.¹⁸¹ Judges in many jurisdictions were also banned from holding in-person proceedings for “nonessential” matters “if doing so would conflict with local, state or national directives about limiting group size.”¹⁸² Accordingly, to protect criminal defendants’ rights to speedy trial and pretrial release, and to prevent significant delays and backlogs, jurisdictions across the country began holding proceedings remotely.¹⁸³

A. State and Federal Law on Remote Proceedings During the Pandemic

1. Statutory Rules

In March 2020, Congress passed the CARES Act, which authorized the use of videoconferencing for a range of federal criminal proceedings, including arraignments, detention hearings, preliminary hearings, misdemeanor plea hearings and, upon a specific finding by the chief judge for the district, felony plea and sentencing hearings.¹⁸⁴ At the state level,

179. Video Conferencing Survey, *supra* note 32, https://www.ncsc.org/_data/assets/image/0026/16694/q7-png.png.

180. *See, e.g.*, Christopher Klein, *Why October 1918 Was America’s Deadliest Month Ever*, HIST. (Oct. 5, 2018), <https://www.history.com/news/spanish-flu-deaths-october-1918>; Julian A. Navarro, *Influenza in 1918: An Epidemic in Images*, 125 PUB. HEALTH REP. 12 Supp. 3 (2010).

181. *See generally* National Center for State Courts, *supra* note 3.

182. McCullough & Platoff, *supra* note 136.

183. *Remote Criminal Court Proceedings During COVID-19*, JUSTIA (May 2020), <https://www.justia.com/covid-19/impact-of-covid-19-on-criminal-cases/remote-criminal-court-proceedings-during-covid-19/>.

184. Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, Pub. L. No. 116-136, § 15002 (2020), [hereinafter CARES Act]. Acting pursuant to the CARES Act, the Judicial Conference of the United States found that “emergency conditions due to the national emergency declared by the President . . . with respect to the Coronavirus Disease 2019 (COVID-19) will materially affect the functioning of the Federal courts generally.” *Id.* This empowered “chief district judges, under certain circumstances and

courts similarly received authorization to use online hearings for urgent and essential matters, including bail, plea, and sentencing hearings.¹⁸⁵ This process was lauded for “allow[ing] defendants continued access to the courts to pursue relief while simultaneously considering the health, safety and welfare of everyone involved in the court system including offenders, lawyers, judges, law clerks, courtroom staff, [and] court security officers . . .”¹⁸⁶

While videoconference proceedings were previously often conducted through closed-circuit television technology, during the pandemic, online-based platforms like Zoom and Microsoft Teams became dominant because the attorneys, the judges, and the court staff—not just the defendant—had to appear remotely.¹⁸⁷ Jurisdictions differed in the types of proceedings that they permitted to take place via video during the emergency, just as they did in pre-coronavirus times.¹⁸⁸ But a consistent trend across the country was to allow broader use of remote proceedings in the interests of public health. Jurisdictions that previously either did not authorize videoconference proceedings at all or limited authorization to initial appearances and arraignments now allowed virtual hearings for a broader range of matters, including pleas, sentencing, and bench trials.¹⁸⁹ A few went further and

with the consent of the defendant, to temporarily authorize the use of video or telephone conferencing for certain criminal proceedings during the COVID-19 national emergency.” *Id.*

185. See, e.g., California Emergency Rules, <https://jcc.legistar.com/View.ashx?M=F&ID=8234474&GUID=79611543-6A40-465C-8B8B-D324F5CAE349>; Texas Supreme Court, *supra* note 14; McCullough & Platoff, *supra* note 136; Shea Denning, *April 2 Emergency Directives Require Continuances, Authorize Remote Proceedings, and Extend Time to Pay*, N.C. CRIM. L. BLOG (Apr. 6, 2020), <https://nccriminallaw.sog.unc.edu/april-2-emergency-directives-require-continuances-authorize-remote-proceedings-and-extend-time-to-pay/>.

186. David Gialanella, *The Alternative Was Uncertain: Many Federal Criminal Proceedings to Go Remote*, N.J. L.J. (Apr. 2, 2020), <https://www.law.com/njlawjournal/2020/04/02/the-alternative-was-uncertain-many-federal-criminal-proceedings-to-go-remote/?slreturn=20200314160011>.

187. See, e.g., Prosecutor Respondent #25 (“Prior to the pandemic, all of our video pleas were done via closed circuit between the courtroom and the jail. We were not using any of the teleconferencing apps. We began using Zoom very quickly after the pandemic put everything on lockdown. . . .”).

188. Compare California Emergency Rules, *supra* note 185, with Texas Supreme Court, Eighteenth Emergency Order Regarding the COVID-19 State of Disaster, <https://www.txcourts.gov/media/1448109/209080.pdf>; see also *supra* Part II.A (discussing the variation in pre-coronavirus rules on videoconferencing).

189. See, e.g., CARES Act, *supra* note 184, § 15002; Supreme Court of Alabama, Administrative Order Suspending All In-Person Court Proceedings for the Next Thirty Days (Mar. 13, 2020), <https://judicial.alabama.gov/docs/COV-19%20order%20FINAL.pdf>; Supreme Court of Arkansas, In re Response to the COVID-19 Pandemic (Mar. 17, 2020), <https://www.arcourts.gov/sites/default/files/articles/COVID-19-PC.pdf>; Florida Supreme Court, In re Comprehensive COVID-19 Emergency Measures for the Florida State Courts, AOSC20-23, Amendment 5 (July 2, 2020), <https://www.florida-supremecourt.org/ezs3download/download/639134/7265622>; N.J. Dir. 12-20, Principles and Protocols for Virtual Court Operations During COVID-19 Coronavirus Pandemic (Apr. 27, 2020), <https://www.njcourts.gov/notices/2020/n200427b.pdf>; Massachusetts District Court Standing Order 7-20: Court Operations under the Exigent Circumstances Created by COVID-19 (Coronavirus), Part V (June 25, 2020), <https://www.mass.gov/districtmunicipal-court-rules/district-court-standing-order-7-20-court-operations-under-the-exigent#v-matters-that-shall-be-conducted-virtually>; Texas Supreme Court, *supra* note 188.

permitted the use of remote proceedings for grand and petit jury proceedings.¹⁹⁰ Grand juries convened remotely in Alaska and New Jersey, and the first online misdemeanor jury trial took place in Texas in August 2020.¹⁹¹

2. Constitutional Limits

The pandemic also led a greater number of states (but not the federal government) to authorize videoconference proceedings in the absence of the defendant's consent.¹⁹² In ordinary times, the use of videoconferencing in a criminal proceeding without a knowing and voluntary waiver by the defendant raises constitutional questions, particularly in contested and evidentiary proceedings.¹⁹³

During the pandemic, however, states have two compelling interests that favor conducting remote proceedings: protecting public health and ensuring the speedy resolution of criminal cases.¹⁹⁴ Video proceedings help protect public health by limiting in-person interaction among the participants and preventing the spread of the coronavirus. They also reduce the risk of

190. See, e.g., Supreme Court of Arizona, Authorizing Limitation of Court Operations During a Public Health Emergency and Transition to Resumption of Certain Operations, AO 2020-114 (July 15, 2020), <http://www.azcourts.gov/Portals/22/admorder/Orders20/2020-114.pdf> (allowing chief judges to authorize remote jury and grand jury selection, grand juries, and jury trials); Texas Supreme Court, *supra* note 188 (permitting remote jury selection and jury trials); Supreme Court of Alaska, Special Order of the Chief Justice No. 8157 (June 22, 2020), <https://public.courts.alaska.gov/web/covid19/docs/socj-2020-8157.pdf> (permitting virtual grand jury pilot program); New Jersey Supreme Court, Notice and Order, Virtual Grand Jury Pilot Program-Expansion to Grand Jury Selection (June 9, 2020), <https://njcourts.gov/notices/2020/n200616a.pdf> (expanding virtual grand jury pilot to include virtual grand jury selection); New Jersey Supreme Court, Notice and Order: Resuming Criminal and Civil Jury Trial (July 22, 2020), <https://njcourts.gov/notices/2020/n200722a.pdf?c=Qjl> (authorizing remote jury selection); Supreme Court of Washington, Order, Re: Modification of Jury Trial Proceedings, No. 25700-B-631 (June 18, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Jury%20Resumption%20Order%20061820.pdf> (permitting remote jury selection).

191. Matthew Adams et al., *NJ's Unconstitutional Experiment With Virtual Grand Juries Should End Immediately*, N.J. L.J. (July 2, 2020), <https://www.law.com/njlawjournal/2020/07/02/njs-unconstitutional-experiment-with-virtual-grand-juries-should-end-immediately/>; Casey Grove, *Zoom in to Jury Duty: A Pilot Project in Rural Alaska Starts in August*, KTOO (June 30, 2020), <https://www.ktoo.org/2020/06/30/zoom-in-to-jury-duty-a-pilot-project-in-rural-alaska-starts-in-august/>; Jouvenal, *supra* note 8.

192. See, e.g., Massachusetts District Court Standing Order 7-20, *supra* note 189, Part V; Florida Supreme Court, *supra* note 189, §III.D, III.E 7/2/2020; Compare Texas Supreme Court, *supra* note 188 (authorizing video proceedings even in the absence of the defendant's consent, as long as such proceedings do not conflict with the state or federal constitution), with TEX. CODE CRIM. PROC. ANN. art. 27.18 (requiring the defendant's consent for the waiver of in-person proceedings and the use videoconference proceedings).

193. See *supra* Part II.A.2.

194. See, e.g., Clarington v. State, No. 3D20-1461, 2020 WL 7050095, at *10 (Fla. Dist. Ct. App. Dec. 2, 2020).

transmission that is likely to occur when officers transport jail inmates to the courtroom.¹⁹⁵

In addition to safeguarding public health, remote proceedings help protect defendants' constitutional rights to a speedy trial. Remote proceedings help courts process criminal cases more quickly during the pandemic and prevent massive backlogs that could delay dispositions after the pandemic as well.¹⁹⁶ The right to a speedy trial, which belongs to the public as well as to the defendant, therefore offers another important justification for holding remote proceedings in criminal cases.¹⁹⁷

The question is whether these two important interests allow states to require virtual criminal proceedings even without the consent of the defendant, as some emergency orders do.¹⁹⁸ On the one hand, states have broad powers to protect public health even at the expense of curtailing some individual liberties.¹⁹⁹ On the other hand, the defendant has a constitutional right to be present at critical stages of the proceeding and to receive effective assistance of counsel; when it comes to trials, defendants also have the rights to confront witnesses and to have a fair and impartial jury decide the case.²⁰⁰

When it comes to the defendant's due process right to be present at criminal proceedings, the state's interest in protecting public health may, in some circumstances, justify a partial restriction on the right to be present and permit the use of video at certain pretrial proceedings, even over the objection of defendants. Courts have to examine, on a case-by-case basis, whether the use of video is necessary to protect public health in a particular proceeding²⁰¹ and whether, even if the restriction on the right to be present is necessary, it

195. See, e.g., Gourdet et al., *supra* note 29, at 9. By facilitating detention hearings during the pandemic, videoconference technology also expedites the pretrial release of defendants, which protects the defendants' health, reduces spread of the virus within detention centers, and thus safeguards the health of the larger community. See, e.g., Kate Kelly, Nai Soto, Nadi Damond Wisseh & Shaina A. Clerget, *Approaches to Reducing Risk of COVID-19 Infections in Prisons and Immigration Detention Centers: A Commentary*, CRIM. JUST. REV. (Sep. 18, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7502677/>.

196. Fair Trials Admin., *Safeguarding the Right to a Fair Trial During the Coronavirus Pandemic: Remote Criminal Justice Proceedings* 4, FAIR TRIALS (Apr. 3, 2020), <https://www.fairtrials.org/news/safeguarding-right-fair-trial-during-coronavirus-pandemic-remote-criminal-justice-proceedings>.

197. *United States v. Rosenschein*, No. 16-4571, 2020 WL 4227852, at *5 (D.N.M. July 23, 2020).

198. See *supra* note 192 and accompanying text.

199. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (permitting states to impose rationally based measures—in that case, mandatory smallpox vaccinations—that limit individual liberties in order to protect public health).

200. See *supra* Part II.A.2.

201. For example, courts will consider whether, given the rate of transmission of the virus in a particular locality and the preventive measures available, remote proceedings are necessary to protect public health, or whether other alternatives that can protect public health equally well without intruding on the constitutional rights of the accused. See *Rosenschein*, 2020 WL 4227852, at **4–5. Courts will usually rely on orders by the administrative judge for the district or of the state Supreme Court in making those determinations. See *id.* at **1–2.

is imposed in a way that adequately protects constitutional rights under the circumstances.²⁰²

Two recent federal district courts have approved the use of remote hearings over the defendant's objections at proceedings where the due process right to be present does not clearly apply: a suppression hearing and a *Daubert* hearing.²⁰³ In dicta, the courts explained that even if the Due Process Clause did apply, the procedures used for the remote hearings ensured fairness.²⁰⁴ For example, due process would be ensured at the remote suppression hearing because the court would "be able to see, hear, and speak to the witnesses, counsel, and Defendant, and they [would] be able to see, hear, and speak to the Court."²⁰⁵ The court therefore concluded that "[t]hrough presence through a screen is not precisely the same as direct physical presence, the difference between the two is not enough to render the proceeding fundamentally unfair and does not deprive Defendant of due process."²⁰⁶ The court handling the remote *Daubert* hearing likewise determined that the special process it had implemented would "address Defendants' potential due process rights":

[T]he Government will be required to submit [the expert's] direct testimony via a declaration/affidavit (in lieu of live testimony) in advance of the *Daubert* hearing. Defense counsel will be given time to go over that direct testimony with each Defendant and prepare for cross-examination. Defendants and counsel will be given a similar opportunity after redirect. In this way, Defendants will be afforded an effectively full opportunity to participate in the *Daubert* hearing²⁰⁷

In brief, during the pandemic, courts may be able to conduct certain remote pretrial hearings over the objection of defendants, as long as the use of video is necessary to protect public health, and the courts take special precautions to ensure that the virtual hearings afford defendants "an effectively full opportunity to participate."²⁰⁸

Courts must also protect defendants' ability to confer with counsel before and during remote proceedings because the Sixth Amendment right to counsel applies with full force to proceedings conducted during the pandemic.²⁰⁹ Given the broad availability today of online platforms that

202. *Id.* at *4; *United States v. Nelson*, No. 17-CR-00533-EMC-1, 2020 WL 3791588, at *4, **6–7 (N.D. Cal. July 7, 2020).

203. *Rosenschein*, 2020 WL 4227852, at *4; *Nelson*, 2020 WL 3791588, at *4, **6–7.

204. *Rosenschein*, 2020 WL 4227852, at **4–6; *Nelson*, 2020 WL 3791588, at **6–7.

205. *Rosenschein*, 2020 WL 4227852, at *4.

206. *Id.*

207. *Nelson*, 2020 WL 3791588, at *6 (footnotes omitted).

208. *Id.*

209. *See, e.g.*, *Geders v. United States*, 425 U.S. 80, 88–89 (1976); *Rosenschein*, 2020 WL 4227852, at *4 (noting that the defendant's right to counsel would be protected at virtual suppression hearing because the defendant would be in the same room as his counsel and could easily consult privately).

permit confidential attorney–client conversations,²¹⁰ any argument that it would be impractical to permit such consultations during remote proceedings in the pandemic falls flat. Part IV.B. discusses in greater detail concrete measures that courts can take to ensure that defendants receive effective assistance in remote proceedings.²¹¹

When it comes to the mandates of the Confrontation Clause, which apply at the trial stage, courts have divided on whether the pandemic justifies the use of remote testimony without the defendant’s consent. One federal district court concluded that in the case before it, the health risks posed by the pandemic justified the use of video testimony by a medically vulnerable witness.²¹² The court explained that “there is no question that limiting the spread of COVID-19 and protecting at-risk individuals from exposure to the virus are critically important public policies”; because the witness at issue was medically vulnerable and would have had to travel from Texas to New York to testify in person, use of video testimony was necessary to protect the government interest in protecting the witness’s and the public’s health.²¹³ Importantly, the court added that the existence of a prior deposition of the witness, where the defendant had been given the opportunity to confront the witness in person, strengthened the reliability of the process by which the video testimony would be made because it permitted the defense to compare the statements and challenge the testimony as needed.²¹⁴

But in two other cases where the defendant did not consent to remote testimony, federal district courts refused to authorize such testimony, even though the witnesses would have to travel from out of state during the pandemic and were concerned for their health.²¹⁵ In one case, the witness was medically vulnerable and would have to travel from Wisconsin to Montana to testify, but the court noted that car travel was a reasonable alternative for the witness.²¹⁶ In the other case, the witness was an out-of-state expert, and the court concluded that the prosecution could find an in-state witness to testify instead or could ask for a continuance of the case until the health threat

210. See *infra* note 248 (explaining that Zoom permits confidential attorney–client communications).

211. See *infra* Part IV.B (setting out recommendations for future online court proceedings).

212. *United States v. Donziger*, No. 11-CV-691, 2020 WL 5152162, at *2 (S.D.N.Y. Aug. 31, 2020).

213. *Id.* (noting that there was “[no] question that allowing Mr. Zelman[—]who is in his 70s and suffers from [Redacted], which, as the letters from his physician reflect, places him at heightened risk of dangerous complications should he contract COVID-19[—]to testify via live video rather than in person, which would require boarding a plane and spending at least two weeks in New York City, is needed to promote those important public policies”).

214. *Id.*

215. *United States v. Casher*, No. CR 19-65-BLG-SPW, 2020 WL 3270541, at *3 (D. Mont. June 17, 2020); *United States v. Pangelinan*, No. 19-10077-JWB, 2020 WL 5118550, at *4 (D. Kan. Aug. 31, 2020) (finding that because alternatives to remote testimony exist, such as continuing the case and finding an in-state testifying expert, video testimony is not *necessary* to further the state policy of protecting public health).

216. *Casher*, 2020 WL 3270541, at *3.

from the pandemic subsided.²¹⁷ As commentators have pointed out, another reasonable alternative for medically vulnerable witnesses might be for the defendant and defense counsel to travel to the witness to conduct a socially distanced pretrial deposition, which can then be introduced at trial or be supplemented by video testimony.²¹⁸ The case law suggests that remote testimony may be permitted during the pandemic only in exceptional circumstances, where the witness's health would be endangered by in-person testimony and no alternatives to remote testimony (such as postponing the trial, finding an alternate witness, or conducting a socially distanced pretrial deposition) are reasonably available.

In addition to the Confrontation Clause, the Sixth Amendment's guarantee of a fair and impartial jury limits states' ability to conduct remote jury trials during the pandemic. As Section II.A.2.e discussed, the increased risk of outside influences on virtual juries, as well as the greater difficulty that courts would have in policing such influences in an online setting, raise serious constitutional concerns.²¹⁹ Even a compelling state interest, such as the protection of public health, does not override the equally compelling interest in ensuring a fair and impartial jury trial. Accordingly, jury trials may not be conducted remotely, at least not without the consent of the defendant.²²⁰ In addition, where the defendant does consent, judges must take special measures to protect the fairness of remote jury trials.²²¹

The expanded use of virtual proceedings during the pandemic has also raised concerns with respect to the right to a public trial. A number of jurisdictions have broadcast criminal proceedings online to accommodate public access.²²² But others have not, either because of concerns about disclosing confidential or sensitive information or because of preexisting prohibitions on broadcasting of court proceedings.²²³ While protecting the

217. *Pangelinan*, 2020 WL 5118550, at *4.

218. Jessica Arden Ettinger et al., *Ain't Nothing Like the Real Thing: Will Coronavirus Infect the Confrontation Clause?*, 44-May CHAMPION 56, 59 (2020); Ayyan Zubair, *Confrontation During COVID* (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3702551.

219. *See supra* Part II.A.2.e.

220. Some rules also require the consent of the prosecution for remote jury trials. Twenty-Sixth Emergency Order Regarding the COVID-19 State of Disaster 20-9112 ¶ 7, available at <https://www.txcourts.gov/media/1449738/209112.pdf>.

221. *See supra* Part II.A.2.e.

222. *See, e.g.*, Supreme Court of Michigan, Order Expanding Authority for Judicial Officers to Conduct Proceedings Remotely (Apr. 7, 2020), https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-04-07_FormattedOrder_AO2020-6.pdf; Sup. Ct. of N.J., COVID-19- UPDATED GUIDANCE ON REMOTE PROCEEDINGS IN THE TRIAL COURTS; OPTIONS FOR OBSERVING COURT EVENTS AND OBTAINING VIDEO AND AUDIO RECORDS; COURT AUTHORITY TO SUSPEND THE COMMENCEMENT OF CERTAIN CUSTODIAL TERMS (Apr. 20, 2020), <https://www.njcourts.gov/notices/2020/n200420a.pdf?c=8vE>; *Texas Court Live Streams*, TEX. JUD. BRANCH, <http://streams.txcourts.gov> (last updated Aug. 5, 2020).

223. *See, e.g.*, *Judiciary Provides Public, Media Access to Electronic Court Proceedings*, U.S. CTS. (Apr. 3, 2020), <https://www.uscourts.gov/news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings>; *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. CTS. (Mar. 31, 2020), <https://www.uscourts.gov/news/2020/03/31/>

public health is an overriding state interest that can justify limitations on public access,²²⁴ it is unlikely that the pandemic excuses complete closures of the proceedings, because reasonable alternatives to such closures exist.²²⁵ Broadcasting remote proceedings on television monitors inside a courtroom, or on private or public Internet channels, as many courts have done, are two available options.²²⁶ If necessary to protect sensitive information or safeguard the privacy or safety of the participants, courts can also provide partial public access to remote proceedings—for example, with a web-link provided by a court administrator only upon request.²²⁷

In brief, the Constitution continues to impose limits on the use of remote proceedings even during the pandemic, though these constraints can in some cases be overridden by the state's compelling interest in protecting public health and speedy trial rights. For example, certain pretrial criminal proceedings might be conducted virtually even without the defendant's consent, as long as courts take special measures to ensure the fairness of the proceedings, compliance with the right to counsel, and the right to a public trial. Still, given the uncertainty in the law, the better practice, even during the pandemic, is to obtain the consent of the defendant, as the federal system and some states have done.²²⁸ The defendant's consent is even more clearly required during virtual criminal *trials* because of the strictures of the Confrontation Clause and the greater likelihood that the video format would affect the fairness of the proceedings, the ability of counsel to offer effective assistance, and the fairness and impartiality of the jury.

B. The Practice of Remote Proceedings During the Pandemic: The Views of Prosecutors, Defense Attorneys, and Judges

As courts increasingly decide whether and how to use videoconferencing during the pandemic, it is important to consider the perspectives of those judges and practitioners who have experience with the practice. These views can help inform decisions not only during but also after the pandemic, as courts and policymakers weigh whether to use remote proceedings more broadly in ordinary times. To help gather these

judiciary-authorizes-videoaudio-access-during-covid-19-pandemic?utm_campaign=usc-news&utm_medium=email&utm_source=govdelivery. Federal courts have varied in how they have provided public access, however: "Some court units are providing call-in and video conferencing links from their websites and others are asking that the media and other third parties call the clerk of court's office for the information." *Courts Deliver Justice Virtually Amid Coronavirus Outbreak*, U.S. CTS. (Apr. 8, 2020), <https://www.uscourts.gov/news/2020/04/08/courts-deliver-justice-virtually-amid-coronavirus-outbreak>; see also Dallas Bar Association, *Trial Tips Webinar: Online Court Proceedings* (May 15, 2020) (remarks by Chief Judge Barbara M. Lynn, N.D. Tex.).

224. See *supra* Part II.A.2.d; Smith, *supra* note 81, at 14–15.

225. See *Waller v. Georgia*, 467 U.S. 39, 48 (1984); OFF. OF CT. ADMIN., *supra* note 86, at 3.

226. See OFF. OF CT. ADMIN., *supra* note 86, at 3.

227. See *supra* notes 83, 86 and accompanying text.

228. E.g., CARES Act, *supra* note 184; California Emergency Rules, *supra* note 185.

perspectives, I conducted a survey of state and federal judges, prosecutors, and criminal defense attorneys practicing in Texas.

1. Survey Method

The survey was web-based, confidential, and took about ten minutes to complete. I emailed invitations to take part in the survey to state and federal judges,²²⁹ prosecutors,²³⁰ and defense attorneys²³¹ in urban, suburban, and rural counties across Texas and all four federal districts in Texas. Survey responses from 589 practitioners and judges arrived between May and August 2020. After excluding noneligible surveys, we analyzed 212 responses from defense attorneys, 218 from prosecutors, and 138 from judges.²³² While I am unable to calculate the precise response rate for many

229. There are a total of 727 state district court and county court judges and 120 federal judges in Texas. See, e.g., OFF. OF CT. ADMIN., *Profile of Appellate and Trial Judges as of Sept. 1, 2020*, <https://www.txcourts.gov/media/1449683/judge-profile-sept-2020.pdf>; U.S. DIST. CT., N.D. TEX., *Judges*, <http://www.txnd.uscourts.gov/northern-district-judges> (listing federal district court and magistrate judges in the Northern District of Texas). Because the emails of state judges are rarely publicly available, I sent emails to a select group of 292 state judges across Texas whose emails I was able to obtain through extensive research. These included judges in rural, suburban, and urban areas. I also emailed the 120 federal district and magistrate judges in the four federal districts of Texas. Of these, three judges wrote back that they could not take the survey because they had not conducted any online proceedings, one that she was retired, and one that he did not preside over criminal cases. I received responses from 92 state and 46 federal judges. Accordingly, the response rate was 39% for federal judges and 31.5% for state judges.

230. I emailed an invitation to 139 district attorneys (DAs) and 137 county attorneys (CAs) from counties across Texas, and asked them to distribute the survey to their staff. (The numbers in these groups exclude CAs and DAs who emailed me that they would not take the survey because they had either not conducted videoconference proceedings or, as with some CAs, did not handle criminal matters). The Texas District & County Attorneys Association (TDCAA) also posted a link to the survey on its Twitter feed, and I shared a survey invitation on the TDCAA web forum. Responses came from prosecutors in 69 counties. Because I am not certain how many state prosecutors received the survey, I am unable to calculate a response rate for state prosecutors.

I also sent the survey to the U.S. attorneys in the four federal districts of Texas. Responses were distributed to prosecutors in three of the four districts. Those three districts have around 400 prosecutors total in their criminal divisions. See, e.g., U.S. ATT'Y'S OFF., N.D. TEX., *Crim. Div.*, <https://www.justice.gov/usao-ndtx/criminal-division> (noting that about eighty federal prosecutors work in the Criminal Division in the Northern District). Assuming all prosecutors in these offices received the survey (which is unlikely because at least one of the offices said they would only distribute the survey to a handful of attorneys), the response rate was roughly 4%.

231. Texas Criminal Defense Lawyers Association (TCDLA) forwarded the survey invitation to the 3,300 members on its listserv. Subsequently, the Dallas Criminal Defense Attorney Association sent the invitation to its members and forwarded it to the Dallas Black Criminal Bar Association. I also sent the invitation to the four federal public defenders across Texas, three of whom distributed it to their staff; one further sent it to several federal defenders in other states.

Because I am not certain how many state or federal defense attorneys received the survey, I am unable to calculate a precise response rate. However, just based on the number of TCDLA members who received an email about the survey, we can estimate that the defense attorney response rate is at most 6%. If my estimate of the federal public defenders who received the email is correct (153 federal public defenders practice in the three federal districts in which the surveys were distributed), the response rate for them is around 21%.

232. Shalima Zalsha of the SMU Statistical Consulting Center helped me conduct the statistical analysis of the data. While the combined number was 589 respondents, we excluded respondents who had

of the groups, it ranged from at least 4% for federal prosecutors to less than 6% of state criminal defense attorneys, around 21% of federal public defenders, 31.5% of state judges, and 39% of federal judges.²³³

Among practitioners that did respond, 32 defense attorneys practiced exclusively at the federal level, 16 of the prosecutor respondents worked federally, and 46 of the judge respondents did so. The rest of the respondents practiced at the state level, or in the case of 50 of the private defense attorneys, at both the state and federal level.²³⁴ Prosecutor respondents came from 69 different counties, and defense attorneys worked in at least 104 different counties. After accounting for overlapping counties, responses came from attorneys across at least 140 out of the 254 Texas counties.²³⁵ Roughly 18% of the state prosecutor and defense attorney respondents practiced in rural counties, while about 12% of state judge respondents did so.²³⁶

Prosecutor and defense respondents could choose more than one area as best describing their practice over the previous year: 219 of the respondents chose misdemeanors, 347 chose felony, and 121 chose appeals or “other” as their primary area of practice.²³⁷ It is not uncommon for private defense attorneys to handle both misdemeanors and felonies, and 133 defense attorneys selected both as primary areas of practice. Federal judges, prosecutors, and public defenders primarily work on felony cases, but because they may also handle a small number of misdemeanor cases, we did not consider them when comparing felony and misdemeanor responses.²³⁸ At the state level, 38% of judges and 26% of prosecutors handled misdemeanor cases.²³⁹ While we do not have data to assess this question for prosecutors

clicked on the survey but had not responded to any of the substantive questions. We also excluded several respondents who practiced federally but not in Texas. After these exclusions, 568 respondents began the survey, of whom 518 (91.2%) completed at least 70% of the questions.

233. See *supra* notes 229–231 and accompanying text.

234. About 82 defense attorneys identified “federal” as a category that best described their individual practice over the last year. But among these, only 32 practiced exclusively at the federal level.

235. Judges were not asked to indicate the name of the county in which they practiced, but simply whether the county was urban, suburban, or rural.

236. Defense attorneys, who often practiced in multiple counties, were identified as “rural” if they practiced exclusively in counties that were categorized as rural or if they practiced in at least two rural counties. Rurality for them and prosecutors was categorized based on this map by the Texas Department of Agriculture: <https://www.texasagriculture.gov/Portals/0/forms/ER/Rural-Metro%20Counties.pdf>. Judges were asked to self-categorize their county as “urban, suburban, or rural.” It appears that the percent of survey respondents who practice in rural areas is not significantly different from the percent of Texas criminal law practitioners who practice in rural areas. E-mail from Cory Squires, Research & Analysis Dep’t Dir., State Bar of Tex., to Jenia Turner, Professor, SMU Dedman Sch. of L. (Sept. 29, 2020) (citing State Bar of Texas data that 80.76% of Texas criminal law attorneys practice in the top ten metropolitan areas of Texas) (on file with author).

237. 218 prosecutors and 212 defense attorneys responded to this question.

238. Close to 90% of cases filed in federal court are felonies. See MARK MOTIVANS, U.S. DEPT. OF JUST., FEDERAL JUSTICE STATISTICS 2015–2016, Table 6 (Jan. 2019), <https://www.bjs.gov/content/pub/pdf/fjs1516.pdf>.

239. We identified their practice based on the types of hearings that they said they had handled online during the pandemic.

and defense attorneys, the felony-misdemeanor composition of our state judge respondents appears representative.²⁴⁰

Among the defense attorneys, roughly 17% were public defenders. Among the private attorneys, 93% had a caseload in which the majority of the cases were criminal matters,²⁴¹ and 43% had a majority of appointed cases—i.e., cases where they were appointed to represent an indigent defendant.²⁴²

Like most surveys of this nature, the survey sample is nonrepresentative, as participants were not randomly chosen but rather self-selected to take the survey.²⁴³ Although I attempted to reach out broadly to prosecutors and defense attorneys across Texas at both the federal and state level, the results may not generalize to all attorneys in the state because the sample is nonrepresentative.²⁴⁴ However, analysis of the data indicates that responses concerning the main topic—the advantages and disadvantages of online criminal proceedings—were generally not affected by race, gender, or years of practice, which may help to allay concerns about the nonrepresentative nature of our samples. Likewise, the difference in responses about the advantages and disadvantages of online proceedings was not statistically significant based on whether a respondent practiced in a rural or urban county and whether the respondent handled primarily misdemeanor or felony cases.

240. Statewide, 250 judges (or 34%) work in county courts at law, which handle misdemeanor cases; while 477 judges work in district courts, which handle felony cases. OFF. OF CT. ADMIN., *supra* note 229.

241. Of these, 17% had a caseload in which 51%–75% of the cases were criminal, and 76% had a caseload of which 76%–100% of the cases were criminal.

242. Of the remaining private defense attorney respondents, 24% did not handle indigent defense cases, and for 33%, appointed cases represented a minority of their caseload.

243. See *Bias in Survey Sampling*, STAT TREK, <http://stattrek.com/survey-research/survey-bias.aspx> (last visited Nov. 17, 2020) (explaining the difference between representative and nonrepresentative samples in a survey, and discussing how bias may arise from nonrepresentative sampling).

244. Because the survey sample was not random, we compared the gender and race composition of respondents with demographic data we received from the State Bar of Texas and data from the Texas Office of Court Administration. E-mail from Cory Squires, Research & Analysis Dep’t Dir., State Bar of Tex., to Brooke Vaydik, Student, SMU Dedman Sch. of L. (Aug. 7, 2020, 13:58 CST) (on file with author); OFF. OF CT. ADMIN., *supra* note 229. Defense respondents were compared with “criminal law” attorneys, prosecutors were compared with “government attorneys,” and judges were compared with “judges” in the Texas Bar and with the Texas Office of Court Administration statistics on district court and county court at law judges. These demographic profiles are not complete equivalents (e.g., government attorneys and judges include those who practice in civil law). With that caveat, we found the following: The gender composition was not significantly different in the three groups. However, the race composition in our sample was significantly different from the race composition of Texas judges, prosecutors, and defense attorneys. Among defense attorneys, a lower percentage of African-American respondents and a higher percentage of respondents of other races and ethnicities were observed. Among judges and prosecutors, a lower percentage of White respondents and a higher percentage of respondents of other races and ethnicities were observed.

Table 1. Respondents' Demographic Characteristics²⁴⁵

	Defense (%)	Judges (%)	Prosecutors (%)
Gender:			
Female	29.5	42.0	47.4
Male	69.4	58.0	52.1
Other	1.1	0.0	0.5
Race:			
White	77.3	64.0	74.2
African-American	2.12	8.1	4.7
Hispanic	14.8	24.3	10.5
Other	5.8	3.6	10.5
Years of practice:			
0-5	10.8	39.4	31.5
6-20	36.8	40.9	51.6
20+	52.4	19.7	16.9

2. Experience with Remote Criminal Proceedings

At the outset, the survey assessed respondents' experiences with videoconference proceedings before the pandemic. In Texas, videoconference proceedings have been statutorily authorized for initial appearances since 1989, and for pleas and waivers of rights since 1997.²⁴⁶ At the federal level, the rules have permitted initial appearances and arraignments by video since 2002.²⁴⁷ Just over a quarter of the survey respondents said that they had participated in such proceedings *before* the

245. For an explanation of how our respondents' demographics compare to the broader demographics of criminal law attorneys, government attorneys, and judges in Texas, see *supra* note 244.

246. Act of Aug. 28, 1989, 71st Leg. R.S., ch. 977, § 1, 1989 Tex. Gen. Laws 4053, 4053-54 (amending TEX. CODE CRIM. PROC. ANN. art. 15.17(a) to provide for initial appearance via closed circuit television); Act of Sept. 1, 1997, 75th Leg., R.S., ch. 1014, § 1, 1997 Tex. Gen. Laws 3700, 3701 (providing for the entry of a plea or waiver of rights by closed-circuit video teleconferencing upon the consent of the defendant and the State). Last year, the legislature extended videoconferencing to hearings on the failure to satisfy a judgment and on the reconsideration of fines. Act of June 15, 2019, 86th Leg., R.S., ch. 1352, § 3.09, eff. Jan. 1, 2020 (to be codified at TEX. CODE CRIM. PROC. ANN. ch. 45(b)).

247. FED. R. CRIM. P. 5, 10, 43 advisory committee's note to the 2002 amendment.

pandemic. The number of remote proceedings in which respondents had participated before the pandemic was relatively small—typically, only 1–5 proceedings. State respondents were more likely to have participated in videoconference proceedings before the pandemic than their federal counterparts. This is not surprising, as the Texas Rules of Criminal Procedure authorize a somewhat broader range of videoconference proceedings than the federal rules.²⁴⁸ The types of proceedings in which respondents had participated pre-pandemic ranged from arraignments, to bail and plea hearings, to sentencing and post-conviction hearings.

As expected, a much larger number of respondents—over 92% of respondents—had participated in online criminal proceedings *during* the pandemic.²⁴⁹ The number of remote hearings that respondents had handled during the pandemic had also grown substantially. The three most common types of proceedings in which respondents had participated via video during the pandemic were bail, plea, and sentencing hearings.

The most frequently used technology for online criminal proceedings was Zoom, followed by Microsoft Teams, and Cisco WebEx or Jabber. At the federal level, courts were using Cisco at the outset of the pandemic but switched to Zoom because “[i]t permits separate rooms for confidential communications between counsel and client, has a very user-friendly system for using interpreters, and is user-friendly for attorneys and courts.”²⁵⁰

Among respondents who knew whether online proceedings were broadcast to the public, close to 39% said that the proceedings were sometimes broadcast, and about 34% said that the proceedings were always broadcast. There was a significant difference in the responses between federal and state judges, as can be expected given the different guidance provided for online proceedings at the state and federal levels.²⁵¹ In Texas, broadcasting of video proceedings has been encouraged, with the Office of Court Administration setting up YouTube channels for trial courts.²⁵²

248. Compare TEX. CODE CRIM. PROC. ANN. arts. 15.17, 27.18 (permitting the use of video for initial appearances and (with the parties’ consent) plea hearings), with FED. R. CRIM. P. 5, 10 (allowing videoconference initial appearances and arraignments with the defendant’s consent).

249. Importantly, practitioners and judges who had not taken part in online proceedings were less likely to take the survey. Therefore, this number likely overstates the percentage of lawyers who have participated in online proceedings during the pandemic.

250. Judge Respondent #40.

251. 71% of federal judges who answered this question said that online proceedings were “never” broadcast, compared to 14% of state judges. Half of the federal prosecutors either did not respond or answered “I don’t know” to this question, so the sample size was too small to make a meaningful comparison. The same was true of federal defense attorneys. In both cases, however, federal practitioners were more likely to say “never” than their state counterparts (38% vs. 22% for prosecutors and 58% vs. 18% for defense attorneys).

252. *Texas Court Live Streams*, TEX. JUD. BRANCH, <http://streams.txcourts.gov> (last visited Nov. 22, 2020).

Although some state judges are not making use of the channel,²⁵³ survey responses confirm that broadcasting is available relatively broadly.

At the federal level, criminal procedure rules ban broadcasting of court proceedings.²⁵⁴ While the CARES Act temporarily enabled remote proceedings, federal courts are not live-streaming these proceedings because of the continued prohibition under the Rules and because of concerns that sensitive information might be revealed to the public.²⁵⁵ Federal courts are instead providing more limited public access to the video proceedings by including access codes in the docket or providing the information upon request.²⁵⁶

Because videoconference proceedings had been used so infrequently in criminal cases before the pandemic, most respondents stated that they had not received guidance or training on the legal, ethical, or practical issues that can arise in such proceedings. Judges, at 61%, were the most likely to have received training or guidance, followed by prosecutors (45%), and defense attorneys (40%). Because a large majority of the defense attorney respondents were private defense attorneys, it is not surprising that they were the least likely to have received training. Among defense attorneys, public defenders (at 56%) were much more likely to have received guidance or training than their private counterparts (at 36%). A number of respondents in all three groups thought that additional training on the legal, ethical, and practical issues would be beneficial.²⁵⁷ While only a minority of practitioners had received training on online proceedings, a large majority (88%) stated that most judges in their jurisdiction had been supportive in facilitating the proceedings.

253. Some are providing online access upon request, while others are streaming to monitors within the courtrooms. *See, e.g.*, Judge Respondent #83 (“When our courthouse was closed to the public, online proceedings were broadcast online, but now that our courtrooms are opened up, the public may watch the proceeding in the courtroom on the screens, so no need to broadcast.”).

254. FED. R. CRIM. P. 53.

255. *Judiciary Provides Public, Media Access to Electronic Court Proceedings*, U.S. CTS. (Apr. 3, 2020), <https://www.uscourts.gov/news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings>; *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. CTS. (Mar. 31, 2020), https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic?utm_campaign=usc-news&utm_medium=email&utm_source=govdelivery; *Courts Deliver Justice Virtually Amid Coronavirus Outbreak*, *supra* note 223; Dallas Bar Association, *supra* note 223 (remarks by Chief Judge Barbara M. Lynn, N.D. Tex.) (expressing concerns about revealing sensitive information if the proceedings are broadcast online).

256. *Courts Deliver Justice Virtually Amid Coronavirus Outbreak*, *supra* note 223 (“Some court units are providing call-in and video conferencing links from their websites and others are asking that the media and other third parties call the clerk of court’s office for the information.”); *Press Freedom and Government Transparency During COVID-19*, REPS. COMM. FREEDOM PRESS, <https://www.rcfp.org/resources/covid-19/#court-access> (last visited Nov. 22, 2020).

257. Judge Respondent #83 (noting that at the state level, “[w]e have very little support or guidance on how to keep the public safe while ensuring the integrity and access of our judicial system”); Prosecutor Respondent #152 (“Additional training on these issues would be helpful as it appears this may be the new reality for quite some time.”).

3. Advantages of Remote Criminal Proceedings

The next set of questions examined whether practitioners and judges perceived online proceedings to have certain advantages and disadvantages, most of which had been previously identified in academic literature or case law. The survey presented respondents with seventeen statements about online proceedings and asked them whether they thought these statements were “never,” “rarely,” “sometimes,” “often,” or “always” true.²⁵⁸ Table 2 shows the responses to the first seven questions, which focused on the potential advantages of online criminal proceedings. Table 2.1 next calculates a ranking of these advantages, based on their perceived frequency in online proceedings.

Table 2. Advantages of Online Criminal Proceedings: Perceived Frequency²⁵⁹

The superscripts in the table (P, J, and D) indicate a statistically significant difference ($p < 0.05$) from the group indicated (P=prosecutors, J=judges, D=defense). For example, the “P” superscript in Defense-Rarely/Never indicates that the percent of defense attorneys who thought online criminal proceedings “never” or “rarely” save time or resources for the defendant is significantly different from the percent of prosecutors who thought the same.

Please review the following statements about online criminal proceedings and note whether they are never, rarely, sometimes, often, or always true.	Group	Rarely /Never (%)	Sometimes (%)	Often /Always (%)	Chi-square
They save time or resources for defendant	Defense	34.0 ^{J,P}	38.0	28.0 ^J	$\chi^2(4)$ = 51.28, N = 527, p < 0.0001
	Judges	18.3 ^{D,P}	32.8 ^P	48.9 ^D	
	Prosecutors	7.7 ^{D,J}	51.0 ^J	41.3	
	All	20.3	41.6	38.1	

258. Prosecutors had to review only sixteen statements because I decided that they would not have a good basis on which to determine how frequently the online setting interferes with attorney-client confidentiality.

259. I thank Shalima Zalsha of the SMU Statistical Consulting Center for conducting the statistical analysis of the data in this paper. She used chi-squared tests to test the association between the various demographic variables and the response. Whenever the sample size was insufficiently large, P-values for the tests were simulated using Monte Carlo simulation. For multiple comparisons of subgroups, the Fisher’s exact test was performed with Bonferroni adjustment to correct for multiple testing and reduce the risk of type I error.

They save time or resources for defense attorneys	Defense	26.5 ^{J,P}	33.0 ^P	40.5	$x^2(4)$ = 37.47, N = 526, p < 0.0001
	Judges	13 ^D	31.3 ^P	55.7	
	Prosecutors	7.2 ^D	49.2 ^{D,J}	43.6	
	All	16.0	38.6	45.4	
They save time or resources for prosecutors	Defense	14.4	30.3	55.3	$x^2(4)$ = 0.62, N = 525 p = 0.9610
	Judges	16	32.8	51.2	
	Prosecutors	15.5	32.1	52.4	
	All	15.2	31.6	53.1	
They save time or resources for the court	Defense	15.1 ^J	34.4	50.5	$x^2(4)$ = 22.18, N = 523, p = 0.0002
	Judges	29.8 ^{D,P}	25.9	44.3	
	Prosecutors	11.0 ^J	40.0	49.0	
	All	17.2	34.4	48.4	
They help resolve cases more expeditiously	Defense	40.7 ^P	40.2	19.1	$x^2(4)$ = 13.65, N = 534 p = 0.0085
	Judges	29.7	49.2	21.1	
	Prosecutors	26.6 ^D	43.5	29.9	
	All	32.6	43.6	23.8	
They help end pretrial detention of defendants more quickly	Defense	38.3 ^P	37.7	24 ^P	$x^2(4)$ = 13.71, N = 526, p = 0.0083
	Judges	26.6	38.3	35.1	
	Prosecutors	23.8 ^D	39.1	37.1 ^D	
	All	29.9	38.4	31.8	
They make proceedings more broadly and easily available to the public	Defense	48.2 ^P	28.2	23.6 ^P	$x^2(4)$ = 21.55, N = 521, p = 0.0002
	Judges	42.1	23.0	34.9	
	Prosecutors	28.0 ^D	31.5	40.5 ^D	
	All	39.0	28.2	32.8	

Table 2.1. Ranking of Advantages of Online Proceedings by Perceived Frequency

The table summarizes the respondents' ranking of advantages of online proceedings, based on how frequently respondents perceived each advantage to be true for online proceedings.

1. Time or resources savings for prosecutors
2. Time or resources savings for the court
3. Time or resources savings for defense attorneys
4. Time or resources savings for the defendant
5. Quicker end to pretrial detention of defendants
6. Broader and easier public access to proceedings
7. Quicker resolution of cases

Survey participants broadly concurred that online proceedings save time or resources for prosecutors, the court, defense attorneys, and defendants. Roughly 85% of all three groups stated that online proceedings save time or resources for prosecutors sometimes, often, or always. When it came to savings for the court, views were somewhat more divided. While a smaller majority of judges (70%) believed that online proceedings had this advantage sometimes, often, or always, a significantly larger percentage of prosecutors (89%) and defense attorneys (85%) agreed with the statement. The responses followed a similar pattern with respect to the question whether video proceedings save time or resources for defense attorneys: 74% of defense attorneys answered “sometimes,” “often,” or “always” to this question, whereas 87% of judges and 93% of prosecutors did so. In brief, defense attorneys and judges, who would be best positioned to know whether the online format saved them time or resources, were significantly less likely than other participants to believe that it did so. Still, even among judges and defense attorneys, a large majority believed that online proceedings saved time or resources for the court and the defense.

A somewhat smaller majority of respondents thought that video proceedings saved time for defendants. Here again, there were statistically significant differences between the responses of defense attorneys and those of prosecutors and judges. Only 66% of defense attorneys thought that video proceedings save resources for defendants sometimes, often, or always, whereas 92% of prosecutors and 82.5% of judges did. In other words, defense attorneys, who likely best understand the experiences of their own clients,

are significantly less likely to believe that online proceedings save time or resources for defendants.

Despite some inter-group variations, most respondents believe that the online format saves time or resources for participants in criminal proceedings. Open-ended responses suggest that the elimination of travel is the main factor behind this perceived benefit. When all participants appear remotely, as they have during the pandemic, they do not have to travel to the jail or the courthouse.²⁶⁰ They further save resources by not having to call witnesses to appear in person, as witnesses may also be able to testify via video.²⁶¹ Some respondents suggested that in rural areas, the cost savings may be even higher:

[Using online hearings,] [i]t cuts down on the time all of us spend in the courtroom and makes appearance by jailed defendants much easier to facilitate. Cost wise, the [c]ourt is not billed for all the transportation time for attorneys to travel to our rural area to visit with clients and appear for the proceeding. Additionally, the sheriff doesn't have the time and expense of having to transport inmates to court appearances. The court could conceivably pay less for the court reporting agency it uses to travel to our rural jurisdiction. I know that it has been much easier for us to schedule hearings, because we can get a reporter scheduled much quicker and easier since they aren't having to travel an hour plus to get to us.²⁶²

My district covers a geographic area that is approximately the size of Delaware. One of my counties houses inmates in jails more than 60 miles away. Many of my attorneys come from the surrounding counties and have to appear in multiple courts in one day.²⁶³

A few respondents noted that, in addition to transportation and time savings, handling everything electronically has saved paper²⁶⁴ and helped reduce traffic congestion in urban areas.²⁶⁵ Many further noted that online proceedings reduced waiting times in the courtroom.²⁶⁶

260. Defense Attorney Respondent #195; Prosecutor Respondent #150; Prosecutor Respondent #55.

261. Prosecutor Respondent #7 (“[I]t has been helpful with witnesses, especially those who are out of town and will certainly help to cut down on cost of travel if it is used for scientist and other witnesses who tend to have to travel from different parts of the state to testify.”); Prosecutor Respondent #136 (“Specifically for some (but not all) expert witnesses who are often located out-of-state and whose physical presence is not necessarily essential for proceedings in my opinion. . . . And for witnesses for whom it’s simply too difficult, cumbersome, dangerous, etc. to travel from far away.”).

262. Prosecutor Respondent #28.

263. Judge Respondent #106.

264. Prosecutor Respondent #142.

265. Prosecutor Respondent #99.

266. *See, e.g.*, Prosecutor Respondent #28 (“Honestly . . . hours and hours of my time have been saved. I’m able to be so much more productive instead of having to sit and waste time in court waiting on the parties or Court to be ready.”); Defense Attorney Respondent #46 (“Too many times, we sit in [c]ourt waiting for the plea. We can sit all morning waiting for a plea and waste the entire morning. If the plea is done virtually, then I can sit at my desk and work while the [c]ourt is handling other business. Also, I would save travel time for [out-of-county] pleas.”).

Respondents also explained how online proceedings can save time or resources for defendants. For defendants who are detained, the online format can alleviate some discomfort and waiting time that accompanies the transportation to the courtroom.²⁶⁷ As one judge explained:

[W]e've all seen the numerous benefits[,] which also include increased safety and convenience to everyone including the defendants who don't have to travel from the various detention centers for routine non-contested proceedings. Depending on [the] region where they're held[,] [d]efendants must wake up very early to make court appearance[s] and are often in the building all day. Nothing ideal about super early wakeups, all day waiting in [a] cell behind [the] courtroom, improvised best effort lunches[,] etc.²⁶⁸

During ordinary times, video proceedings are used primarily for defendants in custody.²⁶⁹ But during the pandemic, many defendants who are out on bond also appear remotely, and they can benefit from not having to travel to the courtroom.²⁷⁰ One defense attorney argued that the convenience of online appearances for defendants on bond can be significant:

I believe this process has revealed that the defendant[']s presence in court is not as necessary as the State and court hold it out to be. Having to appear in person monthly destroys livelihoods and constitutes a punishment before [a] finding of guilt. Because of the extraordinary inconvenience, the [S]tate uses these frequent appearances as leverage to obtain outcomes they favor. I think appearing electronically (especially for preliminary matters) will greatly reduce this leverage.²⁷¹

A judge also explained how online proceedings can benefit defendants who have been released on conditions:

[U]sed with discretion, I think such hearings can sometimes be far more efficient, and less disruptive, than in[-]court proceedings. One example would be a case where a defendant has been released on conditions, but has begun to incur violations, such as through drug use. With video technology, I can hold a short hearing to address the violations, with the defendant

267. See Judge Respondent #87.

268. *Id.*

269. See, e.g., Meghan Cotter, *Video Justice*, GOV'T TECH. (Nov. 30, 1995), <https://www.govtech.com/magazines/gt/Video-Justice.html>.

270. See, e.g., Defense Attorney Respondent #99 ("It is helpful that clients don't have to take off of work to attend court."); Defense Attorney Respondent #57 ("It's a pain for bonded-out clients to have to come to court merely to show their faces and leave a signature."); Defense Attorney Respondent #91 ("I think most courts are seeing that having a client show up to court just to sign a pass slip is a waste of everyone's time if the defense attorney can attest to the fact that the client is responsive and has stayed in contact with the attorney."); Judge Respondent #70 ("It is such a savings for the defendants—no time off work, no travel to courthouse, cuts lawyers' fees by more than half due to savings of travel to and waiting time at courthouse. It's a game-changer for access to justice and ability to be represented by lawyers.").

271. Defense Attorney Respondent #12.

attending on his lunch hour so we do not disrupt[] his job status or caus[e] him to miss work. Though not all cases can be “resolved” this way, many can, and keeping a defendant employed while on release significantly increases the likelihood that defendant remains in compliance during release.²⁷²

A majority of survey respondents further agreed that online proceedings can “help resolve cases more expeditiously” and “help end pretrial detention of defendants more quickly” sometimes, often, or always.²⁷³ However, as the ranking of advantages shows, there was less agreement with this statement than with the statements about time and resource savings.²⁷⁴ There was also divergence among the groups—specifically, prosecutors were significantly more likely than defense attorneys to agree with these statements about the advantages of online proceedings.

Open-ended responses revealed how the online format might expedite proceedings. One respondent explained that online proceedings help “ensure that attorneys can be present in a timely manner in multiple courts[,] whereas before[,] attorneys have had to ask for continuances for such issues, often leading to none of the matters getting resolved.”²⁷⁵ As noted earlier, they also reduce the time that lawyers may have to spend during in-person hearings waiting for the judge or other participants to become available.²⁷⁶

Online proceedings can also speed up the process by accommodating “[out-of-state] experts or other witnesses with difficult . . . travel issues.”²⁷⁷ As another prosecutor explained, “It helps our victims and witnesses attend

272. Judge Respondent #40; *see also* Judge Respondent #79 (“It saves time and unnecessary days off for [d]efendants who prefer to appear remotely. It saves unnecessary time and expense for the attorney if they live in that jurisdiction. It seems to have significantly reduced Failures to Appear.”).

273. *See supra* Table 2.

274. *See supra* Table 2.1.

275. Prosecutor Respondent #15.

276. Defense Attorney Respondent #101 (“Too much time is wasted in court.”); Defense Attorney Respondent #46 (“For pleas only. Too many times, we sit in [c]ourt waiting for the plea. We can sit all morning waiting for a plea and waste the entire morning. If the plea is done virtually, then I can sit at my desk and work while the Court is handling other business. Also, I would save travel time for out-of-[c]ounty pleas.”); Prosecutor Respondent #74 (“For certain hearings, such as bond modification hearings, online proceedings are more efficient. It does save time because if done correctly, you are given a time slot and do not have to waste time in [c]ourt waiting for the [j]udge to become available.”); Prosecutor Respondent #79 (“Much of ‘docket’ time is waiting for [the] [d]efendant and his/her attorney to arrive. Often, defense attorneys have not reviewed discovery or the case file prior to docket and may not have even communicated with [the] [d]efendant (‘hey, do you know what my guy looks like?’). These initial settings are a waste of time, lugging case files back and forth, etc. If discovery and these initial settings can be conducted electronically, it is more likely that cases can be resolved with fewer in-court settings—so long as people do work in between settings.”).

277. Prosecutor Respondent #168; *see also* Judge Respondent #83 (“For example, in misdemeanor courts, chemists from the DPS lab are frequently traveling all across the state to routinely testify in DWI cases, now that blood draws are the norm. Using online testimony would greatly increase the efficiency in which those cases could be handled. The same with experts generally employed by the defense to present counter testimony about lab results. Prior to COVID, the State and the defense were constantly filing Motions for Continuance based on the unavailability of these high[-]demand witnesses.”).

more easily without the threat of missing work. Some have been able to take an early lunch break and attend in the office[,] or in their car[,] or [at] home. It allows the State to conduct hearings more quickly and efficiently due to the [j]udge having the ability to shut down a hearing/meeting as soon as it ends.²⁷⁸ Video proceedings can also expedite cases by avoiding the resetting of hearings that result from limits on transporting inmates from detention centers to the court.²⁷⁹ If matters are resolved more quickly online, this also means that defendants who are detained can be released more quickly—whether on bond while awaiting trial or on time served in more minor cases.

On the other hand, as some responses revealed, online hearings can be less expeditious in various ways.²⁸⁰ Some judges noted that the process is slower because they find it necessary to ask additional questions to ensure that the defendant understands the online process and the rights he or she is waiving.²⁸¹ Furthermore, preparing the necessary paperwork during the pandemic—especially obtaining signatures and fingerprints—may consume more time.²⁸² The parties also have to submit exhibits ahead of the hearing,

278. Prosecutor Respondent #138; *see also* Prosecutor Respondent #32 (“I think pleas via Zoom may take place more frequently, especially for out-of-[c]ounty defense attorneys and defendants. Our probation department does not work on []days, so it doesn’t make a lot of sense for a plea to be scheduled on that date for probation, when the defendant cannot even meet with the probation officers until the following week. Also, many of our misdemeanor pleas are reduced down to Class C offenses. Because of that, their thumb print isn’t necessarily required on the judgment, and their fines can be paid online or over the phone. Making people come in person to plea just isn’t necessary in those cases, and I believe the Court and myself are certainly open to continuing sparing people the expense of travel in order to resolve a case via videoconferencing.”).

279. Prosecutor Respondent #59 (“[T]he big benefit for the county is a reduction in transportation from jail to court as our jail is located quite far from the courthouse. We also have capacity issues with the holding cells in the courthouse[,] and some defendants have to be reset because there are too many on the docket.”); Prosecutor Respondent #142 (“For routine hearings such as pleas or revocations, we would be able to handle many more proceedings without reaching transportation limits set by the USMS. It is convenient and even saves paper, since I now have no physical files with me and am required to use electronic documents.”).

280. *See, e.g.*, Prosecutor Respondent #120 (“Some [judges] understand the formality is lost and how it is so much more time[-]consuming for all without any added value.”).

281. *See, e.g.*, Judge Respondent #132 (“Extra effort to ensure [d]efendant understands everything.”); Judge Respondent #126 (noting that he or she gives “additional admonishments”); Judge Respondent #109 (“Some pleas take more inquiry for me to be satisfied that the defendant really knows and understands what is happening.”); Judge Respondent #105 (“The Court asks additional questions of the defendant to ensure he/she knows that the consent to a videoconference proceeding is knowing, intelligent, and voluntary. . . . The Court must make an affirmative finding that the videoconference hearing is necessary due to risk of exposure of the coronavirus. The defendant must express his/her understanding of the reason for the videoconference hearing and agree to proceed on the record.”); Judge Respondent #77 (“Taken more time to explain the virtual process to participants who may not be familiar with it.”); Judge Respondent #55 (“Taking extra time to explain things, or asking more questions than I would normally to ensure understanding on the part of the defendant and the attorneys. Providing for more time, greater effort to ensure the defendant has had plenty of time talking with his attorney privately[, or] breaking during a hearing to allow for that when there’s even the slightest presentation of a question on the part of a party.”).

282. Prosecutor Respondent #197 (“It’s a hassle because doing everything remotely (like signing and getting fingerprints) takes more time. Also, it makes it harder for [defendants] to go into custody because they aren’t taken in immediately after a plea. Lastly, it seems like Zoom is not conducive to large dockets.”); Prosecutor Respondent #152 (“It’s more of a hassle than going to the courtroom, and there

which requires additional preparation and occasionally leads to a resetting of the hearing.²⁸³ One judge respondent explained how and why online proceedings can take more time than in-person proceedings:

Online videoconference is very slow for us to process cases. During live hearings, if there was a paperwork mistake, we could handle that in a few minutes or less. Now, we usually have to start the paperwork from the beginning and digitally distribute it in order to get it correct for the digital signatures. Furthermore, if the defendant needs to confer with his/her attorney, the process of stopping the proceeding for the attorney-client conference is much slower. During live hearings, an attorney and defendant can confer with whispers in a few seconds without the court stopping the record. Now, everything stops while the two get offline (or in the case of Zoom, go to a breakout room). Matters that used to take 11[-]15 minutes live are routinely taking over an hour to process.²⁸⁴

One judge noted that online proceedings can be slower in rural counties because of the lack of reliable broadband Internet and the lack of funds for adequate videoconferencing technology:

It appears all of the decisions on how policies and procedures are being based upon the courts and defendants having reliable broadband with high[-]speed and heavy[-]traffic capability. This is not the case. It is also problematic in that the new “online” court is time consuming. Rural counties are operated on lean budgets with lean staffing models. I am not confident that rural counties have any representation at the table of the decision makers when developing the COVID-19 Policies of Operation for the Court System. The decision to move everything to virtual court has and continues to place a heavy burden on the courts to introduce and integrate new technology into the court systems.²⁸⁵

Logistical and technological difficulties can also make online proceedings especially burdensome for some defense attorneys. As one respondent explained:

will inevitably be defendants who complain about it down the road.”); Judge Respondent #137 (“Review of documents is taking longer to process, we had to slow our process to allow time for documents to be reviewed, then e-filed and signed (by both parties).”).

283. *See, e.g.*, Judge Respondent #58 (“All exhibits must be e-filed prior [to] a hearing so that all attorneys have access during the hearing.”); Judge Respondent #52 (“I make them bring exhibits to me the day before and [if] the attorneys do not comply[,] I reset the case.”); Judge Respondent #22 (“Take more frequent recesses for Exhibits to be electronically exchanged and reviewed.”); *see also* Judge Respondent #1 (“Giving extra time for the proceedings; making arrangements with witnesses to call/videoconference; discussing the case with the lawyers ahead of time.”).

284. Judge Respondent #68; *see also* Judge Respondent #102 (“Overall, the technology available thus far slows the proceedings, both in set up and conducting the actual proceeding.”).

285. Judge Respondent #137.

As of now, [the online format] weighs heavily against the defense in terms of time required, technology required, and access to technology (for defendants). The other parties, typically, just need to appear, whereas the defense needs to prepare a client over the same technology, with limited means for signatures or the ability to truly review documents together.²⁸⁶

Remote hearings can also be less expeditious because they remove the opportunities for discussions and negotiations in the courtroom and thus slow down the resolution of the case. As one defense attorney respondent explained, “It has made it more difficult to meet with prosecutors, and has taken away the ability to work cases in the courtroom[,] which means it takes longer to get any plea deal done and our clients spend more time in jail, or just waiting to get into court.”²⁸⁷ Judges also lose the opportunity to prod the parties toward a resolution.²⁸⁸

In brief, while large majorities of respondents agreed that remote proceedings save time and resources and expedite criminal proceedings, a sizeable group also provided examples of ways in which the online setting slowed down the process or was more burdensome on one or more groups. Further research is therefore needed to assess the overall efficiency of online proceedings, as well as its potentially differential impacts on certain groups, such as defense attorneys, indigent defendants, and rural criminal court communities.

Another potential benefit of virtual proceedings is that if they are broadcast on the Internet, they can make proceedings more broadly and easily available to the public. Streaming the proceedings online can make them more accessible to the family and friends of the defendant or the victim, to

286. Defense Attorney Respondent #108; *see also* Defense Attorney Respondent #112 (“It is difficult for indigent defendants to come to my office and sign plea papers and then have to come again to my office for the Zoom hearing. Most of my indigent clients do not have access to a computer and/or [do not] know how to work Zoom.”); Defense Attorney Respondent #98 (“I have no interest in buying new equipment in order to participate in ‘you call the jail to Zoom in with a client and do the running to get documents accomplished and delivered to the jail and then Zoom into the jail again in order to do the plea.’ No thanks.”); Defense Attorney Respondent #195 (“It makes a lot more work for the defense attorney to get the papers signed by the Defendant and make sure he can access the online event.”); Defense Attorney Respondent #61 (“It’s created a ton of work for defense attorneys expected to play IT support, as well as give less tech-savvy defendants a crash course in how best to present themselves via video.”).

287. Defense Attorney Respondent #119; Prosecutor Respondent #80 (“I . . . think we will continue having in[-]person dockets because that is how cases get resolved.”); Prosecutor Respondent #156 (“[With online hearings,] the challenges in moving cases proves too cumbersome.”); Prosecutor Respondent #203 (“[O]ur docket moves faster in person.”); *see also* Prosecutor Respondent #16 (“The unreliability of the technology, along with the lack of equal access to the technology, gives me significant concerns. Our job as prosecutors is strongly oriented toward people and service. It becomes much more difficult to have effective, personal conversations on serious matters when you’re doing it through a screen. Some things will always be better face to face.”); Defense Attorney Respondent #57; (“Having all the players in one physical location makes solving problems in process easier.”).

288. Prosecutor Respondent #58 (“It’s easier for the judge to just have a regular [in-person] docket, and it’s harder for the judge to move cases when people don’t have to come to court.”).

the media, and to the general public.²⁸⁹ The audience is no longer limited by the size of the courtroom, and geographical distance is not a barrier to attending.²⁹⁰ For example, the first online jury trial, featuring a speeding case out of Travis County, Texas, at times had an audience of over 1,000 people.²⁹¹ Not surprisingly, most respondents (61%) agreed that online proceedings enhance public access sometimes, often, or always. Prosecutors were again significantly more likely to agree with this statement than defense attorneys. Notably, state prosecutors and judges were much more likely to agree with this statement than their federal counterparts. This is not surprising given the different practices in making the proceedings accessible to the public—live-streaming online for many Texas state courts versus providing an access code upon request for federal courts.²⁹²

4. Disadvantages of Remote Criminal Proceedings

The survey also assessed respondents' views on certain potential disadvantages of online criminal proceedings. Table 3 lists ten potential disadvantages of online proceedings and indicates how often respondents thought that these statements were true. Table 3.1 then ranks the statements based on respondents' level of agreement with them.

289. Defense Attorney Respondent #104 (“The best thing I experienced was public access by [YouTube]. Client family and friends in remote, [out-of-state] places could watch proceedings.”); Prosecutor Respondent #32 (“If anything could survive the pandemic, I would hope it would be the broadcasting of the hearings so that people could have a better understanding of what goes on inside a criminal or civil docket.”); State Judge Respondent #43 (“I am not sure how many people take advantage of it, but the proceedings are broadcast on YouTube and are much more accessible than someone having to come to the courthouse to watch the proceedings.”).

290. State Judge Respondent #126 (“The live broadcasting feature does allow more people to view the proceedings (not limited to courtroom size). Additionally, if someone lives too far away to travel to the courthouse, they are still able to see the proceedings.”).

291. Jake Bleiberg, *Texas Court Holds Jury Trial in Traffic Crime Case over Zoom*, AP NEWS (Aug. 11, 2020), <https://apnews.com/4e9d8013a7aa92f19551328a975e5579>.

292. See *supra* notes 252–255 and accompanying text.

Table 3. Disadvantages of Online Criminal Proceedings: Perceived Frequency

The superscripts in the table (P, J, and D) indicate a statistically significant difference ($p < 0.05$) from the group indicated (P=prosecutors, J=judges, D=defense). For example, the "J" superscript in Defense-Rarely/Never indicates that the percent of defense attorneys who thought online criminal proceedings "never" or "rarely" interfere with attorney-client confidentiality is significantly different from the percent of judges who thought the same.

Please review the following statements about online criminal proceedings and note whether they are never, rarely, sometimes, often, or always true.	Group	Rarely /Never (%)	Sometimes (%)	Often /Always (%)	Chi-Square
The online setting interferes with attorney-client confidentiality	Defense	11.3 ^J	26	62.7 ^J	$\chi^2(2)$ = 78.1, N = 333, $p < .0001$
	Judges	51.9 ^D	27.1	21.0 ^D	
	Prosecutors	—	—	—	
	All	27.0	26.4	46.6	
The online setting makes it difficult for the parties to present the case effectively	Defense	7.4 ^{J,P}	27.2 ^{J,P}	65.4 ^{J,P}	$\chi^2(4)$ = 87.81, N = 532, $p < .0001$
	Judges	35.7 ^D	42.6 ^D	21.7 ^D	
	Prosecutors	24.9 ^D	44.8 ^D	30.3 ^D	
	All	20.9	37.6	41.5	
The online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility	Defense	3.0 ^{J,P}	14.7 ^{J,P}	82.3 ^{J,P}	$\chi^2(4)$ = 131.35, N = 517, $p < .0001$
	Judges	31.4 ^D	44.4 ^D	24.2 ^D	
	Prosecutors	21.5 ^D	40.5 ^D	38.0 ^D	
	All	16.8	31.5	51.6	

The online setting increases the risk that the defendant's guilty plea is unknowing or involuntary	Defense	47.2 ^{J,P}	26.4 ^P	26.4 ^{J,P}	$x^2(4)$ = 80.42, N = 517, $p < .0001$
	Judges	80.8 ^D	14.4	4.8 ^D	
	Prosecutors	83.6 ^D	12.3 ^D	4.1 ^D	
	All	69.1	18.2	12.8	
The online setting increases the risk that the defendant's guilty plea is not factually based	Defense	49.2 ^{J,P}	27.4 ^{J,P}	23.4 ^{J,P}	$x^2(4)$ = 82.60, N = 517, $p < .0001$
	Judges	85.6 ^D	9.6 ^D	4.8 ^D	
	Prosecutors	85.6 ^D	10.3 ^D	4.1 ^D	
	All	71.8	16.6	11.6	
The online setting makes it more likely that sensitive information will be disclosed to the public	Defense	28.9 ^{J,P}	31.0	40.1 ^{J,P}	$x^2(4)$ = 44.51, N = 518, $p < .0001$
	Judges	54.0 ^D	32.3	13.7 ^D	
	Prosecutors	49.2 ^D	34.0	16.8 ^D	
	All	42.7	32.4	24.9	
The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g., signatures, fingerprints)	Defense	6.2	17.4 ^J	76.4 ^{J,P}	$x^2(4)$ = 24.44, N = 526, $p = .0001$
	Judges	14.3	34.9 ^D	50.8 ^D	
	Prosecutors	13.7	23.9	62.4 ^D	
	All	11.0	24.1	64.8	

Frequent technology malfunction negatively affects the fairness of the proceeding	Defense	25.3 ^{J,P}	35.8	38.9 ^{J,P}	$x^2(4)$ = 55.62, N = 520, $p < .0001$
	Judges	54.0 ^D	29.4	16.6 ^D	
	Prosecutors	54.9 ^D	31.9	13.2 ^D	
	All	43.9	32.7	23.5	
Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings	Defense	15.0 ^{J,P}	27.0	58.0 ^{J,P}	$x^2(4)$ = 101.27, N = 511, $p < .0001$
	Judges	54.0 ^D	28.2	17.8 ^D	
	Prosecutors	44.9 ^D	37.1	18.0 ^D	
	All	35.8	31.1	33.0	
The online setting makes it difficult for disabled defendants to participate in proceedings	Defense	30.3 ^{J,P}	35.7	34.0 ^{J,P}	$x^2(4)$ = 73.43, N = 488, $p < .0001$
	Judges	64.8 ^D	26.2	9.0 ^D	
	Prosecutors	61.2 ^D	32.6	6.2 ^D	
	All	50.2	32.1	17.6	

Table 3.1: Ranking of Disadvantages of Online Proceedings by Perceived Frequency

The table summarizes the respondents' ranking of disadvantages of online proceedings, based on how frequently respondents perceived each disadvantage to be true for online proceedings.

1. Challenges in obtaining or preparing the relevant paperwork (e.g., signatures, fingerprints)
2. Difficulties for the parties to assess, and where necessary, challenge witness accounts or credibility
3. Difficulties for the parties to present the case effectively
4. Interference with attorney–client confidentiality
5. Difficulties for indigent defendants to access the technology necessary to take part in online proceedings
6. Greater likelihood that sensitive information will be disclosed to the public
7. Frequent technology malfunction negatively affects the fairness of the proceeding
8. Difficulties for disabled defendants to participate in proceedings
9. Increased risk that the defendant's guilty plea is unknowing or involuntary
10. Increased risk that the defendant's guilty plea is not factually based

The top three disadvantages, which a large majority of respondents identified as occurring “sometimes,” “often,” or “always” in videoconferencing proceedings, were: (1) online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g., signatures, fingerprints); (2) the online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility; and (3) the online setting makes it difficult for the parties to present the case effectively. And while prosecutors were not asked this question, judges and defense attorneys ranked interference with attorney–client confidentiality as the next most frequent problem with online proceedings.

With respect to the problems with preparing paperwork, all three groups believed this was a frequent problem with online proceedings. Open-ended responses revealed that many jurisdictions altered their approach to paperwork to address some of these issues—for example, by allowing and using digital signatures and making it easier to exchange documents online.²⁹³ While some judges still required defendants to come to the courtroom to get fingerprints taken,²⁹⁴ others adapted by “indicating different rules regarding personal information to [be provided to] the court in lieu of a fingerprint for identification.”²⁹⁵ Some defense respondents expressed frustration at the inconsistency and unpredictability of the online paperwork requirements.²⁹⁶ Several also expressed a concern that the defense bore the brunt of this burden: “I have to take the onus to set the hearing; communicate with the State, court and jail; gather all paperwork; go to the jail; scan and transmit endorsed paperwork to the prosecutor and court. If it falls apart, short of technical issues, I get blamed.”²⁹⁷ One defense attorney explained that he goes to obtain signatures in person at the jail because he is worried about providing ineffective assistance if he signs for his client.²⁹⁸ While the paperwork problems seem quite widespread, they are likely to be temporary. As respondents indicated, courts have begun taking measures to address this problem, and new technological and logistical fixes—e.g., digital signatures and fingerprint kiosks—are emerging.²⁹⁹

While the paperwork issues are in the process of being solved, two other frequently mentioned problems are likely to persist even after the pandemic is over. A large majority of all three groups of respondents agree that the online setting makes it difficult for the parties to assess and challenge witness accounts or credibility, and defense attorneys were almost unanimous that this was a problem with remote proceedings.³⁰⁰ In open-ended responses,

293. Defense Attorney Respondent #13.

294. Defense Attorney Respondent #61.

295. Defense Attorney Respondent #108.

296. Defense Attorney Respondent #61 (“It still changes every time about where/how they want the paperwork delivered[—]one day it’s supposed to have been e-filed, the next e-mailed to the judge’s assistant, the next e-mailed to the clerk, etc.”); Defense Attorney Respondent #111 (“In this jurisdiction, as I am sure [it is] all over, there is no consistency in the online application proceedings. You have to guess how each court wants to do the paperwork, whether with [fingerprints], or the types of paperwork they want. If they were all more consistent, everyone would understand and facilitate the process.”); Defense Attorney Respondent #201 (“Some courts are requiring us to go to the jail for the signatures and fingerprints, while others are allowing us to sign for our client as long as they are in agreement with that.”).

297. Defense Attorney Respondent #7; *see also* Defense Attorney Respondent #31 (“It actually takes more time for defense. We still have to see clients, review paperwork with them in person, then take paperwork to clerk/court or scan to them. We are spending more of our resources doing these video pleas.”).

298. Defense Attorney Respondent #198; (“Regardless of [] Covid-19[,] I go see my client and obtain his signature on all [paperwork]. I have been given the option to sign my client’s name and have him sign a waiver. Not me. That’s a Writ waiting to happen.”).

299. *See infra* Part IV.B.

300. *See supra* Table 3.

defense attorneys expressed their strong views on why face-to-face confrontation is critical:

The defense of a criminal defendant is a play in human nature. To [j]udge the credibility of witnesses and of the venire requires of the trial lawyers the access to the person of the subject. It is not possible to make sure evaluations via a video screen. As to defendant[s] and their right of confrontation[,] the video is not capable of redeeming that right.³⁰¹

Confrontation requires face-to-face examination, and fact finders must be able to see a witness'[s] reaction to questioning in the flesh, where they can observe body language. And witnesses should not feel the safety of video distancing during questioning. They need to feel confronted, and the eyes of scrutiny upon them.³⁰²

I have, over objection, cross examined a witness over Skype. This was pre[-]pandemic because the witness was out of state. This was a terrible experience. You cannot see who else is in the room, nor can you see what the witness is reviewing while testifying. Additionally, there is no easy way to cross examine a witness with documents. You cannot show the witness specific passages that you are asking them about. All they have to say is "I can't see it." I don't know if they really couldn't see it or if[,] I suspect, they just didn't want to be asked about it. Very, very frustrating. I don't see this as ever being helpful for the defense, regardless of how much time or money it saves the courts.³⁰³

Some were also concerned that witnesses may be coached off camera and may not be able to be sequestered during the testimony of other witnesses.³⁰⁴

Likewise, a large majority of all three groups agreed that the online setting makes it difficult for the parties to present the case effectively sometimes, often, or always. Defense attorneys (at 93%) were again significantly more likely to agree with this statement than prosecutors (at

301. Defense Attorney Respondent #84; *see also* Defense Attorney Respondent #167 ("Very slippery slope to complete destruction of the right to confront and cross examine."); Defense Attorney Respondent #201 ("Again, I have not experienced this personally in my settings (yet)[,] but it would be difficult to confront a witness with impeachment evidence[,] and they are not face-to-face with anyone[,] which makes it easier to lie and more difficult for a juror to identify that."); Defense Attorney Respondent #44 ("The right to confront is not satisfied by video I do not believe. Easier to lie via video in my mind. Jurors will be far more distracted."); Defense Attorney Respondent #173 ("It is extremely hard to effectively question a witness and judge credibility."); Defense Attorney Respondent #160 ("It is more challeng[ing] to cross-examine remote witnesses as delays and 'tells' make the process clunkier.").

302. Defense Attorney Respondent #30.

303. Defense Attorney Respondent #156.

304. Defense Attorney Respondent #90 ("I want face[-]to[-]face confrontation with all parties involved before the judge. Much harder to invoke 'the rule' or know who else is in the room coaching a witness in their testimony. Someone could be providing a witness note or answers.").

75%) or judges (at 64%).³⁰⁵ As one attorney explained, “invoking the rule,³⁰⁶ presenting evidence, and even reading your client, the judge, or opposing counsel is fairly difficult.”³⁰⁷ Some noted it is also more burdensome to present exhibits or enter physical objects into evidence via video.³⁰⁸ A prosecutor further explained that it is challenging to call witnesses when they are not comfortable with technology or need an interpreter.³⁰⁹ Some also noted that the inability to “read” the body language of others or to use one’s own body language “to add emphasis” are other disadvantages of the remote format.³¹⁰

With respect to all but one of the statements about the disadvantages of video proceedings, there were statistically significant differences between the responses of defense attorneys and the responses of judges and prosecutors.³¹¹ Specifically, compared with prosecutors and judges, a significantly larger percentage of defense attorney respondents perceived the disadvantages of online proceedings to be present “sometimes,” “often,” or “always.” This is not too surprising because among the three groups, defense attorneys are most likely to have directly experienced, or seen their clients experience, the disadvantages of online proceedings. In many ways, the burdens of online proceedings fall disproportionately on the defense, whereas the benefits are more likely to be evenly divided or to accrue more to the court and the prosecution.³¹²

For example, whereas 89% of defense attorneys agreed that the online setting “sometimes, often, or always” interferes with attorney–client confidentiality, only 48% of judges believed that this was “sometimes, often, or always” true. The difference is not too surprising. Defense attorneys are more likely to have personally experienced the problem and thus are more aware of its frequency. Because confidentiality is central to their ability to do their job, defense attorneys are also likely to be more sensitive to the risks to attorney–client confidentiality. Finally, defense attorneys are more likely to consider how the online setting during the pandemic has transformed their

305. See *supra* Table 3.

306. TEX. R. EVID. 614; *Caron v. State*, 162 S.W.3d 614, 618 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (“Texas Rule of Evidence 614, also known as ‘the Rule,’ prevents witnesses from remaining in the courtroom during the testimony of other witnesses.”).

307. Defense Attorney Respondent #108; see also Prosecutor Respondent #151 (“It sometimes makes it difficult to effectively present a witness.”).

308. Defense Attorney Respondent #155; Prosecutor Respondents ##13, 17; see also Prosecutor Respondent #16 (“Visual aids such as timelines, video[,] and audio may be very difficult to present through [Z]oom.”); Prosecutor Respondent #137 (“Offering or showing a witness an exhibit before publishing to the court will be a challenge but we have yet to have this come up.”); Prosecutor Respondent #154 (“It makes it difficult to present evidence[,] [e]specially physical evidence.”).

309. See, e.g., Prosecutor Respondent #117.

310. Prosecutor Respondent #122.

311. The statement about attorney–client confidentiality was only presented to judges and defense attorneys, so the responses show a statistically significant difference only between these two groups.

312. See Poulin, *supra* note 98, at 1097.

overall relationship with their clients—not merely during the court proceeding itself, but also during pretrial or post-trial consultations. For example, in-person visits have been banned at many jails or are avoided by defense attorneys concerned about the health risks.³¹³ Furthermore, even remote conference capability has not been easily accessible for many detained clients and has prevented timely consultation.³¹⁴ As one attorney explained:

It is extremely difficult to communicate with clients before and after court appearances. Provided that there aren't any curveballs and that I have been able to speak with my client thoroughly in advance, the hearings go smoothly. But often before initials I am only given [ten] minutes to speak to two clients, which is insufficient and impairs the attorney[-]client relationship (they feel rushed) and the proceedings (where the client needs further explanation, a break in the proceedings is necessary although some judges seem irked).³¹⁵

Detainees placed in quarantine as a result of a coronavirus outbreak in their unit have at times not been permitted to speak to their attorneys at all during the quarantine.³¹⁶ And video conference availability is limited in some jails, making it difficult for defense attorneys to make video appointments or discuss the case in sufficient detail with a client.³¹⁷ When consultation does occur, another problem is that the evidence cannot be easily reviewed with the client via video.³¹⁸ And attorneys express concern that they cannot always ensure the privacy of video consultations with detained clients.³¹⁹ Given their

313. See, e.g., Candice Norwood, *Criminal Defendants in Limbo as Trials Put on Hold During Pandemic*, PBS (May 22, 2020), <https://www.pbs.org/newshour/nation/criminal-defendants-in-limbo-as-trials-put-on-hold-during-pandemic>.

314. See, e.g., *id.*

315. Defense Attorney Respondent #140.

316. See, e.g., Spencer S. Hsu, *D.C. Jail Inmates with Coronavirus Barred from Access to Lawyers, Family, Showers and Changes of Clothing, Inspectors Say*, WASH. POST (Apr. 15, 2020), https://www.washingtonpost.com/local/legal-issues/dc-jail-inmates-with-coronavirus-barred-from-access-to-lawyers-family-showers-changes-of-clothing-inspectors-say/2020/04/15/69a86c9e-7f36-11ea-9040-68981f488eed_story.html; E-mail from Dallas County Defense Attorney, to Jenia Turner, Professor, SMU Dedman Sch. of L. (Apr. 16, 2020) (“It is now my understanding that the entire south tower of the jail is under quarantine. When a client is on quarantine, we cannot even video conference them.”).

317. *Courts Deliver Justice Virtually Amid Coronavirus Outbreak*, *supra* note 223.

318. See, e.g., Defense Attorney Respondent #108 (“The other parties, typically, just need to appear, whereas the defense needs to prepare a client over the same technology, with limited means for signatures or the ability to truly review documents together.”); Defense Attorney Respondent #161 (“Attorneys need to build a relationship with our clients, and video makes that nearly impossible.”); Defense Attorney Respondent #20 (“Representing people is about developing relationships and the process is much more difficult online . . .”).

319. E.g., Defense Attorney Respondent #200 (“There is no way to determine if detention officers are listening to what [the] client and attorney are saying. Depending on the room being used, there may be no private areas for [the] client to use.”); Defense Attorney Respondent #63 (“I also do not trust the jail process to keep the attorney–client privilege when we cannot visit clients in jail and only by videoconference.”).

first-hand experience with restricted attorney–client communications during the pandemic, it is not surprising that defense attorneys were significantly more likely than judges to see the online format as impairing attorney–client confidentiality.

That said, many judge respondents are aware of these concerns. Close to half of judge respondents noted that problems with attorney–client confidentiality occur at least some of the time in online proceedings. About a dozen judges acknowledged the problem in open-ended responses as well. When asked whether they have had to take any special measures to ensure the fairness and integrity of online proceedings, eleven judges noted that they had taken such measures (e.g., ensuring there is a private line of communication, providing breaks for confidential communications, informing defendants of their right to communicate privately with their attorneys) to protect attorney–client confidentiality.³²⁰

Defense attorneys were also significantly more likely to agree that the following problems occur in online criminal proceedings sometimes, often, or always: (1) “the online setting makes it more likely that sensitive information will be disclosed to the public”; (2) indigent defendants have difficulty accessing the technology necessary to take part in online proceedings (85% of defense attorneys versus only 46% of prosecutors and 56% of judges); (3) the online setting makes it difficult for disabled defendants to participate in proceedings (70% of defense attorneys versus only 39% of prosecutors and 35% of judges); and (4) frequent technology malfunction negatively affects the fairness of the proceeding (75% of defense attorneys versus only 46% of prosecutors and judges).

Open-ended responses reveal how these problems can arise and how they can be addressed. When it comes to indigent defendants, one prosecutor noted that “[a]lthough many defendants can access camera phones and [Z]oom, they may have a much more difficult time finding free Wi-fi, especially in times when places like public libraries may be shut down due to social distancing.”³²¹ Another prosecutor explained how such concerns have been addressed:

320. See, e.g., Judge Respondent #104 (“I insist [that there be] a direct line (cell phone or landline) between the lawyer and the defendant who are in different locations.”); Judge Respondent #100 (“I make sure that defendants have had sufficient time to confer with counsel and if not I take a break to give them the time they need to prepare for hearings. I also make sure that defendants can confer with counsel during evidentiary hearings and will recess if necessary to give them time to prepare.”); Judge Respondent #55 (“Providing for more time, greater effort to ensure the defendant has had plenty of time talking with his attorney privately.”); Judge Respondent #37 (“Had to figure out ways for the defendant to communicate with his/her attorney while in the state jail custody and appearing remotely when the attorney is not present.”); Judge Respondent #3 (“I’ve had to ensure that the defendant can communicate with his attorney at any[] time during the proceedings in private manner.”).

321. Prosecutor Respondent #16.

Most families of indigent defendants have been able to download the Zoom app on their phone or laptop. As for defendants themselves, we have dealt with jail defendants who are brought to court to use the court technology. The bond defendants can come to Magistrate Court or use their attorney's technology if necessary.³²²

In non-pandemic times, when such problems arise, judges can also switch to in-person proceedings.³²³ Some prosecutors noted, however, that they do not have firsthand knowledge about the experiences of disabled or indigent defendants with online technology, which likely explains the significant difference in the responses of prosecutors and defense attorneys.

When it comes to technology malfunctioning, the main concern is that interruptions in the connection can cause one of the participants to miss an important statement.³²⁴ One defense attorney related a significant disruption as a result of a technology glitch: "I was kicked off a proceeding that continued without me. When I logged back on, it was over and no one had noticed I had not been present. Very disconcerting."³²⁵ Some respondents noted that technological difficulties are likely to be a greater problem in rural areas, where broadband Internet is often unavailable: "Many of the people and places in our rural county (including the courthouse) lack consistent, strong wireless internet connections. Defendants without internet access can't attend online. Even our felony court reporter had trouble losing connection with the one or two hearings she tried."³²⁶

The first online criminal jury trial, conducted by a justice of the peace in Austin, Texas, did feature numerous audio glitches that caused jurors to ask the prosecutor to repeat herself.³²⁷ Likewise, our observation of fifty-nine online plea hearings in Texas revealed audio or connection problems in about 20% of cases.³²⁸ An observational study of online family court proceedings during the pandemic also found that close to 50% of the proceedings "had some kind of problem with technology, although many were minor and quickly resolved (e.g. problems logging in, audio quality[.])."³²⁹ As some respondents acknowledged, technological malfunctions are less likely to

322. Prosecutor Respondent #137.

323. Prosecutor Respondent #28 ("In these situations, our judges just opt out of electronic proceedings, going forward with in-person, instead.")

324. *See, e.g.*, Defense Attorney Respondent #75 ("There are moments [because] of connectivity issues or other glitches where a statement is indecipherable."); Defense Attorney Respondent #191 ("Every [one I've done has had some tech glitch[,]] from no sound to judge being dropped out mid-hearing.")

325. Defense Attorney Respondent #211.

326. Prosecutor Respondent #16.

327. This is based on the author's own observations. For a similar report, see Bleiberg, *supra* note 291.

328. *See infra* note 333 and accompanying text.

329. Elizabeth Thornburg, *Observing Online Courts: Lessons from the Pandemic*, 54 FAM. L.Q. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696594.

affect the fairness of the proceeding if judges take special care to ensure that everyone can hear and see well throughout the proceeding.

Respondents were least likely to be concerned that the online setting would increase the risk of unknowing, involuntary, or factually baseless pleas. Here, again, defense attorneys are significantly more likely to agree that online proceedings feature this problem: Whereas 51%–53% of defense attorneys believe that online proceedings “sometimes, often, or always” increase the risk of involuntary, unknowing, or factually baseless pleas, only 14%–20% of prosecutors and judges believe the same. It is possible that defense attorneys are more likely to see this as a problem because of their closer relationship to their clients and thus better understanding of the pressures that might lead a defendant to take a guilty plea. As commentators have observed, a serious concern with the combination of infected jails, suspension of jury trials, and the availability of online plea hearings is that some innocent defendants might plead guilty to avoid the heightened risk of contracting COVID-19 in jail.³³⁰ Even in ordinary times, pretrial detention increases the pressure on defendants to plead guilty and can lead innocents to admit guilt to obtain a quicker release from jail.³³¹ In the current emergency, when the coronavirus pandemic threatens the health and even the life of pretrial detainees, the pressure to plead guilty to avoid this risk of infection is significantly greater.³³²

Observations of fifty-nine plea hearings across eighteen different Texas courts and twelve counties in June 2020 showed that the average duration of the online plea hearings was roughly seven minutes, and the median was six minutes.³³³ Online plea hearings therefore appear to be slightly shorter than in-person plea hearings.³³⁴ Notably, in 83% of the online hearings observed, the judges did not inquire into the factual basis of the guilty plea. The lack of inquiry into the factual basis at the hearing is not surprising, as the Texas Code of Criminal Procedure provides that the factual basis of a guilty plea

330. *E.g.*, Johnson, *supra* note 5.

331. *E.g.*, Jenia Turner, *Plea Bargaining*, in 3 REFORMING CRIMINAL JUSTICE: TRIAL AND PRE-TRIAL PROCESSES 73, 82 (Erik Luna ed., 2017) (citing studies).

332. Johnson, *supra* note 5; *see also* McCullough & Platoff, *supra* note 136 (“He said a plea deal isn’t always the best route, either, and mentioned—without naming names—that he’s aware of at least one prosecutor who tried to use fear of catching the virus in jail to sway a defendant to take the offer already on the table.”).

333. My research assistant Brooke Vaydik observed the hearings online and documented and coded them. Of the hearings observed, forty-one concerned felonies, four concerned misdemeanors, and in fourteen, the level of charges was unknown.

334. Allison D. Redlich, *The Validity of Pleading Guilty*, in 2 ADVANCES IN PSYCHOLOGY AND LAW 1–4, 13, 20–21 (Brian H. Bornstein & Monica K. Miller eds. 2016) (discussing studies showing that plea hearings last on average less than ten minutes and that most tender-of-plea forms omit mention of factual guilt); Amy Dezimmer et al., *Understanding Misdemeanor Guilty Pleas: The Use of Judicial Plea Colloquies to Examine Plea Validity* (draft manuscript on file with author) (finding that plea hearings in misdemeanor cases lasted on average slightly less than eight minutes, while in felony cases they lasted on average slightly longer than fourteen minutes).

can be satisfied through a written stipulation of facts.³³⁵ That said, particularly given the additional pressures on defendants to plead guilty during the pandemic, the better practice for judges would be to inquire independently into the factual basis at the hearing so as to ensure that the defendant understands and agrees with the stipulations. The brevity of online hearings and the lack of in-depth inquiry into the basis for the guilty plea may help explain defense attorney survey concerns regarding online guilty pleas.³³⁶

The survey also asked respondents to opine whether, in their view, the online format was more likely to produce decisions more favorable to the defense, produce decisions more favorable to the prosecution, or make no difference on the outcome. Once again, there was a significant difference between the responses of defense attorneys, and those of prosecutors and judges. Whereas 72% of defense attorneys believed that online proceedings tend to lead to less favorable outcomes for the defense, only about 5% of prosecutors and judges thought so. The large majority of prosecutors and judges instead thought that the online format made no noticeable difference to the outcome of the proceeding.

335. TEX. CODE CRIM. PROC. ANN. art. 1.15 (“[I]t shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same. The evidence may be stipulated if the defendant in such case consents in writing, in open court, to waive the appearance, confrontation, and cross-examination of witnesses, and further consents either to an oral stipulation of the evidence and testimony or to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment of the court. Such waiver and consent must be approved by the court in writing, and be filed in the file of the papers of the cause.”).

336. Given the novelty of online hearings and the various additional pressures of the pandemic on judges and lawyers, it is possible that additional safeguards will be adopted over time as participants become more accustomed to the new mode of proceedings. We are continuing our observations of plea hearings in Texas and other states and will report on these findings in a future paper.

Table 4. Perceived Effect of Online Format on the Outcome

The superscripts in the table (P, J, and D) indicate a statistically significant difference ($p < 0.05$) from the group indicated (P=prosecutors, J=judges, D=defense). For example, the “P” superscript in Defense-“Favorable to Defense” box indicates that the percent of defense attorneys who thought online criminal proceedings were favorable to the defense is significantly different from the percent of prosecutors who thought the same.

	Group	Favorable to Defense (%)	No Noticeable Difference (%)	Favorable to Prosecution (%)	Chi-Square
Compared to in-person proceedings, do online proceedings tend to lead to more favorable outcomes for the prosecution, for the defense, or make no difference?	Defense	7.7 ^P	20.7 ^{J,P}	71.6 ^{J,P}	$x^2(4)$ $= 213.72, N$ $= 427,$ $p < .0001$
	Judges	13.9	81.5 ^D	4.6 ^D	
	Prosecutors	19.5 ^D	75 ^D	5.5 ^D	
	All	13.8	56.9	29.27	

IV. THE FUTURE OF REMOTE CRIMINAL JUSTICE

While videoconference criminal proceedings were until recently rare occurrences, the experiment with online justice during the coronavirus pandemic is likely to change that. Once courts and practitioners become accustomed to online hearings, they are apt to use them more broadly in ordinary times.³³⁷ This Part discusses the views of survey respondents on the future of online criminal justice and then offers recommendations on how the online format can be used without undermining the fairness and integrity of criminal proceedings.

A. Survey Findings

Respondents displayed broad consensus that some form of online criminal justice will continue to be used in the future. More than

337. See *supra* note 17 and accompanying text.

three-quarters of survey respondents said they expect video proceedings to be used more frequently after the pandemic is over. When asked whether they would *like* to see video proceedings used more frequently after the pandemic, however, the three groups had different reactions, as laid out in Table 5.

Table 5. Preference for Continued Use of Online Criminal Proceedings

The superscripts in the table (P, J, D, F, and S) indicate a statistically significant difference ($p < 0.05$) from the group indicated (P=prosecutors, J=judges, D=defense, F=federal, S=state). For example, the “P” superscript in the Defense box indicates that the percent of defense attorneys who would like to see online criminal proceedings used more frequently after the pandemic is over is significantly different from the percent of prosecutors who thought the same.

	All (%Yes)	Defense (%Yes)	Judges (%Yes)	Prosecutors (%Yes)	Chi-Square
Would you like to see online/videoconference proceedings used more frequently in criminal cases after the pandemic is over?	59.25	47.6 ^P	59.8	70.3 ^D	$x^2(2) = 20.46, N = 508$ $p < .0001$

Table 5.1. Preference for Continued Use of Online Criminal Proceedings: Federal vs. State

	Group	Federal (%Yes)	State (%Yes)	Chi-Square
Would you like to see online/videoconference proceedings used more frequently in criminal cases after the pandemic is over?	Defense	57.9	51.2	$x^2(1) = 0.28, N = 159,$ $p = .5957$
	Judges	47.6	66.3	$x^2(1) = 3.24, N = 122,$ $p = .0718$
	Prosecutors	37.5 ^S	72.9 ^F	$x^2(1) = 8.74, N = 193,$ $p = .0048$

The defense bar is the most divided on the value of online proceedings in ordinary times. A slight majority of defense attorneys (52%) said they would *not* wish to see the use of video proceedings go up, even though

roughly 75% expect it would happen anyway. The other two groups—judges and prosecutors—have a more favorable view of the utility of online proceedings after the pandemic is over, with prosecutors being the most favorably inclined. Among judges, around 60% would like to see video proceedings used more frequently after the pandemic, but a higher number (78%) expect this to happen. Among prosecutors, around 70% would like to see the proceedings be used more frequently after the pandemic is over, and a slightly higher percent (78%) expect this to occur.

Notably, there is a significant difference in the responses of federal and state prosecutors: only a minority (37%) of federal prosecutors would like to see the continued use of online criminal proceedings, compared to 73% of their state counterparts. Similarly, among judges, federal judges (at 48%) are less likely than their state colleagues (at 66%) to favor continued use of online proceedings.³³⁸ The differences between state and federal judges and state and federal prosecutors on this question are not too surprising in light of responses to other questions in the survey. For example, federal prosecutors (at 40%) were more likely than their state counterparts (at 17%) to believe that online proceedings tend to favor the defense.³³⁹ Federal judges were significantly less likely than their state counterparts to believe that online proceedings bring time and resource savings for the participants or that they make the proceedings more broadly accessible to the public.³⁴⁰ At the same time, they were also less likely to believe that the various disadvantages of online proceedings occur often.³⁴¹ It appears they were just less convinced that online proceedings bring sufficient advantages to be worth even the rare costs and difficulties that accompany the novel format.

From the open-ended answers to these questions, one can glean a more in-depth understanding of these results. Those who favor using online proceedings after the pandemic provided several broad reasons for their views.

338. This difference, however, fell just short of the threshold of statistical significance.

339. This difference, however, fell short of the threshold of statistical significance even though the overall response—whether online proceedings were less favorable to the prosecution, more favorable to the prosecution, or made no noticeable difference—was affected by whether a prosecutor practiced at the federal or state level ($P=0.032$).

340. The differences between state and federal judges were statistically significant on the questions whether online proceedings save time and resources for defense attorneys, defendants, and prosecutors; and whether online proceedings make the proceedings more broadly accessible to the public. They fell short of the threshold of statistical significance for the question of whether online proceedings save time and resources for the court—61.5% of federal judges thought this happened sometimes, often, or always, whereas 75% of state judges thought so.

341. Federal judges were significantly less likely than their state counterparts to believe that the following disadvantages of online proceedings were present sometimes, often, or always: (1) the online setting makes it difficult for the parties to present the case effectively; (2) the online setting makes it difficult for the parties to assess and, where necessary, challenge witness accounts or credibility; (3) the online setting makes it more likely that sensitive information will be disclosed to the public; (4) indigent defendants have difficulty accessing the technology necessary to take part in online proceedings; and (5) the online setting makes it difficult for disabled defendants to participate in proceedings.

First, as expected, many respondents emphasize the time and resources saved by videoconference proceedings as the main reason for wanting video to be used more often.³⁴² The responses emphasize reduced travel and waiting times, and some mention cost savings and safety gains that would result from not having to transport inmates to the courtroom for certain proceedings.³⁴³ These advantages are expected to continue even after the pandemic is over.

Similarly, certain respondents emphasized that online hearings help secure witness testimony more easily:

I would like to see the use of video conferencing expanded for witness testimony, at least. It can often be difficult to get witnesses in to testify from out of town. I think the technology is sophisticated enough now to allow for a witness to testify and still meet constitutional and practical requirements for an adversarial criminal hearing. It would let us use our time and resources more efficiently instead of having to pay to fly/drive in witnesses and prevent from having to reset hearing a number of times due to travel requirements.³⁴⁴

Likewise, certain respondents thought online proceedings could help secure the presence of defendants in misdemeanor cases, especially when it comes to indigent defendants in rural counties.³⁴⁵ Preliminary evidence from remote proceedings during the pandemic suggests that the online format did reduce the failure to appear in some jurisdictions.³⁴⁶

342. See, e.g., Prosecutor Respondent #99 (“In addition to all benefits already stated (e.g., time, cost, judicial resources) the ability to participate in online/videoconference proceedings from home in urban areas aids in reducing traffic congestion and commute times. This allows prosecutors (depending on where they live in relation to the courthouse) to get more done in a day.”); Prosecutor Respondent #89 (“I think it would save time and resources for everyone involved.”); Defense Attorney Respondent #46 (“Too many times, we sit in Court waiting for the plea. We can sit all morning waiting for a plea and waste the entire morning. If the plea is done virtually, then I can sit at my desk and work while the Court is handling other business. Also, I would save travel time for out[-]of[-]c]ounty pleas.”).

343. Prosecutor Respondent #59 (“[T]he big benefit for the county is a reduction in transportation from jail to court as our jail is located quite far from the courthouse. We also have capacity issues with the holding cells in the courthouse and some defendants have to be reset because there are too many on the docket. Hopefully, this will eliminate that problem.”); see also Prosecutor Respondent #97 (“Avoids transportation issues with inmates in custody. Safe and Secure.”).

344. Prosecutor Respondent #26; Prosecutor Respondent #7 (“Again, it would be a great way to cut down on expenses and help to not waste as much time for those witnesses who have to travel to testify. This is especially true for Chemist and Medical examiners who need to be in the lab but often can’t be because they are having to travel all over the state to testify. I anticipate using videoconferencing to be an effective way to cut down on a good amount of cost and waste.”).

345. Prosecutor Respondent #22 (“I am in a rural county with an FTA [failure to appear] rate of 40% on DWLI [Driving While License Is Invalid] cases. Perhaps video could allow many lower income defendants to appear instead of not having means to appear.”); Defense Attorney Respondent #78 (“Most appearances for defendants could be achieved online to assure presence.”).

346. National Center for State Courts, *supra* note 113.

Some defense attorney respondents also noted that video consultations make it easier to “check in” with clients.³⁴⁷ Again, this benefit would be especially valuable in rural areas, where lawyers or clients would often have to drive significant distances to meet in person.³⁴⁸ In brief, the convenience of video proceedings, which facilitates access for defendants and witnesses and helps ease lawyer–client consultations, is a benefit that is expected by many respondents to remain important even after the pandemic.

A few respondents also emphasized the benefits of broader publicity coming with online hearings:

I think it is fantastic that more people can view what is going on inside our courtrooms. I have never felt our system more accessible and transparent before, and I think that should continue. If anything could survive the pandemic, I would hope it would be the broadcasting of the hearings so that people could have a better understanding of what goes on inside a criminal or civil docket.³⁴⁹

While in ordinary times, members of the public can always attend proceedings in person, the convenience of viewing proceedings from a computer or a phone can enhance public access. As noted earlier, more than 1,000 spectators watched the first online jury trial for a traffic misdemeanor case.³⁵⁰ Our observations of dozens of plea hearings in counties across Texas, which helped inform this Article, were also facilitated by the online format.

At the same time, roughly one-third of respondents who would like to see the continued use of video proceedings after the pandemic added important qualifications that video should be used for *some* proceedings but not others.³⁵¹ A number of respondents identified initial appearances, bond hearings, status hearings, and certain other uncontested pretrial hearings as

347. Defense Attorney Respondent #33 (“Having videoconferencing at the jail has been a great thing. I can have a meeting just to “check in” which may only last 5 minutes but I have made contact with my client to give a status update and see if they have any questions or issues that need to be addressed.”); Defense Attorney Respondent #180.

348. See *supra* notes 101–102, 262–263 and accompanying text.

349. Prosecutor Respondent #32.

350. Bleiberg, *supra* note 291.

351. Prosecutor Respondent #92 (“In certain proceedings. Not all. While it’s been [a]ffecting [d]etention [h]earings, most of the docket has remain stagnant.”); Prosecutor Respondent #80 (“For certain types of hearings only: bond hearings, certain pre-trial matters, but anything with serious implications I would want in person.”); Prosecutor Respondent #79 (“Much of ‘docket’ time is waiting for [the] [d]efendant and his/her attorney to arrive. Often, defense attorneys have not reviewed discovery or the case file prior to docket and may not have even communicated with [d]efendant (‘hey, do you know what my guy looks like?’). These initial settings are a waste of time, lugging case files back and forth, etc. If discovery and these initial settings can be conducted electronically, it is more likely that cases can be resolved with fewer in-court settings[—]so long as people do work in between settings.”); Prosecutor Respondent #73 (“For certain hearings, such as bond modification hearings, online proceedings are more efficient. It does save time because if done correctly, you are given a time slot and do not have to waste time in [c]ourt waiting for the [j]udge to become available.”).

suitable for videoconference.³⁵² Some attorneys went further and thought suppression hearings, plea hearings, or even bench trials would be appropriate to conduct online.³⁵³ But many categorically opposed the idea of conducting virtual jury trials, and some expressed the same view about contested proceedings more broadly:³⁵⁴

I think that the online/videoconference proceedings can make the practice of criminal law much more efficient, once in person proceedings are back in place at the same time. There are things that can be done much more quickly and efficiently online but there are some things, such as contested hearings, pleas[,] and trials that really need to be conducted in person in order to be efficient. I believe that the combination of both mediums will help advance the practice as a whole.³⁵⁵

I do not feel a jury trial should ever be conducted in a criminal matter through an online proceeding. The ability to see the whole person and select the fairest jury of one[']s peers requires in-person proceedings. Also, I believe there are serious confrontation clause issues pertaining to a jury or judge being able to assess witness credibility when the proceedings are online. Body language and demeanor is best measured through in-person communication.³⁵⁶

352. Defense Attorney Respondent #104 (“I expect to see expanded use for oral arguments in appellate cases, arraignments and bond hearings at the trial level.”); Defense Attorney Respondent #109 (“[I would like to see them used more frequently after the pandemic] [f]or routine docket calls to assess the progress toward resolution of the case. For actual hearings and trials I think they are either less useful or affirmatively harmful to the defendants.”); Defense Attorney Respondent #84 (“I oppose any blanket use of video/online conferencing on anything but non-substantive hearings or proceedings. I have no problem with [] online docket calls. However, most everything else in a criminal defense needs to be live and in person. The defense of a criminal defendant is a play in human nature. To [j]udge the credibility of witnesses and of the venire requires of the trial lawyers the access to the person of the subject. It is not possible to make sure evaluations via a video screen. As to [defendants] and their right of confrontation[,] the video is not capable of redeeming that right.”); Defense Attorney Respondent #41 (“Only for arraignments and other non-issue settings.”).

353. Prosecutor Respondent #81 (“I do not think that online criminal proceedings are practical in the context of a criminal jury trial due to concerns about juror distractions/attention, constitutional concerns related to the 5th [A]mendment, reading witnesses demeanor, among other things. However, for bench trials and other evidence & motion hearings/pretrial conferences, it is a wonderful tool that we should have been using more frequently prior to the Covid-19 pandemic.”); Defense Attorney Respondent #130 (“Mainly agreed pleas or minor hearings. I do not think this is appropriate for a contested trial.”).

354. Defense Attorney Respondent #75 (“I hope that they will be used more in the future for uncontested matters. However, I strongly prefer in-person hearings if there are any contested issues. . . . I can never see online criminal proceedings being appropriate for jury trials or any part of jury trials (jury selection).”).

355. Prosecutor Respondent #86; *see also* Prosecutor Respondent #78 (“Jury trials cannot be conducted over online methods. Key methods and connecting with potential jurors are lost during jury selection and lose the ability to ensure jur[ors] stick to the case at hand.”); Defense Attorney Respondent #62.

356. Prosecutor Respondent #68; *see also* Prosecutor Respondent #57 (“I fear we are going to see a lot of appellate issues arise out of the use of the videoconferencing proceedings. Some judges have been

One important concern involved the selection of the jury—a process that many thought could only be conducted effectively in-person.³⁵⁷ More broadly, attorneys worried about presenting evidence, evaluating the credibility of witnesses, and cross-examining witnesses online.³⁵⁸ Many believed that online hearings undermine the constitutional rights of defendants.³⁵⁹

For defense respondents who were opposed to continued use of online proceedings after the pandemic, several problems beyond the difficulties with presenting evidence, cross-examining witnesses, and assessing credibility stood out. They worried about the ability to establish rapport and prepare clients in virtual meetings,³⁶⁰ about the ability to communicate confidentially with clients during the hearing,³⁶¹ about the court's perception of the defendant in video hearings, and about the broader perception of injustice when proceedings occur online:

Accused persons in the criminal justice system already face dehumanization[;] remote hearings, especially on anything other than the most routine matters, such as arraignment, significantly heighten those concerns.³⁶²

A courtroom is where we convene to address and resolve legal and judicial business. It [is] where credibility determinations are made every hour. It is where the citizens of this great nation see and meet the judge as a person of authority, justice, and fairness (hopefully). It is a place where arguments can be made and persuasive skills exercised. All of that is lost in the shuffle in video conferences and video hearings. Advocacy and zealous

talking about conducting voir dire over Zoom[, and] having criminal trials over Zoom. I think that is a HORRIBLE idea fraught with problems.”).

357. Defense Attorney Respondent #34; Defense Attorney Respondent #63; Defense Attorney Respondent #75; Prosecutor Respondent #7; Prosecutor Respondent #57; Prosecutor Respondent #78.

358. Defense Attorney Respondent #24 (“If the cross of witnesses is involved, or jurors[—]absolutely not.”); Defense Attorney Respondent #30 (“But not for trials, certainly not jury trials, or other contested matters where witness credibility and believability is an issue. Confrontation requires face-to-face examination, and fact finders must be able to see a witness’ reaction to questioning in the flesh, where they can observe body language. And witnesses should not feel the safety of video distancing during questioning. They need to feel confronted, and the eyes of scrutiny upon them.”); Defense Attorney Respondent #44.

359. *E.g.*, Defense Attorney Respondent #39 (“These proceedings are only helpful to those who look at due process, the right to confront witnesses, and our jury trial system as an inconvenience, rather than the bulwarks of justice.”); Defense Attorney Respondent #211. For a discussion of the various ways in which a virtual jury trial may violate the rights to counsel, to confront witnesses, and to a fair and impartial jury, see State’s Objection to a Virtual Trial, *State v. Ward*, No. 1620963 (Tarrant Cnty. Crim. Ct. #1 July 15, 2020) (on file with author).

360. *E.g.*, Defense Attorney Respondent #140.

361. *E.g.*, Defense Attorney Respondent #63; Defense Attorney Respondent #194.

362. Defense Attorney Respondent #40; *see also* Defense Attorney Respondent #61 (“I do not want defendants who are in custody to be left in the jail to appear in court by video because I think that creates a status quo bias in favor of leaving them in jail, and makes them less real and human to the court.”).

representation are not even invited during a video hearing/conference much less present.³⁶³

I believe that justice would be best served by having the hearings in person. In-person hearings offer a better chance to observe the demeanor and witnesses and habits that they may have when they are being less than truthful[—]you lose some of that with virtual hearings. In the contested MTR hearing that I did have, I did not feel like I had the same opportunity to present testimony of my witnesses. I also feel that defendants will feel cheated by the justice system if contested hearings continue to happen virtually. This also lends to the feeling that they did not get their day in court and is likely to cause feelings that their defense attorney is just part of the system instead of being an advocate for them.³⁶⁴

Among defense attorneys, other than for routine administrative hearings or to visit clients, online criminal justice is generally seen as “a bad idea” that should not be extended past the pandemic.³⁶⁵ One respondent suggested he would retire if forced to continue practicing online in the future.³⁶⁶

B. Recommendations

The survey reveals general agreement among judges and practitioners that online proceedings can save time and resources for participants, primarily by reducing travel and waiting times.³⁶⁷ By allowing people to join in from work or home, remote proceedings can also improve access to the proceedings for defendants, victims, witnesses, and other interested parties.³⁶⁸ They can reduce failure to appear rates and facilitate more frequent attorney–client consultations.³⁶⁹ Finally, online broadcasting of the proceedings can expand public access, which in turn can enhance the fairness and legitimacy of the process.³⁷⁰

For all their conveniences, however, remote proceedings also feature a number of downsides. For low-volume jurisdictions, the costs of installing and maintaining the necessary technology can be significant and may outweigh the benefits of convenience and reduced transportation costs.³⁷¹ Remote proceedings can also impose disproportionate burdens on some groups—for example, on defense attorneys, who must prepare additional paperwork and spend more time getting their clients ready for the

363. Defense Attorney Respondent #26.

364. Defense Attorney Respondent #68.

365. Defense Attorney Respondent #39.

366. Defense Attorney Respondent #198.

367. *See supra* Part III.B.3.

368. *See supra* notes 261, 264–268 and accompanying text.

369. *See supra* notes 113, 128, 158–160, 345–347 and accompanying text.

370. *See supra* notes 289–291 and accompanying text.

371. Terry et al., *supra* note 113, at 10.

particularities of online hearings.³⁷² In jurisdictions with poor Internet coverage, such as rural areas, lack of access and frequent connectivity disruptions can make it difficult for defendants to participate in remote proceedings and for defense attorneys to represent their clients effectively.³⁷³ Survey respondents also expressed serious concerns about the effects that the online format has on the ability of the parties to present their cases, and to assess and challenge witness testimony.³⁷⁴ Defense attorneys further worry that the video format will dehumanize their clients in the eyes of judges and jurors and result in harsher outcomes.³⁷⁵ More than two-thirds of defense attorneys believe that online proceedings lead to less favorable results for defendants.³⁷⁶

Existing empirical evidence, although limited, supports many of the concerns raised by survey respondents. For example, observations of online proceedings confirm that technological glitches frequently disturb the proceedings, though in most cases, these disturbances are not serious enough to undermine fairness.³⁷⁷ More concerning, the video format can bias assessments of witnesses and the defendant, discourage defendants from engaging in the process, and negatively influence outcomes for defendants.³⁷⁸

Some of the problems with remote proceedings can be fixed with investments in better technology, additional training for the attorneys and judges, and better protocols for using the online format to ensure a fair process. For example, more advanced technology can help attorneys prepare for remote hearings with pre-formatted paperwork, digital signatures, and digital fingerprints.³⁷⁹ And the installation in jails, courtrooms, and other public buildings of remote proceeding kiosks with sophisticated software, cameras, and microphones can improve access to online proceedings and reduce the biasing effects of video technology.³⁸⁰

Yet the kind of financial investments that many of these measures would require (particularly in rural areas, where broadband Internet is often unavailable) may well erase any efficiency gains brought about by online

372. See *supra* notes 286–288 and accompanying text.

373. See *supra* notes 280–288 and accompanying text.

374. See *supra* notes 354–364 and accompanying text.

375. See *supra* notes 360–362 and accompanying text.

376. See *supra* Table 4.

377. See *supra* notes 327–329 and accompanying text.

378. *Supra* Part II.B.2.

379. See, e.g., Turner, *supra* note 76, at **45–46 (discussing digital case management platforms that permit the exchange of evidence and the use of pre-formatted digital paperwork for criminal cases); E-mail from Ron DaLessio, Vice Pres. of Sales, CourtCall, to Jenia Turner, Professor, SMU Dedman Sch. of L. (Sept. 24, 2020) (on file with author) (explaining that CourtCall remote hearing kiosks, installed in some jails across the country—and possibly in courtrooms in the future—permit the taking and submission of digital signatures and fingerprints).

380. See Angela Morris, *Now Trending: 'Zoom Kiosks' to Breach Digital Divide Between Public and Remote Courts*, LAW.COM: TEX. LAW. (May 29, 2020, 3:11 PM), <https://www.law.com/texaslawyer/2020/05/29/now-trending-zoom-kiosks-to-breach-digital-divide-between-public-and-remote-courts/?slreturn=20200713230501>.

proceedings.³⁸¹ Finally, even with additional investments, some of the negative effects of video proceedings—including the disengagement of defendants and the difficulty of confronting adverse witnesses effectively—are likely to persist.

Given the concerns raised by empirical studies and by many survey respondents, courts and legislatures should be cautious about expanding online proceedings to trials or hearings where testimonial evidence or the credibility of the defendant is evaluated.³⁸² Except in special circumstances, such as a public health emergency, online proceedings should not be used without the defendant's consent in: (1) arraignments and detention hearings, where the defendant's credibility may be evaluated as part of a decision on pretrial release; (2) plea hearings, because the judge needs to evaluate whether the plea is voluntary, knowing, and factually based, and will often decide whether to accept the sentence recommendation negotiated by the parties; (3) sentencing hearings at which the court will be evaluating evidence, including the defendant's credibility; and (4) trials. In trials, not only will witness testimony be evaluated, but a jury will be selected and other critical decisions about the case will be made which require face-to-face interaction and the full participation of the defendant. State statutes that already permit the use of videoconferencing at these stages without the defendant's consent should be revised to require such consent.³⁸³ More broadly, given significant concerns about whether video technology might interfere with defendants' constitutional rights, legislatures and courts should be wary of extending the use of such technology to contested or evidentiary criminal proceedings after the pandemic is over.

The survey does suggest two areas in which online technology can be used without serious concerns about reducing the fairness of the proceedings. As several respondents indicated, it can be valuable for status conferences (known as docket calls in Texas)³⁸⁴ and hearings where purely legal issues are debated. In these circumstances, defendants do not have a constitutional right to be present, because courts have determined that the defendant's presence is not necessary to ensure the fairness of the proceedings.³⁸⁵ Likewise, the use of video is not likely to undermine the integrity of the proceedings, as neither evidence is evaluated nor are critical decisions by the

381. See *supra* notes 121–127 and accompanying text.

382. Cf. Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 WM. & MARY BILL RTS. J. 769, 773 (2004) (calling on courts and legislatures “not to stop the technology train, but to slow it down in criminal trials until more research [on videoconferencing] has been done”).

383. See *supra* note 48 and accompanying text.

384. See, e.g., FORT BEND CNTY. (TEX.) CRIM. DIST. CT. LOC. R. 5.2.1 (“Defendant and defendant's attorney must be present during docket call.”); HARRIS CNTY. (TEX.) CRIM. DIST. CT. LOC. R. 6.14; PANOLA CNTY. (TEX.) CRIM. DIST. CT. LOC. R. 1.16; REFUGIO CNTY. (TEX.) CRIM. DIST. CT. LOC. R. 1.18. For an explanation of how a status conference works in practice, see Blanchard Law, Status Conference, <https://blanchard.law/criminal-defense-process/status-conference/>.

385. LaFave et al., *supra* note 37, § 24.2(a).

defendant required. Remote status conferences would also have the important benefit of easing access for defendants, who would no longer have to travel to the courtroom and take significant time off child care or work to attend.³⁸⁶ It would help reduce “failure to appear” rates and the added punishment that can come with such failures.³⁸⁷

As a few survey respondents noted, online technology can also be used more frequently for attorney–client consultations.³⁸⁸ Virtual consultations can be used to supplement in-person meetings and thus increase contact between defendants and their counsel.³⁸⁹ A study of videophone consultation in Phoenix found that the use of video can facilitate more frequent interactions between counsel and client, and at least one study of defendants’ views found no negative perceptions among clients about the use of video in attorney–client consultations in misdemeanor cases.³⁹⁰ Positive experience with the use of virtual consultations in the field of mental health likewise suggests that this is an area worthy of further exploration.³⁹¹

The survey responses also offer ideas about measures that courts can take to ensure fairness when states do use online proceedings for critical stages of the proceeding. At the very least, before an online proceeding is conducted, judges should inquire whether the defendant has consulted with counsel about the advantages and disadvantages of proceeding via video and whether the defendant has voluntarily chosen to proceed by video.³⁹² Preferably, before allowing a defendant to waive the right to appear in person at critical stages of the proceeding, the court itself will warn the defendant about the potential perils of proceeding by video using a procedure similar to that used to admonish defendants about the dangers of self-representation³⁹³ or the procedure used to inform defendants about the consequences of waiving the right to trial.³⁹⁴

Judges must also help protect attorney–client confidentiality by ensuring that any defendants appearing from jail are in a private space, that attorneys and their clients have a confidential line of communication, and that frequent breaks are provided to facilitate attorney–client consultation during

386. *See supra* note 111 and accompanying text.

387. *See supra* notes 113, 271 and accompanying text.

388. *See supra* note 347 and accompanying text.

389. *See* Poulin, *supra* note 98.

390. Eliot, *supra* note 118, at 736; McDonald et al., *supra* note 130, at 200.

391. *See supra* note 160 and accompanying text.

392. This would be similar to the procedure used to accept a guilty plea and the accompanying waivers of trial-related constitutional rights. *See, e.g.*, FED. R. CRIM. P. 11.

393. *Faretta v. California*, 422 U.S. 806, 835 (1975) (holding that, to ensure a valid waiver of the right to counsel, the defendant “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’”).

394. *E.g.*, FED. R. CRIM. P. 11.

online proceedings.³⁹⁵ Judges must check regularly that the participants can see, hear, and understand the proceedings.³⁹⁶

To the extent that adversarial and evidentiary proceedings do occur remotely, either during the pandemic or beyond, judges must also be attentive to the perils of presenting and evaluating evidence via video.³⁹⁷ They must help ensure that remote witnesses are “subject to full cross-examination,” are “able to be observed by the judge, jury, and defendant as they testif[y],” and are not distracted or coached during their testimony.³⁹⁸ Following social science on videoconferencing and with the help of technical staff, court administrators should also develop protocols on camera angles, lighting, and image size that reduce video’s biasing effects.³⁹⁹

Courts and legislatures must also take measures to prevent logistical and technological hurdles from disproportionately burdening certain defendants or defense attorneys.⁴⁰⁰ They must ensure that indigent, disabled, and non-native speakers are able to understand and take part in online proceedings.⁴⁰¹ Court administrators can also take technological measures, such as providing common virtual backgrounds, that help equalize participants and reduce the danger that visual signs of poverty will affect judges’ or jurors’ perceptions of the witnesses or defendants.⁴⁰²

Likewise, courts must try to alleviate the additional paperwork and technological burdens that fall on the defense in remote proceedings. During the pandemic, this means facilitating the use of digital signatures (or permitting defense counsel to sign paperwork for the defendant, with the defendant’s consent confirmed on video⁴⁰³) and laying out clear and

395. See *supra* note 320 and accompanying text (discussing survey responses by judges about measures taken to protect attorney-client confidentiality during online proceedings).

396. See *supra* notes 139–141 and accompanying text.

397. See *supra* notes 149–153, 300–304 and accompanying text.

398. *Maryland v. Craig*, 497 U.S. 836, 857 (1990).

399. A pilot study of video proceedings in England found that when court administration technical staff helped judges and participants with similar issues, the support “was reported as crucial to ensuring that parties were satisfied with their experience and perceived it as fair.” Legal Education Foundation, *supra* note 140, at 8. For a list of questions that protocols on video testimony should address, see Friedman Amicus Brief, *supra* note 70, at 17.

400. Legal Education Foundation, *supra* note 140, at 8; see also *Conducting Fair and Just Remote Hearings: A Bench Guide for Judges*, NAT’L CTR. FOR STATE CTS., https://www.ncsc.org/__data/assets/pdf_file/0025/51784/Remote-Hearing-Bench-Guide.pdf (last visited Nov. 23, 2020).

401. Some courts and counties have experimented with ways to make remote justice more accessible. See, e.g., Morris, *supra* note 380 (describing the implementation of Zoom kiosks in particular Texas courthouses to aid litigants with court proceedings).

402. Bandes & Feigenson, *supra* note 150, at *29 (proposing that courts provide “common virtual backgrounds for all participants to eliminate both visual distractions and disparities among witnesses and parties”).

403. A good model for this approach is the recently proposed emergency Rule 62(c)(2) of the Federal Rules of Criminal Procedure, which would provide a more permanent basis for remote proceedings during emergencies. This rule permits the defendant to delegate the signing of necessary documents to defense counsel when “emergency conditions limit a defendant’s ability to sign” and when the defendant confirms

consistent policies about the format and requirements of online proceedings.⁴⁰⁴ After the pandemic, legislatures that wish to expand the use of online criminal proceedings must invest in technological solutions that broaden access for all participants, provide efficient digital solutions for the necessary paperwork, and ensure quality image and sound. Finally, courts must also develop clear policies on public access concerning online proceedings and safeguarding the right to an open trial, while also ensuring that sensitive or private material is not broadcast inadvertently.⁴⁰⁵

V. CONCLUSION

The coronavirus pandemic has forced courts to innovate to provide criminal justice while protecting public health. Many have turned to online platforms to conduct criminal proceedings without undue delay. The convenience of remote proceedings has encouraged some to consider expanding their use in ordinary times. In Texas, practitioners and judges surveyed for this Article broadly agree that the online format saves time and resources for the participants in criminal proceedings, and a majority of prosecutors and judges would like to see it continue to be used after the pandemic is over.

Defense attorneys, however, are more skeptical about the benefits of remote proceedings and express serious concerns about fairness. Judges and prosecutors also acknowledge that virtual proceedings often inhibit the presentation of evidence and confrontation of witnesses, and many worry about the use of the online format for contested hearings and especially for jury trials. Some empirical evidence backs up these concerns, though further research is needed.

These concerns suggest that, after the pandemic is over, we should be cautious about expanding the use of online platforms to conduct critical stages of the proceedings. Online technology can be used safely for status

the delegation on the record or counsel files “an affidavit attesting to the defendant’s consent.” Meeting of the Advisory Committee on Criminal Rules, Agenda Book, Nov. 2, 2020, at 142, https://www.uscourts.gov/sites/default/files/2020-11_criminal_rules_agenda_book.pdf.

404. E.g., Dallas County Criminal Court at Law 2, Virtual Plea Instructions (providing that in virtual plea hearings, a Personal Data Sheet can be read into the record in lieu of a fingerprint) (on file with author). Some courts have had bailiffs take fingerprints in court for a virtual plea, which requires both the defendant and the bailiff to be present. E.g., Denton County Court at Law, Bond Plea Process (on file with author); *Pioneering Program Allows To Process Pleas Outside of Courtroom*, MARILYN BURGESS: HARRIS CNTY. DIST. CLERK (Apr. 20, 2020), <https://www.hcdistrictclerk.com/common/about/HCDCnews.aspx#>. Some courts enter the booking fingerprints into the record at the plea hearings. Council of Judges El Paso Cnty. Courthouse, *The Courts are Not Closed*, <http://www.epcounty.com/information/courtresponse.pdf> (last updated June 29, 2020, 2:20 PM).

405. E.g., *Background and Legal Standards—Public Right to Access to Remote Proceedings During COVID-19 Pandemic*, STATE OF TEX. OFF. OF CT. ADMIN., <https://www.txcourts.gov/media/1447316/public-right-to-access-to-remote-hearings-during-covid-19-pandemic.pdf> (last visited Nov. 23, 2020).

hearings and hearings on questions of law. It can also help expand the availability and frequency of lawyer–client consultations in criminal cases. Beyond that, remote hearings likely carry too many risks to the fairness of the proceedings to be used with regularity. If courts make the choice to use them in some limited circumstances, this should be done only after obtaining an informed and voluntary consent from the defendant, and with great care taken to reduce the risks of unfairness and unreliable results.

How Video Changes the Conversation

Social Science Research on Communication Over Video and Implications for the Criminal Courtroom

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Introduction

While some courts have used video conferencing technology for years, the ongoing public health crisis that began in early 2020 necessitated the physical closing of court buildings and the widespread adoption of video in almost every jurisdiction in the country. Numerous decision-makers are now considering video as a permanent fixture in the courtroom. Yet there is very little empirical research on the use and impact of video in courtrooms. One study shows clearly that video produces drastically different outcomes for defendants than in-person court: Shari Diamond's 2010 study on felony bail amounts in Cook County, IL.² Diamond found that in the eight years after Cook County moved from in-person to video initial bail hearings, bail amounts in felony cases increased by an average of 51%, or \$21,000.³ Ten years later, the question still left open by the Cook County study is, why? Why were the outcomes of bail hearings so drastically different over video? This review of social science scholarship on video mediated communication may begin to answer that question.

Effective, accurate, and empathetic communication is crucial in the courtroom. As researcher Martin Reiland states emphatically in a 1993 study of non-verbal communication in a New Jersey courtroom, "few contexts depend more on the uses of both spoken and unspoken discourse."⁴ Criminal courts in particular are the venue of weighty decision-making that affects not only defendants' lives but public opinion of and support for our system of government and the rule of law. Social science research from medical and workplace contexts, as well as the courtroom context, shows that communicating over video can alter an interaction,

making it more difficult for participants to understand each other, speak up, and relate to each other.⁵

Academic scholarship on video communication suggests that an interaction over video can be analyzed through three different lenses.⁶ One lens is basic processes of conversation: perception, or how others view you when seeing you over video; engagement, meaning your own user experience; and decision-making, meaning the result of the interaction. Another lens is the physical factors influencing those processes that make video different from in-person interaction: non-verbal aspects of communication including eye contact, body language, and tone. A final lens is factors that are personal, interpersonal, or just specific to that interaction, for example, familiarity between the parties, users' language skills and technology skills, and the length of the interaction. These lenses are not siloed or exhaustive; they continuously interact with each other and are all present in every conversation.

This paper will begin by exploring the importance of non-verbal cues to in-person communication and how these non-verbal cues change over video. Next, we examine common personal and interpersonal factors influencing perception and engagement and use a case study to illustrate how altered perception and engagement changed decision-making for employers in remote job interviews. Finally, we review the limited number of studies conducted with courtroom actors to demonstrate how the same problems with perception, engagement, and decision-making implicated by video communication in other settings persist and may even be exacerbated in the courtroom context.

A scan of social science research makes clear that the quality of communication in the criminal courtroom can be compromised when conducted over video rather than

in-person. Policy makers and criminal justice stakeholders must be hypervigilant when making decisions about video's continued use following the public health crisis. Recent publications offer techniques to mitigate or lessen the technological challenges associated with video, which are especially helpful to jurisdictions that were forced to adopt video due to COVID-19. We do not list them or debate their efficacy here; although we recommend rigorous study of their effectiveness. We also do not address the potential legal and constitutional concerns regarding the use of video that have been discussed by various scholars.⁷ Rather, our intention with this paper is to present social science research to inform the long-term debate about video's role when courts can safely reopen. Ultimately, we urge practitioners and researchers in the field to collaborate on conducting research evaluating the impact of video in criminal courtrooms. Moreover, when it is safe to return to court, we strongly recommend that in-person appearances for all high-stakes criminal court proceedings resume, particularly when an individual's liberty is at risk.

Effects Of Non-Verbal Communication On Perception

Communication through non-verbal cues affects how we judge and are judged by others.⁸ While previous attempts to attribute specific percentages of communication to each of these non-verbal cues have been debunked,⁹ recent research about communication both in-person and over video suggests that eye contact, body language (including gestures and facial expressions), and tone of voice affect perception.

1. Eye Contact

A person's gaze—where their eyes are focused and whether they make eye contact with others—is a significant conveyor of “interpersonal information,” which many people understand intuitively and use as a tool to judge others. In-person, using frequent eye contact makes participants appear more attentive, friendly, cooperative, confident, mature, and sincere.¹¹ Conversely, those who do not use frequent eye contact “are judged as defensive or evasive.”¹² A downcast gaze can also communicate boredom or deception.¹³

Over video, eye contact is not possible.¹⁴ In fact, “most videoconferencing systems make it impossible for participants to make eye contact or even to determine where or at what the other participants are looking.”¹⁵ Perhaps more than any other non-verbal cue, eye contact over video has been a research focus because it seems the most difficult in-person aspect to replicate through improved software.¹⁶ As explained by technology researchers David Nguyen and John Canny, the inability to make eye contact over video, also termed gaze error, “is a serious problem because not only are intended cues lost, but also unintended cues may be communicated: downcast eyes, sideways gaze, or gazing ‘over someone’s head’ replaces what should have been direct eye contact.”¹⁷

One study of how different camera angles could potentially imitate eye contact between physicians and patients in the telehealth context found that eye gaze angle may adversely affect patients’ satisfaction with videoconferencing.¹⁸ A survey of “92% of observers [examining pictures of physicians seen at different camera angles] responded that the difference in the perceived

eye contact was important to them as patients.”¹⁹ In the educational context, teachers who use frequent eye contact in the classroom have students who are more productive and who learn material at a faster rate than those students who do not have a teacher using eye contact.²⁰ This may be true in part because eye contact has an added value “during communication in bigger groups, when it is used to indicate the next speaker or the receiver of current remarks.”²¹

2. **Body Language**

Compared to other modes of human interaction, like telephone calls, in-person communication contains the greatest number of observable details, including body language, such as posture, hand gestures, and facial expressions, that can help participants better understand what is being said.²²

Body language is also an important component of building trust and empathy between participants,²³ which can affect how one is perceived by others.²⁴ Like eye contact, facial expressions can convey a great deal of information during a communication by signaling attention and interest, disagreement with what another participant is saying, as well as a desire to speak without the need to verbally interject.²⁵

Technical issues with video software can negatively impact communication in obvious ways, an issue that comes up in many studies of video. However, even minor technical issues like a slight lag time between a person moving and the replication of those movements over video can jeopardize the effective use of non-verbal cues. Some movements last microseconds and others last longer

and thus are more visible. Because facial expressions and hand gestures are often communicated very quickly, they can be lost through lag.²⁶

If not lost through lag, other gestures may be lost instead because they are simply not visible due to the camera angle at which the participant is viewed. The framing of a person often only shows their body from the shoulders up, and as a result, arm gestures and body posture may not be seen.²⁷ When a person's full upper body and torso are visible to their conversation partner over video, people are better able to understand each other, and the conversation feels more natural.²⁸ However, the facial expressions of a person sitting farther away from the camera in order to display their full upper body may then be less visible to their conversation partner.²⁹

3. **Body Language**

Regardless of user choices like how far one is sitting from the camera, software that is working as designed can still cut off vital communication cues like those expressed through a user's tone of voice. Emotion is often expressed through low and high pitches.³⁰ Over video, these low and high pitches may be lost, because audio design in video technologies tends to focus on middle range frequencies.³¹

Effects of Personal And Interpersonal Factors on Perception and Engagement, and Resulting Impact on Decision-Making

While every participant in a video conversation has access to and, to some extent, control over their eye movement, hand gestures, and tone, other factors that are unique to one participant or to the group as a whole can also impact perception, engagement, and, consequently, decision-making during the conversation. Factors like how familiar a participant is with the technology and with their conversation partner play an important role in the dynamics and outcomes of video interactions.

1. Factors Influencing Perception: Familiarity with Participants, Length of Interaction, Forming Relationships

Empathy is easier to generate between people who know each other and during longer interactions; thus, strangers are already at a disadvantage for empathetic communication whether speaking in person or over video.³² Further, because interpersonal connections may take longer to grow over computer-mediated modes of communication like video,³³ strangers are at the greatest disadvantage when speaking over video calls that are short in length.

Research psychologist Chris Fullwood's 2007 study of impression formation in-person and over video found that individuals who were unfamiliar with each other before the experiment perceived their partners more

favorably—more likable and more intelligent—in face-to-face communication rather than video mediated communication.³⁴ The study posits that this difference in impression formation may be in part because video mediated communication can interfere with the gazing process; as discussed more fully above, gazing is important for impression formation but may not be possible due to how video technology is set-up.³⁵

Another study of remote employees at Google found that even the teams there— the users perhaps best suited of any group of persons to navigate the complexities of video communication—consider face-to-face meetings in addition to frequent video meetings essential to effective collaboration and communication.³⁶ In particular, participants described initial in-person meetings as more effective than video at establishing new working relationships, as well as sustaining them.³⁷ Employees also described “deteriorate[d]” experiences when the number of participants over video increased, because participants had a harder time seeing facial expressions, reading body language, and identifying speakers.³⁸

2. Factors Influencing Engagement: Familiarity with Technology, Language Skills, Viewing Oneself

While familiarity with one’s conversation partner is a factor in both in-person and video communication, familiarity with technology only applies to video, and seems to primarily affect engagement, or user experience. A Dutch study of teams answering trivia questions over video initially found noticeable differences between the in-person and video groups.³⁹ Groups communicating over video had more interruptions where the same person who

was speaking kept talking after being interrupted, took fewer turns than groups meeting in-person, and were less satisfied with their experience than groups meeting in-person.⁴⁰ However, the researchers observed that differences between video groups and in-person groups decreased over time, suggesting that with more time and experience, people may be able to adapt to challenges and limitations associated with video.⁴¹

One aspect of video affecting engagement that all participants encounter regardless of their familiarity with the technology is the ability to watch oneself during the conversation. A 2017 study observing individuals working together over video to complete a task found that viewing oneself leads to a reduction in both individual satisfaction with the process and team performance, as measured by comparing each team's solution against the optimal solution for the task.⁴² The effect of viewing oneself causes self-consciousness similar to test anxiety in that looking at one's own appearance while being evaluated takes away precious limited "cognitive space" that would otherwise be spent on completing the task at hand.⁴³

Perhaps the clearest example of how personal factors can affect engagement is language skills. Non-native language speakers often speak less, fail to request clarification, and exhibit symptoms of anxiety due to the increased stress associated with speaking in another language.⁴⁴ In a study of multiparty conversations over video with majority native speakers, communication science researchers found that discussions "can move forward rapidly while non-native speakers are left behind."⁴⁵ Native speakers may attribute non-native speakers' low level of apparent engagement in the

conversation—fewer spoken words, less looking into the camera—to factors like shyness, disinterest, or untrustworthiness, rather than language difficulties.⁴⁶ Researchers also found that non-native speakers were aware that they spoke less and looked down more due to the stress of finding the right words in a secondary language, factors that native speakers discounted.⁴⁷

4. How Perception and Engagement Over Video Led to Altered Decision-Making: Case Study of Video Job Interviews

A 2013 study by researchers at U.S. and Canada business schools made findings related to perception, engagement, and decision-making in one experiment comparing in-person and video job interviews. Perceptions by both applicants and employers were more negative when applicants were interviewed over video. Applicants had significantly less favorable evaluations of their interviewer (on measures of personableness, trustworthiness, competence, and physical appearance), while employers gave applicants lower ratings of affect (likeability) and lower overall interview scores.⁴⁸ Applicants' engagement was also impacted: they felt video interviews offered them less of a chance to perform and gave employers less information that would help them select the best candidate. Ultimately, applicants who interviewed over video were less likely to be hired.⁴⁹ Importantly, and in part because of the outcomes of the interviews, video applicants perceived their remote interviews as being less procedurally just.⁵⁰

Courtroom Studies: Observing Video Court Through All Three Lenses

More empirical research is needed to determine how the mental processes of experienced decision-makers, like employers interviewing job applicants or judges in a courtroom, change when they make decisions over video.⁵¹ As discussed above, the Cook County study showed a direct correlation between use of video and harsher decision-making. Some factors identified by Diamond that made the video bail hearings in Cook County a poor environment for decision-making may not be relevant today in all jurisdictions. For instance, the grainy quality and black-and-white video presentation is unlikely to still be in use in 2020.⁵² But the nature of decision-making in the courtroom remains the same. As the following studies attest, introducing video to the courtroom means nearly all courtroom actors will expend energy dealing with technical issues, confirming identities, and managing impressions. And while typical courtroom actors, who already benefit from their existing relationships to one another, may have more time to become accustomed to the process, defendants certainly will not.

1. Judges

How judges experience video court is critical to this discussion as they are the impartial decision-makers in the courtroom. Judges are relied upon to take in new information and, in the context of criminal proceedings like initial appearances or arraignments, make decisions very quickly. Australian researchers Emma Rowden and Anne Wallace found when observing judges over a three year period that “fundamental judicial tasks, such as

monitoring participant [behavior], exercising control over proceedings, ensuring a fair trial, facilitating witness testimony and conveying and demonstrating community-held values, are transformed when performed” over video.⁵³ The 2018 study indicates judges have an increased cognitive load when presiding over video court.⁵⁴ Appearing over video, judges were less confident in their ability and the perception of their ability to maintain control over the courtroom, expressing concern about witness intimidation and other factors that may influence a witness’s truthfulness.⁵⁵

2. Defendants

Although there is research about patients’ satisfaction with telehealth visits, few studies have been conducted on defendants’ satisfaction with video. Recognizing this need, researchers from Texas Tech University designed a study to determine how video impacts attorney-client communication during consultations.⁵⁶ The study found no significant difference between in-person and video, with “defendants’ ratings of working alliance, trust in their attorneys, procedural fairness, [and] satisfaction with attorney services” being relatively the same in both groups.⁵⁷ However, the study has significant limitations that affect how widely its findings can be applied. The study included only public defenders that were associated with the University, some being attorneys-in-training, and the study’s sample size was smaller than expected because some defendants and attorneys withdrew due to various legal outcomes like nonattendance and dismissal of charges as well as technical issues.⁵⁸ Most importantly, defendants’ ratings were “only collected prior to

defendants' case dispositions," meaning that when rating their experience with their attorney, they were not able to take into account the outcome of their case.⁵⁹

A 2004 study of Chicago immigration courts examined defendants' actual experiences in video court and found that defendants face more hurdles and receive worse outcomes when they are immigrants.⁶⁰ The Chicago study reflects many of the same findings and concerns as Helenai He's 2017 study on language bias discussed above.⁶¹ Remote immigrants often face issues with technology, access to their attorney, and language interpretation, and are more likely to experience these problems if they do not speak English.⁶² In fact, "70% of non-English speakers experienced at least one problem related to videoconferencing during their hearing, and almost 50% received removal orders (as opposed to 21% for English-speakers)."⁶³ Further, 86% of non-English speaking Latinos compared to 46% of English-speaking Latinos were ordered removed.⁶⁴

3. Witnesses

Unlike defendants, witnesses appearing over video are not subject to a decision like a removal order. Perceptions of their performance, however, can still influence outcomes. In a 2001 study of child witnesses, mock jurors viewed the testimony of child witnesses in a courtroom setting or over one-way, closed circuit video ("CCTV"), and then deliberated over the verdict of the case. Some child witnesses were instructed to lie in their testimony and others were instructed to tell the truth.⁶⁵ Results showed that jurors were less likely to vote to convict after viewing children testify via CCTV, potentially because they viewed

child witnesses testifying over video as less credible.⁶⁶ “Children testifying via CCTV were seen as significantly less accurate, believable, consistent, confident, able to testify based on fact not fantasy, attractive, and intelligent.”⁶⁷ Yet, jurors could not tell the difference between child witnesses who were lying, as instructed, and those who were telling the truth, indicating that their perceptions were not necessarily accurate.⁶⁸

While the child witness study is about how other people perceived the witness, Rowden and Wallace’s 2019 study interviewing expert witnesses discusses how witnesses perceive their own performance. Trials with expert witnesses testifying may make up a small portion of criminal court proceedings, but the study demonstrates that when court actors are prompted to consider how others perceive them, important differences between performance in-person and over video may come to light. Expert witnesses as a group require greater use of body language than many people using video, relying on gestures not only to interact with their exhibits and explain complex concepts, but also relying on the non-verbal cues of the judge and jury to determine if they are being adequately understood.⁶⁹ Rowden and Wallace found that testifying over video compromises expert witnesses’ ability to complete both these tasks.⁷⁰ Expert witnesses interviewed after testifying over video also felt that the quality of the video technology significantly affected their ability to communicate their evidence.⁷¹ In particular, they were concerned that appearing from their own homes instead of a courtroom contributed to their being perceived as less legitimate, effective and authoritative as experts.⁷²

Conclusion

As the country continues to grapple with the effects of the public health crisis, video court is now a fact of life—and potentially will remain one—for many judges, prosecutors, defense attorneys, and defendants. Other recent publications offer techniques to mitigate or lessen the technological challenges associated with video, which may be particularly helpful to jurisdictions that did not use video prior to COVID-19. We do not list them or debate their efficacy here; although we recommend their study for effectiveness. Absent is robust research documenting how the switch from in-person to video in the courtroom context affects perceptions and engagement, and the resulting impacts on decision-making. Nor is there an understanding of how defendants experience video court, whether they believe the process to be fair and transparent, or how video affects the public's trust in the system. For thousands of defendants, the decisions and outcomes of these proceedings will remain on their permanent record and have lasting effects far beyond the life of their case. The academic scholarship on video communication in other contexts offer important insights and sound an alarm: the ability of video to achieve the same level of effective communication as in-person interactions is not possible. The widespread use of video in criminal courts across the country was borne out of necessity during the pandemic. The permanent use of video should not proceed without rigorous, in-depth research on how video may alter courtroom experiences and case outcomes. When the public health crisis subsides, we strongly recommend a return to in-person appearances for all high-stakes criminal court proceedings.

Endnotes

1. The Center for Court Innovation would like to thank Samantha Kobor, a legal intern during summer 2020, who conducted extensive research and writing on this topic that laid the foundation for this document.
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3. *Ibid*, 892.
4. Martin S. Remland, "The Importance of Nonverbal Communication in the Courtroom," Paper presented at the *Annual Meeting of the Eastern Communication Association, New Haven, CT* (April 29–May 2, 1993): 4.
5. Similar research on differences between in-person and video communication has been conducted in educational settings and is discussed in one of the studies discussed *infra* (Gemmell at footnote 20). However, this paper does not utilize studies conducted in the educational context, due in part to significant differences between the educational and courtroom contexts, like the adult-child dynamic.
6. Dr. Lindsay Long, Ph.D., a human factors scientist from *Exponent*, was an excellent resource to the authors. Her insights on the framework of a video interaction helped inform the organization of this paper.
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 11. Jim Gemmell et al., "Gaze awareness for Video-Conferencing: A Software Approach," *IEEE Multimedia* 7, no. 4 (Oct.-Dec. 2000): 26 – 35, 26.
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 17. Nguyen & Canny, "More than face-to-face," 424. Nguyen and Canny conclude that for systems that preserve both eye gaze and upper body cues (video frame that includes full torso), there is no deficit in communication effectiveness compared to face-to-face. However, study limitations include one-on-one meetings using Multiview systems.
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Court Appearances in Criminal Proceedings Through Telepresence

Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology

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EXECUTIVE SUMMARY

Local jurisdictions, faced with caseloads of increasing complexity and cost, have adopted alternative approaches to criminal case processing—including new technologies—that have the potential to reduce backlog and improve judicial efficiency. *Telepresence technology*, which allows an individual or group of individuals to appear in a court proceeding from a remote location, is one prominent example. Although telepresence has the potential to increase court safety, reduce costs, and enhance court efficiency, its use also might involve some unanticipated disadvantages. Telepresence technology has been used in courts since the 1970s, but its potential to yield both benefits and burdens in various contexts has not yet been fully examined.

On behalf of the National Institute of Justice (NIJ), RTI International and the RAND Corporation convened the Court Appearances Through Telepresence Advisory Workshop in November 2018 as part of the Priority Criminal Justice Needs Initiative. The Priority Criminal Justice Needs

Initiative regularly convenes workshops to bring together experts, practitioners, scientists, and key stakeholders for discussions on the most-pressing challenges and opportunities for advancement within the criminal justice system. The conversations are designed to help NIJ prioritize areas in which further research and technological developments could directly improve justice system processes, procedures, policies, and outcomes.

The Court Appearances Through Telepresence Advisory Workshop (telepresence workshop) was designed to explore the potential benefits and burdens of telepresence technology and identify innovative solutions for addressing concerns regarding the use of these technologies for criminal court appearances. The 12 core participants in the workshop included five members from an academic, training, or research institute; five local court practitioners (one judge, one court administrator, one correctional administrator, one public defender, and one director of a special programs unit in a

PRIORITY NEEDS



RESULTS

- Research is needed on options for improving network connectivity and on best practices and minimum standards for audio setup.
- Research is needed to assess the impact of telepresence technology on the experiences of witnesses and victims.
- Technical issues that influence the effectiveness of telepresence technology should be identified, and national standards for the setup of telepresence systems should be developed.
- A training curriculum for each of the different court actors who interact with telepresence technology in some capacity should be developed.
- Model configurations that can be used to help purchasers make intelligent buying decisions should be developed.
- Research is needed to better understand the effect of telepresence technology on defendants' experiences with the court process and perceptions of procedural justice.
- Research should be conducted into the appropriate levels of video quality and image size, and implementation standards for courts should be developed.
- Research is needed to determine whether there is a difference in cross-examinations that occur in person versus via telepresence technology.
- Pilot courtrooms (e.g., laboratories) should be created where court staff can try new technologies and get more comfortable with them.



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District Attorney's office); and two staff members from state-level offices overseeing court services (one information technology [IT] director and one language access coordinator). The participants represented a broad spectrum of stakeholder voices, from victims to defendants to various members of

the courtroom workgroup. All participants had considerable experience using or researching the use of telepresence technology. Several panel members had previously served as experts for an NIJ workgroup specifically focused on videoconferencing at postarrest hearings (Davis et al., 2015).

WHAT WE FOUND

Panel members shared their insights about the impact of telepresence technology on various court stakeholders, including defendants, judges, witnesses, victims, and attorneys, and on different types of cases in criminal courts. They acknowledged the potential benefit of telepresence technology in expediting pretrial and trial case processing; providing cost savings; and expanding the ability of victims, witnesses, language interpreters, and other individuals to participate. However, the panel members also discussed the potential disadvantages of telepresence technology, which can result in a violation of the defendant's constitutional rights or increase the risk of an unfavorable outcome. Participants also expressed the need for detailed

technical standards and stakeholder-specific trainings that ensure the proper setup and high-quality multipurpose use of telepresence technology in court. Given the complexity of the issues involved, the participants emphasized the need to enable state and local courts to handle data collection and storage in a manner that preserves the trial record.

Through an interactive discussion, panel members outlined and ranked pressing needs and proposed solutions related to the use of telepresence technology for criminal court appearances. This report provides a summary of the workshop discussion and proposes key areas for future research based on the panel members' prioritization of research needs.

INTRODUCTION

Definition of Telepresence Technology

Over the past several decades, growing case volumes and costs, coupled with tightening resource constraints, have prompted U.S. courts to seek out cost-saving and efficiency-enhancing technologies that facilitate the administration of justice. Telepresence technologies are one such innovation.

Telepresence encompasses a diverse set of technologies that send data signals through a circuit, allowing parties in remote locations to communicate with one another in real time. There have been considerable advancements in information technology in recent decades, making the use of individual telepresence and videoconferencing commonplace in a wide variety of contexts. This includes individual use on personal computers or mobile devices and business and education applications with dedicated systems for telepresence collaboration and meetings. The logistics of telepresence for court appearances are simple: The party appearing in court from a remote location sits in front of a monitor with a camera and a microphone that capture video and audio data, respectively. The courtroom where the proceeding is taking place also is equipped with an audio and video setup. Video and audio data are transmitted between the remote party and the courtroom via a network connection, allowing those present in both locations to see and hear one another in real time. Thus, telepresence technology allows an individual or group of individuals to participate in court proceedings remotely rather than appear in the courtroom in person.

Courts have been using some form of telepresence since 1972, when an Illinois court conducted the first video phone bail hearings. As technological advancements have enabled faster and higher-quality videoconferencing at lower costs, more and more courts have invested in these systems.

Current Uses of Telepresence Technology in Criminal Courtrooms

There are no national estimates on the prevalence of telepresence technology in the legal system. It is unclear exactly how many U.S. courts permit the use of telepresence and for what purposes. However, telepresence technology appears to be geographically widespread. Fifty-seven percent of pretrial services programs that responded to the Pretrial Justice Institute's 2009 survey reported conducting initial court appearances via video. According to the National Center for State Courts' (NCSC's) State Court Organization data set, which was last updated in

June 2017, state-level offices of courts oversee the use of videoconferencing in 35 states and the District of Columbia (Strickland et al., 2017).

Telepresence technologies are used in local, state, and federal courts to facilitate the remote appearance and presentation of evidence by various court parties, including witnesses, victims, defendants, and outside experts (Center for Legal and Court Technology, 2014). For example, telepresence technology is used to allow the remote appearance of defendants in prisoner civil rights cases and in pretrial proceedings (e.g., arraignments), postconviction proceedings (e.g., parole revocation hearings) and immigration removal hearings (Davis et al., 2015; NCSC, undated; Pretrial Justice Institute, 2009). In criminal trial proceedings, the use of telepresence generally is restricted to the remote appearance of witnesses and victims. However, some courts allow defendants to appear remotely for certain types of sentencing hearings (Bridenback, 2016). Problem-solving courts use telepresence to facilitate the participation of outside parties, such as service providers, who are involved in cases and working directly with defendants. These technologies also are used to facilitate other court functions, including remote interpreting and remote court reporting.

The spread of telepresence technology in courts is governed by legal and constitutional considerations. In addition to state or local-level protections that might exist in a jurisdiction, there are several constitutional rights that criminal courts must consider and protect when determining whether to use telepresence technology, including the following:

- The Fifth Amendment grants criminal defendants the right to substantive and procedural due process, and telepresence technology might make it difficult to determine whether a defendant who waives certain rights understands what they are agreeing to and can therefore consent to this waiver.
- The Sixth Amendment grants criminal defendants the right to adequate assistance of counsel, including the ability to confer with their defense attorneys during proceedings and to receive competent legal representation.

The Sixth Amendment's confrontation clause grants defendants the right to confront or challenge a witness on cross-examination. In *Maryland v. Craig*, the Supreme Court held that the defendant's Sixth Amendment rights were not violated because the use of one-way videoconferencing technology still allowed the witness to be placed under oath, the defendant to cross-examine the witness, and the jury or finder of fact to

ascertain the witness' credibility by viewing their demeanor (Brooks, 2012, pp. 198–199; *Maryland v. Craig*, 497 U.S. 836, 1990; Devoe and Frattaroli, 2009).¹ In *Crawford v. Washington*, the Supreme Court further clarified that it is a violation of the defendant's Sixth Amendment rights under the confrontation clause to be denied the opportunity to confront or challenge an adversarial witness who makes a testimonial statement that is offered to prove the truth of the matter asserted. If a witness made a testimonial statement prior to trial and the defendant did not have an opportunity to cross-examine or confront this witness previously, then this witness' statement is not admissible at trial unless this witness is available for cross-examination during the trial proceedings (*Crawford v. Washington*, 541 U.S. 36, 2004).

The violation of a defendant's constitutional and legal rights warps the aim of the criminal justice system to ensure a fair process and increases the likelihood that decisions made during the pretrial or trial proceedings will be challenged on appeal. To reduce these risks, jurisdictions that use telepresence technologies most often employ them during pretrial court proceedings, which lessens the risk of violating the defendant's constitutional rights (Bridenback, 2016). Defendants are most likely to appear remotely through telepresence technology during pretrial proceedings, while victims, witnesses, language

Among the most commonly cited advantages of videoconferencing in a legal setting are increased safety for court stakeholders and corrections personnel, reductions in costs associated with transportation, and enhanced court efficiency.

interpreters, and attorneys might appear remotely during both pretrial and trial proceedings. The NCSC's 2010 Video Conferencing Survey found that more than half of the jurisdictions using telepresence technology reported using it for initial appearances and criminal arraignments, whereas less than 20 percent reported its use in motion hearings or court trials (NCSC, undated).

Potential Advantages and Disadvantages of Telepresence Technology in Criminal Proceedings

Like any other technology, telepresence in U.S. courts creates both challenges and opportunities. To identify the potential benefits and burdens of telepresence technology, RTI staff conducted an extensive academic and legal literature review of research on the use of telepresence technology in criminal cases. To date, there has not been a comprehensive landscape analysis to fully examine the key factors courts should consider in making determinations about the adoption of telepresence technology in different types of settings and proceedings. Among the most commonly cited advantages of videoconferencing in a legal setting are increased safety for court stakeholders and corrections personnel, reductions in costs associated with transportation, and enhanced court efficiency. Potential advantages include the following:

- **improved safety:** By allowing individuals to appear in court remotely, telepresence eliminates the need to transport defendants and offenders from correctional facilities to courthouses, reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public (Maryland Administrative Office of the Courts, 2012; Concurrent Technologies Corporation and CONSAD Research Corporation, 2000).
- **cost reductions:** Telepresence technologies have the potential to reduce expenditures on the transportation of defendants and offenders to and from court facilities; the medical services made necessary by the exposure of sick inmates to court personnel; and travel for the attorney, correctional staff, and other inmates, which is charged to litigants (CONSAD Research Corporation, 2000; Devoe and Frattaroli, 2009; Kloepfel, Janku, and Vradenburg, 2011).
- **increased court efficiency:** By cutting down transportation time, videoconferencing could allow for faster case processing, reducing case backlogs (CONSAD Research Corporation, 2000; Shubik-Richards, Stemen, and Eichel,

2011; Webster and Hall, 2009; Wisconsin Supreme Court, Office of Court Operations, 2017).

- **reduced detention time for defendants:** Eliminating the need to transport and secure defendants could expedite pretrial proceedings, reducing the amount of time defendants spend in jail prior to their court dates. For instance, the Philadelphia Research Initiative found that the use of videoconferencing in traffic cases and in courts designed to expedite pleas for individuals held before trial for low-level misdemeanors (e.g., “crash courts”) reduced the amount of time defendants spent in jail and doubled the number of cases resolved annually (Shubik-Richards, Stemen, and Eichel, 2011).
- **expanded access to the criminal justice system:** Telepresence technology could increase access to the legal system for expert witnesses, victims, and other court stakeholders who live in remote locations or who fear for their safety in court (Kenniston, 2015; Lynch, 2015). Such technologies could render distant courthouses in large jurisdictions more accessible. Telepresence might be used to assist individuals with disabilities who would otherwise have difficulty attending court proceedings. The use of this technology also might increase the availability of judges by making it possible for them to perform their roles and functions without having to be present in a courtroom (Willis and Kirven, 2004).
- **greater access to language interpreters:** Telepresence technologies can facilitate the provision of language interpretation services, allowing non-English speakers and individuals with communications disabilities to access the criminal justice system more easily (Bridenback, 2016; MacCabe, 2016).
- **reduced trauma for victims:** Telepresence technology enables victims of crimes, such as rape, sexual assault, and child abuse, to testify against the defendant without experiencing the revictimization and trauma of being physically present with their offender (Garvin et al., 2011; Kenniston, 2015).

Although telepresence technology might offer courts valuable advantages, concerns remain regarding its potential impact on legal and constitutional rights, the behavior of court actors, perceptions of credibility, and ultimately, the case outcomes. Potential disadvantages of telepresence technology in the courtroom include the following:

- **legal and constitutional considerations:** As noted previously, in addition to protections under federal and state law, a criminal defendant is granted several protections under the U.S. Constitution that function to promote a fair and just process, including the Fifth, Sixth, and Fourteenth Amendments. Although the defendant has some of these legal and constitutional rights during pretrial proceedings, all of these rights, such as the defendant’s constitutional right to confront adversarial witnesses, are present and must be preserved and protected at trial. Depending on the type of proceeding, telepresence technology might be interpreted as infringing on these legal and constitutional rights (Cimino, Makar, and Novak, 2014; Davis et al., 2015; Haas, 2006; Raburn-Remfry, 1993). However, in other scenarios, telepresence technology could preserve the defendant’s rights by ensuring that the defendant is not held in custody longer than necessary.
- **impact on perceptions of the legal process:** Social science researchers have voiced concerns that videoconferencing might influence the judgment and behavior of individuals who appear in court remotely. Defendants and witnesses who are not physically present in the courtroom might not fully appreciate the gravity of the proceeding in which they are appearing, increasing the risk that they engage in impulsive or contemptuous behavior, or alternatively, that they become disengaged from the legal process (Eagly, 2015; Gibbs, 2017; Lederer, 2009; Raburn-Remfry, 1993).
- **issues of credibility:** As a mode of presentation, videoconferencing could affect assessments of demeanor and nonverbal cues (e.g., eye contact, body language) in ways that lessen the speaker’s ability to connect emotionally with listeners and that reduce the speaker’s perceived credibility (Landström and Granhag, 2010; Landström, 2008; Landström, Ask, and Sommar, 2015; Walsh and Walsh, 2008).
- **impact on outcomes:** Stakeholders have observed that telepresence might have an appreciable negative impact on the outcomes of cases in which it is used. Removing the defendant from the physical courtroom might inadvertently encourage harsher responses on the part of the court.
- **technical issues:** Telepresence technologies are far from infallible. A poor-quality audio, video, or network connection raises concerns for the constitutional rights of court parties. More-serious technical issues could delay or disrupt court proceedings (Devoe and Frattaroli, 2009).
- **data storage and security:** Securely storing the large quantities of video and audio data generated by video-

A threshold question in determining whether to implement telepresence technology is the potential for this technology to make the defendant appear less truthful or trustworthy, thereby diminishing the defendant's credibility and potentially increasing the likelihood of harsher case outcomes.

conferencing that must be preserved according to court policies can be both costly and burdensome (Webster and Hall, 2009; NCSC, undated; Maryland Administrative Office of the Courts, 2012).

- **impact on the defendant-attorney relationship:** Telepresence might negatively affect the attorney-client relationship by threatening the ability of clients and their attorneys to carry out private communications (Bellone, 2015; Dona et al., 2005; Gibbs, 2017; McDonald, Morgan, and Metze, 2016).

RTI's review of the literature informed the identification of the invited panel participants. To foster a dynamic discussion that would address diverse stakeholder perspectives, RTI staff sought the input and participation of judges, court and jail administrators, prosecutors, public defenders, researchers, law professors, pretrial services providers, and IT professionals. This initial review of extant literature also assisted in the identification of subject-matter experts. Many of the panel members have made significant contributions to the literature on telepresence technologies or have been involved directly in the implementation of telepresence pilot projects that were the subject of research studies. A few of the participants were members of a workgroup convened for a study of videoconferencing at postarrest release hearings funded by NIJ (Davis et al., 2015).

Beyond the identification of panel members, the literature review also served as a guiding framework to structure the workshop discussion around the potential advantages and disadvantages of telepresence technology from different court perspectives or contexts, including pretrial and trial proceedings and various types of cases in criminal and civil courts.

RESEARCH AND DEVELOPMENT NEEDS RELATED TO TELEPRESENCE TECHNOLOGY IN THE COURT SYSTEM

Over the course of a day and a half, the workshop participants discussed the positive and negative aspects of using telepresence technology in court proceedings for a variety of court stakeholders (e.g., defendants, judges, witnesses, victims, attorneys). The participants were asked to consider areas where further research is needed to fully understand the implications of this technology. The panel members weighed the benefits in cost savings and broader access to the criminal justice system against delays and challenges created by technical issues and the potential violation of the defendant's legal and constitutional rights. Ultimately, the participants identified 24 specific research and development needs related to the use of telepresence technology in the court system. The remainder of this report focuses on the discussion among workshop participants about these needs and the recommendations for addressing them. The discussion and identified needs are categorized broadly into three main areas:

1. the need for a better understanding of the impact of telepresence technology on court outcomes and actors
2. the need for technical standards, training, and guidelines related to the setup and operation of telepresence technology
3. potential areas of expansion for telepresence technology.

Each of these three main categories is addressed in the following sections.

Understanding the Impact of Telepresence Technology on Court Outcomes and Actors

As noted previously, the criminal justice system is structured to protect a defendant's legal and constitutional rights and to ensure the fairest possible process. A threshold question in determining whether to implement telepresence technology is the potential for this technology to make the defendant appear less truthful or trustworthy, thereby diminishing the defendant's credibility and potentially increasing the likelihood of harsher case outcomes.

The Impact of Telepresence Technology on Defendants

Legal and Constitutional Considerations

The participants discussed concerns about the potential violation of a defendant's legal and constitutional rights through the use of telepresence technology. Although Justice Antonin Scalia stated in an opinion that confronting a person who is testifying remotely is not the same as the person physically being in the same courtroom (Scalia, 2002), one panel member asserted that a defendant's ability to engage in "contemporaneous cross-examination under oath" through telepresence technology is the same as being in the same courtroom. This participant argued that the most important question is whether the appearance of a witness remotely affects the truthfulness of the testimony. In their view, if a person is not any more likely to be untruthful when testifying remotely, then the use of telepresence technology during court proceedings should not be a concern.

Perceived Credibility

In both civil and criminal proceedings, the credibility of a defendant can be an essential element in the strength of a litigant's case. This is true in pretrial hearings, when a defendant is appearing before a judge, and at trial, when a defendant's demeanor, statements, and presentation can affect individual jurors. Factors contributing to perceptions of a defendant's credibility include such nonverbal expressions as eye contact and posture and the defendant's tone and responsiveness when speaking (Landström and Granhag, 2010; Landström, 2008; Landström, Ask, and Sommar, 2015). Telepresence technology has the potential to negatively affect each of these elements. Although no known studies have confirmed this directly, poor lighting could affect how well the judge can see the defendant onscreen and could affect the judge's perceptions of that individual. Similarly, if the camera and video monitors are set up

in such a way that the defendant's face appears too large or too small on the court's video monitor, it might be difficult for the judge to assess the defendant's body language. Panel members theorized that having a defendant appear before the camera in a correctional uniform could lead to a perception that the individual is guilty simply because they are dressed in the required jail or prison uniform. However, this is a consideration regardless of whether the defendant appears before camera or in person.

Other participants stated that they were less concerned about the potential impact of telepresence technology on a judge's assessment of a defendant's credibility because people are not especially skilled at accurately reading an individual's demeanor, whether in person or via videoconference. Studies have demonstrated that the assessment of one's demeanor is not a reliable means by which to assess credibility (Bennett, 2015; Blumenthal, 1993; Ogden, 2000; Roth, 2000; Timony, 2000). Therefore, the diminished ability to read a person's demeanor because of the use of cameras and monitors might not be the key issue for determining whether to embrace telepresence technology.

Regardless, panel members noted that more research is needed to understand whether the use of telepresence technology affects perceptions of a defendant's credibility and whether this results in differential case outcomes. Some studies that have examined the impact of telepresence technology on pretrial case outcomes when a defendant is appearing remotely found differences in case outcomes (Diamond et al., 2010; Eagly, 2015). Other studies have found that individuals who testify live are perceived more positively and are seen as more

Although no known studies have confirmed this directly, poor lighting could affect how well the judge can see the defendant onscreen and could affect the judge's perceptions of that individual.

credible by jurors than those who testify via videoconference (Landström and Granhag, 2010; Landström, 2008; Landström, Ask, and Sommar, 2015). In contrast, Bellone (2015) found no major differences in perceptions of credibility because of the use of telepresence technology.

Defendant Satisfaction and Perceptions of Procedural Justice

A defendant who is appearing remotely at a pretrial hearing might face unique challenges that are distinct from appearing physically in the courtroom. For example, a defendant who is appearing remotely might be in a room where other people are talking or where other background noises are present. One panel member described an instance in which videoconferencing equipment was installed in the loud boiler room of a jail, making it difficult for the defendant to hear and be heard. By contrast, a courtroom is expected to remain silent during proceedings, which can reduce distractions and help foster the defendant's perception that the proceeding is serious and that the judge is weighing all factors. Participants noted that, in general, defendants do not get adequate guidance on what to expect in the courtroom, what the purpose of the particular proceeding is, how to behave, and what they will be expected to do. This lack of guidance is particularly problematic when the defendant is appearing remotely and potentially has even less awareness of what is happening in the courtroom. Defendants who feel that the judge does not care or has not heard them or who feel removed from the process might perceive that the judi-

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cial process is not procedurally just or that they did not have a chance at a fair outcome.

Furthermore, there are ways to counteract any risk that appearances through telepresence technology result in defendants feeling unsupported by friends and family in the judicial process. One panel member explained that sometimes the defendant's friends and family will sit directly behind the prosecutor to ensure that the defendant is aware of their presence.

In general, participants questioned whether quality interactions through telepresence technology would result in similar perceptions of satisfaction with the process and of procedural justice as an in-person appearance. More research is needed to understand the procedural and technical implications of breakdowns in the technology on defendant perceptions.

Bail Hearing Outcomes

One consideration that courts must take into account is whether remote appearances might influence how a judge rules at a particular preliminary hearing. The panel members noted that telepresence technology was largely discontinued in Cook County, Illinois, bail hearings after a study found that the use of telepresence technology during bail hearings resulted in bail being set at higher monetary amounts or not being offered at all (Diamond et al., 2010). However, the participants referenced potential limitations in that study, noting that the placement of cameras in the court prevented speakers from seeing key courtroom parties (e.g., judge, jury) and that this limited view might have influenced their level of comfort, making them appear untrustworthy. Questions remain about whether the technical setup of the equipment has as much of an impact as the technology itself on a judge's determination during a bail hearing. Panel members also noted that research on the impact of social media platforms on communication suggests that individuals who are communicating behind a screen tend to speak more harshly, aggressively, and unkindly than they would in a face-to-face interaction (Cookingham and Ryan, 2015; Groshek and Cutino, 2016; Krzyżanowski and Ledin, 2017; Lee et al., 2014; Richards, Caldwell, and Go, 2015; Siddiqui and Singh, 2016).

There is a need for additional, rigorous research to study the impact of telepresence technology on hearings and judicial interactions with defendants. This is particularly needed as bail reform efforts around the country encourage judges to focus their decisionmaking on the release or detention of the defendant rather than on the offer or set amount of monetary bonds.

Amount of Time Spent in Jail

One of the participants said that defendants who have been surveyed about their experience with telepresence technology understand that appearing remotely could result in spending less time in jail or prison. Appearing remotely can enable the judge to move through the scheduled docket more efficiently and reduce delays that might force a defendant to spend more time in jail.

On the other hand, defendants might be forced to spend additional time in jail during the pretrial phase if telepresence equipment does not function properly or if the use of telepresence technology increases the likelihood of a judge denying bail. Panel members discussed the need to collect data to assess the impact of using telepresence technology on the amount of time a defendant spends in jail. A better understanding of this effect is important because of the potential negative consequences to defendants directly and the costs associated with incarcerating a defendant for a longer period.

Perceptions of the Seriousness of the Proceedings

The participants agreed that it is critically important for defendants to recognize that a remote appearance is still part of a legal proceeding. The participants discussed the psychological weight that is part of the experience of appearing in a courtroom. One panel member noted that when the defendant is removed from the courtroom setting, they might not fully grasp the importance of the situation, the implications of the proceedings, or the weight of what it means to be appearing in court. Additionally, if defendants do not get adequate guidance on what is happening in the courtroom, being on the other side of a videoconference camera might feel more like watching a television show than participating in a hearing. The defendant might shift from an active participant to a passive observer. Finally, panel members hypothesized that younger defendants who use social media or play games that require remote communication might be more comfortable with the technology and view the court proceedings as something like a game. A lack of appreciation for the seriousness of the proceeding, coupled with the feeling of being removed from the process (or that it is a game) could affect the defendant's likelihood of following the terms of pretrial release because of a lack of perceived seriousness of the outcome.

Outer Bounds of Telepresence Technology

In addition to noting that courts are unlikely to allow defendants to appear remotely at trial because of concerns about

Appearing remotely can enable the judge to move through the scheduled docket more efficiently and reduce delays that might force a defendant to spend more time in jail.

the potential violation of the defendant's constitutional or legal rights, the participants stated that telepresence technology likely would not be adopted in death penalty cases. It is unlikely that the prosecutor, defense attorney, or judge would want to risk diminishing the credibility of the defendant or another key individual when the impact could have irreversible consequences. One panel member made the point that it also would not be good practice to allow a witness to testify remotely in a death penalty case because of the risk of the ruling being thrown out on technical grounds if there were any problems with the functioning of the telepresence technology.

The Impact of Telepresence Technology on Defense Attorneys

Younger attorneys, jurors, witnesses, and other participating individuals who have grown up with access to widespread technology and sophisticated technological devices might be more at ease with the use of telepresence technology. For some attorneys, the use of telepresence technology can be as routine as filing legal documents through e-filing systems. In addition, a remote appearance might be less unique to younger attorneys, jurors, and witnesses who are more used to virtual interactions in their personal and professional lives and might be more adept at incorporating technology into court proceedings.

In addition to the adjustment it might require for an attorney to represent a defendant who is appearing remotely, participants acknowledged that a defense attorney's experience providing counsel to a client during pretrial proceedings when they are appearing remotely can be entirely different from that of providing counsel in person. This observation led to a broader discussion about the level of potential dissatisfaction

Telepresence technology might be especially beneficial in cases where physically appearing in court would be detrimental to the victim's physical safety and emotional well-being.

defense attorneys might experience when representing defendants who are appearing remotely. One panel member noted studies done around the use of telemedicine that found satisfaction among patients, but not among providers, and suggested that although defendants might largely be satisfied with the quality of representation in proceedings involving telepresence technology, the defense attorneys could find the experience less than satisfying. However, one panel member pointed out that the challenge of not having sufficient time with the defendant also exists in courtrooms where no telepresence technology is used. Telepresence technology might exacerbate this problem, but it did not create it.

The participants identified a need for further research on cases in which the defense attorney is physically present in the courtroom while the defendant is remote compared with cases where the defense attorney is in the jail or prison where the defendant is being held and also is appearing remotely. When telepresence technology is used for proceedings in which the defendant is held in another location, such as pretrial release hearings, a defense attorney has the option of being present either with their client or in the courtroom. Some panel members described this as a strategic decision. On one hand, the attorney might perceive an advantage to being physically present in the room with the judge (assuming that the judge is not also remote). On the other hand, if the defendant is not prepared to appear before the camera and does not come across as credible, their remote appearance can negatively impact the perceived credibility of the defense counsel as well. A defense attorney, particularly a public defender with a large workload, also might have to weigh the time it takes to travel to the location of the client.

The Impact of Telepresence Technology on Victims

The panel members discussed several issues relating to the impact of telepresence technology on victims. They discussed some of the reasons that a victim might wish or need to be physically present in the courtroom during a pretrial hearing

or a proceeding in which the defendant is appearing remotely. First, the prosecutor might ask the victim to appear at a pretrial proceeding to corroborate or speak to evidence the prosecutor wishes to present to the judge. The victim's presence and ability to speak could be relevant to the prosecutor's case. A victim also might have a constitutional or legal right to attend the pretrial proceeding. Some states, such as Ohio, have a victims' rights statute, which guarantees the victim the right to attend preliminary hearings (Ohio Rev. Stat. § 2930.09). However, one panel member pointed out that the perceived fairness of participating through telepresence technology might be influenced by other victims' or witnesses' experiences with the technology.

Second, the participants discussed the fact that a witness or victim who is concerned about their own physical safety is more likely to stay away from the courtroom if the defendant appears in person. Therefore, the use or availability of telepresence technology might encourage victims or other witnesses to participate in the proceedings. Telepresence technology might be especially beneficial in cases where physically appearing in court would be detrimental to the victim's physical safety and emotional well-being. For example, cases involving restraining orders, child custody, gang-related violence, or violence against women or cases with large financial stakes can place the victim at risk if they were to appear during the trial. One panel member explained that during a remote pretrial appearance by the defendant, the cameras in the courtroom could be positioned to exclude the victim from view. This could create a feeling of safety and security for the victim and thereby encourage the victim's presence in the courtroom.

Third, in addition to lessening fears among victims and witnesses, telepresence technology offers the benefit of enabling these individuals to participate in court proceedings if the physical location of the courtroom would otherwise create challenges. The panel members acknowledged that participating in a court proceeding not only might be inconvenient but also could place the person's job or other responsibilities at risk. The

ability to include such individuals in the process using telepresence technology is an important benefit.

Fourth, the participants discussed the psychological benefit to the victim of attending pretrial proceedings with a remote defendant. A victim who gains experience sitting in the courtroom during pretrial proceedings when the defendant is not physically present might be better prepared to be in the same room with the defendant when the actual trial begins. The panel members noted that it would be useful to have empirical data about how victims perceive the experience of telepresence technology.

The Impact of Telepresence Technology on Judges

One factor that affects how widely telepresence technology is used in the courtroom is the judge's level of comfort with the technology. Panel members explained that the judge is often the one who decides whether and when telepresence technology will be used, and these decisions are relatively arbitrary. As one participant explained, "Judges run their courtroom the way they like." This notion extends to the use of telepresence technology. Panel members noted that it is unrealistic for judges and other professionals in the criminal justice system to be tasked with acquiring a high level of technological competency in addition to their traditional duties. In many cases, courts cannot afford to hire technology consultants. As a result, it often is the judge who ends up troubleshooting technological problems and making necessary adjustments. As one participant noted, a judge might be less capable of fully using telepresence technology if the equipment setup is so complicated that "the bench looks like a cockpit."

The panel members discussed the benefits of using telepresence technology to enable judges to sign warrants electronically after hours, including over the weekend. Some states, such as Texas, do not allow judges to sign warrants digitally because the state constitution requires judges to be physically present within the jurisdiction when they sign a warrant. However, in jurisdictions where it is allowed, this capability could lead to an earlier release of the defendant during the pretrial phase of a case, which the participants agreed represented a good application of technology.

On the other hand, the panel members also considered the disadvantage of judges having the capacity to work over the weekend. One downside of the "24-7" nature of technology is that always being available can lead to overwork and fatigue. One potential solution could be to schedule judges to be on call one weekend per month, which is similar to the schedules

of medical doctors. Further research is needed to understand whether telepresence technology is leading to more-overworked judges.

The Impact of Telepresence Technology on the Court Increased Efficiency

The participants discussed the fact that telepresence technology was used first in jurisdictions that required a defendant to have a pretrial hearing within 24 or 48 hours because videoconferencing capabilities made it easier to meet these deadlines. Telepresence technology offers state and local courts, which often are working with limited resources to meet the demands of a heavy caseload, the potential for increased efficiency in case processing and cost savings. The ability for the defendant, an expert or lay witness, language interpreter, attorney, or other key individual to appear remotely can reduce disruptions that otherwise might occur if the person is unavailable on a particular court date, required to drive a large geographic distance and therefore subject to traffic delays, or subject to physical limitations that make travel difficult. A delay in one case can affect the court's entire docket on a particular day. The use of telepresence technology therefore can alleviate some of these scheduling challenges.

However, problems with telepresence technology can result in lengthy delays or lower-quality backup options. Panel members explained that if videoconferencing technology is

A victim who gains experience sitting in the courtroom during pretrial proceedings when the defendant is not physically present might be better prepared to be in the same room with the defendant when the actual trial begins.

not functioning properly during a pretrial release hearing, the available options might be to use an available program, such as Skype, or allow the defendant to waive the right to appear and conduct the proceedings through a regular conference call. More research is needed to understand the implications of these backup options. Although it might appear that allowing the proceedings to be conducted via conference call speeds up proceedings, saves money, and keeps the defendant from spending unnecessary time in jail, these advantages might be offset by a greater chance that bail will be denied or set at a higher monetary amount. If a judge is more likely to rule unfavorably based on the defendant's remote appearance, the use of telepresence technology ultimately might be more detrimental to a defendant's case.

Access to Language Interpreters

The participants discussed the potential benefits and consequences of a language interpreter who appears remotely. Skilled language interpreters are in high demand, and telepresence technology could afford the opportunity to hire qualified and experienced language interpreters who would not otherwise be able to participate. However, the panel members cautioned that even the best language interpreters might not be able to participate meaningfully if they are unable to operate the equipment and technology necessary. Language interpreters have a lot of responsibility in terms of who can hear their translations and what is recorded. The participants considered that language interpreters might not wish to use telepresence technology because of this recording feature, which can be used at a later time to grade the quality of their performance. More research is

Panel members noted that more research is needed to understand the circumstances in which the use of telepresence technology saves the court money and when it becomes costlier.

needed to understand whether the use of telepresence technology serves to improve or diminish the quality of language interpretation.

Cost Savings

If the camera, monitor, or other equipment used for telepresence is not functioning properly, either in the courtroom or in the location of the person participating remotely, it can cause disruptive delays that could end up being costly to the court and even to the parties involved. Rather than increasing efficiencies, delays because of technological issues can cause further backlog and result in additional costs from defendants being held in jail for longer periods. Panel members noted that more research is needed to understand the circumstances in which the use of telepresence technology saves the court money and when it becomes costlier. It is assumed that telepresence technology reduces costs, but this might depend to some degree on the backup plans put in place for when the technology fails.

Priority Needs Related to Understanding the Impact of Telepresence on Court Outcomes and Actors

Based on the discussion among workshop participants regarding the need to better understand the impact of telepresence technology on various court and case outcomes, several areas were identified as priority research and development needs. The panel identified and later ranked needs related to understanding the impact of telepresence technology on court proceedings. These needs include concerns about defendants receiving a fair hearing; whether the use of telepresence technology might violate defendants' constitutional rights; the potential impact of the technology on the quality of court proceedings; whether this technology improves witness participation; how the use of this technology might change the behavior of the defendant, witnesses, lawyers, or judge; and the degree to which telepresence technology results in cost savings.

Developing Technical Standards, Training, and Guidelines for the Setup and Use of Telepresence Technology

A core theme that arose in the panel discussions was the need to establish technical and training standards around the use, setup, and operation of telepresence technology in U.S. courts. From one jurisdiction to the next, there is substantial variation in how frequently telepresence technology is used and for which types of proceedings. At the federal level and in several states, such as Wisconsin (Wis. Stat. § 885[3], 2008), comprehensive

rules govern the use of telepresence technology in the courtroom. However, these standards are the exception rather than the norm. There is no national consensus around when the use of telepresence technology is appropriate or how it can be used in a way that maximizes benefits and minimizes burdens. The Supreme Court has not issued clear guidelines regarding when telepresence technology can be used in the courtroom outside the use of one-way telepresence technology in a case involving a child victim of sexual abuse (*Maryland v. Craig*, 497 U.S. 836, 1990).

Regarding the first question, panel members identified the need for a protocol that a jurisdiction could use to determine whether telepresence technology is appropriate, given the type of proceeding, type of case, safety considerations, resources of the jurisdiction, and potential disparities or other negative outcomes associated with its use. This protocol would help ensure that decisions about when to use telepresence technology are more consistent and transparent.

In response to the second question, participants emphasized that when the use of telepresence technology is deemed appropriate, standards and best practices should govern its setup and use. Specifically, these standards should regulate the placement of monitors and cameras; the quality and consistency of audio, video, and network connections; the background; and data storage and security. In addition to reducing the incidence of technical issues that disrupt and delay court proceedings, having technical standards would assist courts in making decisions about technology needs. As noted previously, the way in which telepresence technology is installed or operated can affect perceptions of credibility and case outcomes. Technical standards and training on proper setup and use could help insure against these negative consequences.

According to the panel members, the single greatest barrier to defining technical standards for the utilization and installation of telepresence technology is the lack of research in these areas. Little guidance is available on what constitutes an acceptable range of quality or consistency for video, audio, or network connections and on what kinds of functionalities should be supported by videoconferencing systems. Guidelines require that individuals appearing remotely and persons in the courtroom be able to see, hear, and communicate with one another but do not outline specific technical standards beyond this. For example, the Wisconsin Court System's standards require that video and sound quality adequately allow participants to observe the demeanor and nonverbal communications of other

court participants but do not define the standard against which adequacy is assessed.

Technical standards and best practices around the installation and use of telepresence technology would inform the development of training on how the technology should be used and provide logistical guidance around how court actors should appear for the purposes of audio and video clarity and how to communicate nonverbally in ways that would be possible in person. For some courtroom participants, the need for training is closely tied to the need for standards on the proper setup of equipment. For others, training is needed to help set expectations around the use of telepresence technology and to develop a better understanding of how it works.

In the remainder of this section, we detail the participants' discussion around the need for technical standards and training to promote the proper setup and high-quality, multipurpose functioning of telepresence technology in court.

User-Friendly Setup

Panel members commented on the difficulty of building internal support for and justifying the up-front costs of videoconferencing systems that are not "dead simple." They pointed out that, in many cases, courts cannot afford to hire technology consultants. The onus for installing and operating these technologies is shifting to court and corrections personnel who lack training and expertise regarding the system's installation. Furthermore, depending on existing court processes and configurations, the use of technology (or the malfunctioning of technical systems during use) might create disproportionate impacts on proceedings. If such potential pain points are not identified and adjustments are not made to address them, further burden could fall on court personnel. Therefore, telepresence technology should be designed with user-friendly setups in mind that are easy to install in a variety of settings, including court and correctional facilities. Moreover, participants argued that telepresence vendors should automate system updates and provide ongoing technical support to promote the system's continued use. Furthermore, before new systems are implemented, an assessment of the implications of technology failure and the development of backup plans should be explored.

Optimal Viewing Arrangements

Panel members discussed the placement, size, and synchronicity of videoconferencing cameras and monitors. They observed that although these technical elements have the potential to influence perceptions of the speaker and case outcomes, they receive

Although panel members agreed that the remote location from which the speaker is appearing does not need to simulate a courtroom, they argued that it should, in some way, convey to the speaker that they are taking part in a formal courtroom proceeding.

insufficient attention from the court and the correctional personnel responsible for setting them up.

As noted earlier, defendants appearing in court via telepresence might not be able to make eye contact with the judge or other court parties in the same way they would in person, which can affect perceptions of their credibility. This issue is exacerbated when cameras and monitors are not set up in a manner that gives the appearance of eye contact. Panel members, referencing the aforementioned Cook County bail hearing study, contended that the placement of monitors and cameras in the courtroom is a matter that should be governed by technical standards (Diamond et al., 2010). Participants recommended that national standards be developed for the setup of telepresence technology, including the placement and synchronicity of cameras and monitors. The panel members agreed that there should be articulable standards on how cameras and monitors should be arranged to offer the fairest presentation of the defendant, who would be appearing at pretrial hearings and proceedings through telepresence technology. If such standards existed, the defense attorney could raise a formal objection demanding that a correction be made to the equipment's placement.

In addition to the need for standardized protocols governing the placement of the video cameras and monitors, the participants recommended that the design of courtrooms using telepresence technology have a basis in scientific evidence instead of continuing to reflect long-standing cultural norms that promoted a quiet courtroom space in which outside technological distractions were minimized. Many courtrooms have been designed to not allow for wireless internet connectivity or reliable cell phone reception. The panel members discussed the need to retrofit older courtrooms that were built long before the invention and availability of current technological devices and equipment to enable telepresence technology to be incorporated.

Participants also touched on the importance of the background for remote court appearances. Lighting and other environmental conditions of the remote court party have the potential to influence not only the judge's perceptions of the speaker but also the speaker's attitudes regarding the proceeding. Although panel members agreed that the remote location from which the speaker is appearing does not need to simulate a courtroom, they argued that it should, in some way, convey to the speaker that they are taking part in a formal courtroom proceeding. Participants felt that defining standards for the conditions of the location from which speakers appear in court remotely and developing training protocols for court and correctional personnel could address these concerns.

Additionally, the viewing arrangements and background in which an individual is physically located while appearing remotely could influence remote participants' behavior and style of communication. Panel members contended that attorneys, judges, defendants, and witnesses should be provided with strategies and considerations for how to improve their appearance in front of the camera. These strategies would provide guidance on, for example, how to dress in front of a camera and how to communicate clearly with other court actors via videoconferencing. Such trainings could help ensure that extraneous factors related to viewing arrangements do not negatively affect the outcomes of proceedings.

Network Connection

Panel members identified low network capacity as a common issue that hinders the use of telepresence technology, particularly in rural counties where networks are less accessible and affordable. Videoconferencing requires high-quality network connections that can simultaneously support live video-audio streaming and other types of network traffic. Without sufficient bandwidth, several technical issues can arise, including dropped signals, buffering, latency (i.e., video and audio delays), and

otherwise poor-quality audio and video. Participants recommended that research be conducted on network alternatives, such as wireless networks, that leverage existing resources.

Quality and Consistency of Sound Clarity

Sound quality and consistency was another aspect of videoconferencing for which panel members asserted that standards were needed. Participants expressed the concern that in the absence of specific guidelines, a subjective “good enough” standard would be applied, eroding the legal rights of defendants. In addition, panel members discussed the issue of audio-video synchronicity, observing that audio lags can create frustrating situations in which courtroom parties unintentionally talk over one another. As a solution to these and other audio-related issues, participants suggested that research should be conducted to identify best practices for videoconferencing audio setups and to determine which materials or other equipment could be used in the setup to minimize background noise and produce high-quality audio. The panel members agreed that there is a pressing research need to determine how best to remove background noise and improve the remote party’s ability to hear what is being said in the courtroom and vice versa.

Private Channels Between Certain Parties

If microphones are not properly muted when an attorney needs to confer with the defendant or the judge, the defendant’s rights could be jeopardized. Thus, participants identified the provision of private channels—in which certain court parties can engage in unrecorded communications—as another important videoconferencing functionality. Private channels, such as chat systems and meeting rooms, allow attorneys who are physically present in the courtroom to confer with their remotely located clients without having to disrupt a proceeding. In addition, they permit sidebars in proceedings when attorneys are appearing from remote locations. Private channels also can serve as waiting rooms in which remote participants are placed before a proceeding begins.

Panel members recommended that capabilities allowing court parties to communicate privately be incorporated into technical standards for telepresence technology. Although many commonly used “off-the-shelf” videoconferencing systems, such as Skype, do not offer private channels, participants suggested that at least having a mute button and offering training to ensure that it is used properly are critically important to preserving the ability of defense attorneys to confer privately with the defendant during court proceedings.

Data Storage and Security Requirements

Panel members stated that the use of telepresence technology in court necessitates the development of policies governing the storage and security of videoconferencing data. These data might supplement or constitute the court record, and thus, storage is a key consideration. Participants noted that many noncommercial videoconferencing systems do not allow users to record sessions. Standards for the maintenance and dissemination of court records that are based on paper filing systems might not provide adequate guidance on how to capture and store data generated by telepresence systems in ways that ensure that these data can be retrieved many years in the future.

According to panel members, “cost often drives the issue of storage.” Multimedia court records that include both video and audio data captured via videoconferencing offer a higher degree of accuracy but storing large amounts of video information is costly in terms of resources and staffing. Document duplication further exacerbates this issue.

In addition to high costs, participants expressed concern that multimedia court records would allow appellate courts to overturn lower court rulings more easily and make assessments about credibility and other factors that could usurp the function of the trial court. As a result, trial and appellate courts have shown little interest in multimedia court records.

Data captured for government purposes must be stored more securely than data collected for commercial purposes, and these additional security requirements could contribute to a court’s reluctance to adopt this technology. On the topic of cybersecurity, panel members expressed concern that without the proper security measures, external parties could listen in on or even disrupt ongoing proceedings. Although encryption technologies have become an industry standard for telepresence systems, the degree of system security varies across telepresence systems.

A related issue that was raised by participants was how to ensure that videoconferencing data stored by the courts have not been tampered with by outside parties. Many states adhere to the Federal Rules of Evidence’s Best Evidence Rule, which requires that the original version of a document or material that is introduced at trial be preserved for later review (Federal Rules of Evidence R. 1001, *et seq.*). A document must be authenticated to prove that it is the original version and not a duplicate copy. The panel members discussed the challenges of assessing the authenticity of video and audio files captured via telepresence technology. One common method is to assign the file a unique number or document key at the time it is

placed into storage. When the file is retrieved and needs to be authenticated, the court can run an algorithm that looks for this unique, identifying number to verify that a particular file is original. To ensure the authenticity of documents used during proceedings in which one or more parties is appearing remotely, participants recommended the use of digital signatures.

Multipurpose Infrastructure or Model Configurations

Building on the discussion of user-friendly setups, panel members noted the value of multipurpose infrastructure. Proprietary equipment and software that cannot be translated across devices might limit the ways in which telepresence technology can be used in court. For example, noncommercial systems, such as Skype and FaceTime, can be used on any device with a network connection; other telepresence systems might not offer that degree of flexibility.

Likewise, technical infrastructure can determine which telepresence systems courts can consider implementing and how these systems can be used. One participant described how their jurisdiction was able to implement a remote interpreting system at little cost to the court by using existing infrastructure that was designed to support digital court reporting. Given that the up-front costs of installing telepresence technology equipment can be high, efficiencies could be realized by ensuring that telepresence systems are designed to enable multiple functions.

However, panel members pointed out that court purchasers often neither are aware of their options when searching for telepresence systems nor sufficiently knowledgeable about the key features these systems should include and support. Telepresence vendors who could assist courts in identifying the most-suitable commercial products might not know how to communicate this information effectively to court purchasers, whose needs and concerns differ from those of corporate clients. To address these issues, participants recommended that model configurations for telepresence systems be developed that can help guide courts' decisions to purchase these technologies. They further proposed that a collaboration model be developed or identified

that would help court leadership, administrators, and technologists articulate their needs to court technology vendors.

File and Video Feed Sharing Between the Court and Remote Parties

The effectiveness of telepresence technology in the courtroom might be improved by ensuring that it supports certain functionalities, such as file and video feed sharing. Panel members discussed how telepresence technology could offer a means of quickly and easily sharing files and documents between courts and remote parties, complementing existing electronic case filing systems. They also observed that videoconferencing could facilitate greater public access to court proceedings via shared video feeds. Panel members recommended that best practices and policies be developed that would govern the public's and media's access to telepresence feeds and data.

Priority Needs Around Technical Standards

Using the discussion among workshop participants regarding the need for best practices and standards related to the technical aspects of and training on the use of telepresence technology, several areas were identified as priority research and development needs. In this realm, participants highlighted such problems as staff not having adequate and routine training on the functionality of telepresence systems; the lack of established protocols for how to handle technology failures; wide variation in audio quality and its impact on proceedings; the lack of guidelines on image size and video quality, both of which affect the experience of using telepresence technology; courtrooms not having sufficient bandwidth for telepresence solutions; and variation in when courts deploy telepresence technology. Associated needs included the development of a telepresence technology training curriculum; development of national standards and model configurations for the setup of telepresence systems; research on the appropriate levels of audio setup, video quality, and image size; and research into options for improving network connectivity.

Proprietary equipment and software that cannot be translated across devices might limit the ways in which telepresence technology can be used in court.

Potential Expansions of Telepresence Technology

The participants acknowledged that telepresence technology has many useful and important applications throughout the court system. However, the panel members expressed the need to develop standards around the implementation and use of telepresence technology. Such standards could help address some of the concerns raised earlier in this report about the potential negative impact of remote appearances on the outcome of defendants' cases and disruptions that can occur through equipment failures or problems. The participants discussed some of the specific areas in which the implementation of standards would be useful.

Telepresence Technology and Data Collection and Data Storage

One potential benefit to expanding the use of telepresence technology is the capability to collect data, which can be used to assess the impact of this technology on various outcomes. The panel members agreed that intentionally collecting data can make it feasible to do a cost-benefit analysis of whether and how telepresence technology is saving the court money and also to assess which aspects of the courtroom process could be improved. For example, some courts have assessed the cost implications of using telepresence technology when employing language interpreters. These data can inform future decisions about whether to upgrade or expand certain technology and can help shift courts away from making such determinations based solely on anecdotal evidence.

Overcoming the Cost Implications of Expanding Telepresence Technology

Many courtrooms intentionally prohibit the use of cell phones and other technological devices within the courtroom to reduce disruptions during court proceedings. Similarly, many courtrooms are designed to not be technologically savvy or adaptable. This can make it challenging to improve connectivity inside a courtroom. Telepresence technology used in a courtroom with limited technological capabilities might not function optimally if too many individuals are online at the same time.

One of the biggest challenges in the adoption and implementation of telepresence technology is the cost associated with bringing bandwidth technology to areas that do not already have an established technological infrastructure. This can be particularly burdensome and disruptive in rural areas where

Telepresence technology used in a courtroom with limited technological capabilities might not function optimally if too many individuals are online at the same time.

the implementation of bandwidth entails physically placing the wires under the streets.

One participant recommended the increased use of 4G wireless technology as the best option for areas with less technological bandwidth but that seek to use telepresence technology. Improving wireless coverage is less expensive and more feasible than adding more bandwidth or using satellites. A judge, attorney, or other individual who is appearing or participating remotely can check a wireless coverage map to determine the geographic areas that have the strongest wireless signals. However, it is important to consider the type of connectivity required inside the courtroom because continuously streaming a video places greater demand on infrastructure than simply clicking on websites.

An important consideration the panel members discussed is the need to ensure that security and privacy can be maintained no matter what software and form of internet connectivity are being used. In such cases as child protective court, it is imperative that the use of technology prevents those outside the courtroom from being able to listen in on the conversation and proceedings occurring in the courtroom. Even more pressing than protecting the privacy of conversations in the courtroom is the need to prevent someone, whether inside or outside the courtroom, from disrupting the legal proceedings.

The participants discussed potential advantages and disadvantages with using commercial video platforms, such as Skype and FaceTime. There were concerns about whether the degree of security that exists on these platforms is sufficient to protect confidentiality, particularly in situations where the conversation is recorded. The participants identified a need to establish best practices to maintain the confidentiality of conversations that

occur through telepresence technology. A panel member shared that one judge addresses this concern by clearing the courtroom when a conversation of a confidential nature is about to occur over Skype. Another courtroom is set up to prevent the unintentional overlap of language interpreters in court proceedings by requiring interpreters outside the state to wait until the court allows them to join. This function prevents language interpreters from accidentally listening in on other court proceedings.

A Fully Virtual Courtroom

After discussing the cost savings; the enhanced capacity to process cases more efficiently; and the ability of key individuals, such as witnesses and qualified language interpreters, to participate, the panel members explored the idea of implementing a fully virtual courtroom in which everyone appears remotely. The Center for Legal and Court Technology (2014) at the William and Mary Law School in Williamsburg, Virginia, exemplifies the capabilities and features of a technologically sophisticated courtroom. Although many jurisdictions might not have the resources or ability to replicate all of the components of the Center for Legal and Court Technology, state and local courts might consider implementing some of these capabilities for use in certain legal proceedings. If everyone participated through telepresence technology, any bias or negative consequences would be eliminated because the defendant or other key individuals would not be the only individuals who were appearing or participating remotely. Additionally, the younger generation that is used to interacting regularly with friends, family, and others through various non-face-to-face technological platforms might be more amenable to participating in court proceedings that are entirely virtual. For those who are less comfortable with the technology, participants discussed setting up a portable, “field-deployable courtroom” or “beta courtroom” for those who wish to test out telepresence technology before formally adopting it or who want to have the experience of a fully virtual courtroom for future consideration.

Other panel members raised serious concerns about the idea of most courtrooms becoming fully virtual courtrooms. For one, they noted that jury trials might be the one type of criminal justice proceeding that should not be adapted into a fully virtual courtroom. However, because jury trials make up a very small percentage of overall court proceedings, the widespread adoption of telepresence technology during pretrial proceedings could have a large impact. Other participants raised concerns that a fully virtual courtroom could impede the ability of defense attorneys, prosecutors, and judges to commu-

nicate and build professional relationships, which are an important component of how these practitioners function and work toward a fair and just criminal justice system. For example, it is not uncommon for the defense attorney and prosecutor to talk informally and come to an agreement in the courtroom, outside the regular procedures of a particular court proceeding. A fully virtual courtroom could eliminate the possibility of such unplanned communication, thereby affecting the case’s outcome. Some participants pointed out that a fully virtual courtroom could still have private chat or texting features that allow for such side conversations. For example, the judge could call for a private sidebar with the prosecutor and defense attorney by opening a side channel with just those participants. The participants acknowledged that such features hold the most value for individuals who already have established relationships with one another. In addition, a fully virtual courtroom could place more responsibilities on the presiding judge to acquire the training needed to operate and manage the technological aspects of the proceedings. However, a fully virtual courtroom could still follow the protocols of a physical courtroom in the compilation of the trial record and in that sidebars would not be officially recorded and stored.

The panel members raised a related concern about the potential impact a fully virtual courtroom could have on behaviors and interactions. As mentioned earlier, communicating behind a screen might change how an individual engages with others. It remains an open question whether the sum of such different behaviors could lead to different court outcomes.

Priority Needs Related to Expanding the Use of Telepresence Technology

Through the discussion around further expansion of telepresence technology throughout the court system, workshop participants identified two major priority needs. First, to address any reluctance on the part of court leadership to adopt telepresence technology, the participants expressed a need to develop pilot courtrooms where court staff could test out new technologies and become more comfortable with them. Second, participants recommended developing telepresence technology performance indicators, which could include metrics that might automatically be produced by these systems, such as time needed to connect to the system, system requirements needed to handle the amount of data transferred through the telepresence connection, and any gaps in connectivity during the session.

PRIORITIZING TELEPRESENCE NEEDS

The gaps in knowledge regarding the use of telepresence technology and the related research and development needs outlined earlier were recognized as pressing issues that could help advance the responsible use of telepresence technology. From the discussions with the 12 workshop participants, 24 different needs were identified that, if addressed, could shed light on the impact of telepresence technology on the court system and ensure that the technology is being used in a manner that maximizes efficiencies while safeguarding fairness and the protection of defendants' rights. These potential targets for effort and investment were prioritized based on the participants' ranking of several different factors, which allowed the most valuable or attractive needs to be identified.

The Logic of Rating the Telepresence Technology Needs

The needs were prioritized using a variation of the Delphi Method, a technique developed at RAND to elicit expert opinion about well-defined questions in a systematic and structured way (RAND Corporation, undated). The Delphi process used for the Priority Criminal Justice Needs Initiative builds on previous RAND work examining criminal justice technology, police, and practice needs (Hollywood et al., 2016; Jackson et al., 2015). Additional detail on the ranking methods and outcomes can be found on the RAND website and in the appendix to this report. For this workshop, participants were asked to rate

1. **how important each of the needs is for the continued or expanded use of telepresence technology.** Each participant rated each need on a scale of 1 to 9 for each category (where 1 corresponded to contributing nothing to the objective and 9 indicated that meeting the need could result in a 20-percent or greater improvement in performance).
2. **how practical it would be to meet the need** (while meeting some needs might require only minor adaptation, meeting others might be very difficult). The participants rated each need's chance of technical success on a scale of 1 (10-percent chance of succeeding) to 9 (90-percent chance of succeeding).

These two scales sought to capture the key components needed to calculate the expected value of a possible innovation:

how valuable it would be multiplied by the probability that it could be produced successfully. Rather than simply asking a group of experts to rank a set of options and taking the average of those responses, the Delphi Method seeks to identify and explore differences among experts' responses. As a result, ratings are done in multiple rounds, with discussions between each round focusing on specific ratings where there were divergences in the group. For this effort, the RAND team led the participants in three rating rounds and intervening discussions on the telepresence-related needs. The discussion focused predominately on those needs for which there was a great deal of spread in the prioritization across the panel members.

The Prioritized Telepresence Needs

The effectiveness of such expert elicitation processes as the Delphi Method relies on the knowledge and capabilities brought to the process by the participants. In identifying and selecting workshop participants, we sought to build a panel with a mix of perspectives and views within the context of needs related to telepresence in the courtroom. All of the workshop attendees except the project and NIJ staff participated in the ranking process.

We took each of the scores assigned by the participants and calculated an expected value for each need—multiplying the benefit scores and the probabilities of its success. To calculate the final ratings of each need, we used the median expected value assigned by the participants, which provides reasonable estimates of the center of the data even if there are outliers in the rankings. These expected values were used to cluster the needs into three tiers, as described in the appendix to this report. There were ten needs assigned to the top tier by expected value, which we present in Table 1.

The ten top-tier needs are (1) conducting research into improved network connectivity; (2) identifying best practices with regard to audio setup for telepresence technology; (3) conducting research to determine the impacts of telepresence technology on victims and witnesses; (4) developing national standards for the setup of telepresence systems; (5) developing a training curriculum on how to make use of telepresence technology; (6) developing model configurations for telepresence technology to be used by court purchasers; (7) conducting research into the effect of telepresence technology on defendants' experiences with the court process and perceptions of procedural justice; (8) developing standards on video quality and image size; (9) conducting research to understand differences in cross-examinations that occur in person versus via

telepresence technology; and (10) developing pilot courtrooms to help court staff get comfortable with the technology. The full ranked list of needs identified by workshop participants is included in Tables 1, 2, and 3, with the highest-priority opportunities and needs presented in Table 1, followed by the middle-tier needs in Table 2, and the lower-tier needs in Table 3. Each need corresponds to one of the following three categories, which were discussed earlier:

1. the need for a better understanding of the impact of telepresence technology on court outcomes and actors (measuring outcomes)
2. the need for technical standards, training, and guidelines related to the setup and operation of telepresence technology (technical standards and training)
3. potential areas of expansion for telepresence technology (areas for expansion).

Table 1. Top-Tier Concerns for Court Appearance Through Telepresence

Problem or Opportunity	Associated Needs	Corresponding Category
Courtrooms need high-quality network connections (bandwidth) to support telepresence solutions in addition to existing network traffic.	<ul style="list-style-type: none"> • Conduct research into options for improving network connectivity. 	Technical standards and training
The audio quality associated with telepresence technology varies widely but can have a large impact on proceedings.	<ul style="list-style-type: none"> • Conduct research to identify best practices and minimum standards for audio setup. 	Technical standards and training
It is unknown whether telepresence technology improves witness participation and reduces victim trauma (consistent with constitutional requirements).	<ul style="list-style-type: none"> • Conduct research to assess the impact of telepresence technology on the experiences of witnesses and victims. 	Measuring outcomes
There are critical effectiveness issues associated with the setup of telepresence technology that often receive insufficient attention from those responsible for the setup.	<ul style="list-style-type: none"> • Identify the technical issues that impact the effectiveness of telepresence technology and develop national standards for the setup of telepresence systems. 	Technical standards and training
To make the best use of telepresence technology, local and remote staff need initial and refresher training on the equipment and the ability to test the functionality of the system routinely.	<ul style="list-style-type: none"> • Develop a training curriculum for each of the different court actors who interact with telepresence technology in some capacity. 	Technical standards and training
Purchasers of telepresence systems are not sufficiently knowledgeable about the key features that are needed for different types of interactions (e.g., language interpretation, court reporting, remote testimony).	<ul style="list-style-type: none"> • Develop model configurations that can be used to help purchasers make intelligent buying decisions. 	Technical standards and training
Defendants might perceive that they cannot get a fair hearing via telepresence technologies.	<ul style="list-style-type: none"> • Conduct research to better understand the effect of telepresence technology on defendants' experiences with the court process and perceptions of procedural justice. 	Measuring outcomes
Image size and video quality affect the experience of using telepresence technology, but there are no criteria for the minimum, maximum, or ideal video quality and image size	<ul style="list-style-type: none"> • Conduct research into the appropriate levels of video quality and image size and develop implementation standards for courts. 	Technical standards and training
Courts have not established whether remote witness testimony (including two-way video and cross-examination processes) affects confrontation and due process.	<ul style="list-style-type: none"> • Conduct research to determine whether there is a difference in cross-examinations that occur in person versus via telepresence technology. 	Measuring outcomes
There is a reluctance or a lack of awareness on the part of court leadership to adopt telepresence technologies.	<ul style="list-style-type: none"> • Develop pilot courtrooms (e.g., a laboratory) where court staff can try new technologies and get more comfortable with them. 	Areas for expansion

Table 2. Middle-Tier Concerns for Court Appearance Through Telepresence

Problem or Opportunity	Associated Needs	Need Received a High-Importance Score (Yes/No)	Corresponding Category
Little is known about the actual cost savings associated with the use of telepresence technology and who benefits from these savings. Often, the savings are not experienced by the entities that would incur the costs.	<ul style="list-style-type: none"> • Conduct a cost-benefit risk analysis from the perspective of a local court system to understand best practices for using telepresence technology in a manner that would achieve cost savings. 	Yes	Measuring outcomes
There is insufficient information available about the impact of telepresence technology on courtroom outcomes.	<ul style="list-style-type: none"> • Conduct research to assess whether there are systematic differences in the outcomes of cases that involve telepresence technology versus in-person proceedings. 	Yes	Measuring outcomes
Telepresence systems naturally produce data, which could be used to identify patterns in usage and opportunities for improved or expanded usage.	<ul style="list-style-type: none"> • Develop best practices for useful performance indicators and the kinds of data that should be collected from these systems to inform the indicators. 	Yes	Areas for expansion
It is unknown whether telepresence technology is used effectively to mitigate witness and victim risk in high-risk scenarios.	<ul style="list-style-type: none"> • Conduct research to assess the impact of telepresence technology on the experiences of witnesses and victims. 	Yes	Measuring outcomes
Over time, members of the courtroom workgroup who repeatedly work in the same physical space develop a rapport that might be lost when interacting remotely.	<ul style="list-style-type: none"> • Conduct research to assess the long-term implications (advantages and disadvantages) of in-person versus virtual interactions. 	Yes	Measuring outcomes
There are no tested or established protocols for what to do or what backup measures to use when telepresence technology fails.	<ul style="list-style-type: none"> • Develop protocols and training to ensure due process. 	Yes	Technical standards and training

Table 3. Lower-Tier Concerns for Court Appearance Through Telepresence

Problem or Opportunity	Associated Needs	Need Received a High-Importance Score (Yes/No)	Corresponding Category
It is unknown whether the use of telepresence systems affects the quality of services (e.g., interpretation and court recording services) and how they are delivered	<ul style="list-style-type: none"> Conduct research to determine the effect of telepresence technology on the delivery of court services. 	Yes	Measuring outcomes
There is the potential for decisionmaking to suffer when some or all of the participants are remote (judge, court reporter, prosecutor, defendant, etc.).	<ul style="list-style-type: none"> Conduct research on the impacts on decisionmaking, communication, and perceptions of satisfaction with the process when one or more parties are participating remotely. 	No	Measuring outcomes
Courts have yet to determine the constitutionality of remote testimony from witnesses.	<ul style="list-style-type: none"> For cases in which remote witnesses are necessary, identify best practices that would eliminate all solvable issues so the appellate courts can focus on the constitutional issues. 	Yes	Technical standards and training
Court technology vendors and those purchasing technology for the court often have difficulty communicating with each other about needs and how particular products could meet those needs.	<ul style="list-style-type: none"> Develop or identify a collaboration model that will help court leadership, administrators, and technologists to specify needs. 	Yes	Technical standards and training
Social behavior and communication styles might change naturally when individuals are communicating via telepresence technology, which could introduce mode effects into case outcomes.	<ul style="list-style-type: none"> Conduct research into how the use of telepresence technology affects communication among those involved in a proceeding and whether this, in turn, affects outcomes. 	No	Measuring outcomes
Communication via telepresence systems might require additional skills on the part of participants.	<ul style="list-style-type: none"> Develop best practices for participants using telepresence technology (clothing colors and patterns, speaking slowly and clearly, looking into the camera, etc.). 	No	Technical standards and training
More evidence is needed to determine when courts should employ telepresence technology.	<ul style="list-style-type: none"> Conduct research on the most-appropriate situations in which to use telepresence technologies. 	No	Technical standards and training
Depending on local sharing policies, making telepresence feeds available to outside parties and the media can be a challenge.	<ul style="list-style-type: none"> Develop best practices and policies around access to and sharing of telepresence feeds. 	No	Technical standards and training

CONCLUSION: ENSURING THAT TELEPRESENCE TECHNOLOGY LIVES UP TO THE HYPE

As is often the case with technology, the introduction of telepresence technology to the courts has the potential to dramatically change the system. The use of telepresence technology can reduce court costs; improve safety; enhance efficiency; reduce pretrial detention times; and expand access to justice for people in remote areas, those who fear for their safety, and those who face other barriers (e.g., language) to navigating the court system. For these reasons, courtrooms around the country have adopted telepresence technology for use in certain types of proceedings. Many panel members expressed the sentiment that telepresence technology is the future of courts and envisioned a day when there will no longer be a need for physical courtrooms.

However, to date, the adoption of telepresence technology has been largely inconsistent and haphazard, with each court making separate determinations about how it should be set up, who should use it, and when it should be used. As one participant noted, the use of telepresence technology has been largely reactive rather than proactive. Courts, needing to reduce costs or solve an acute problem (e.g., too few interpreters), introduce telepresence technology as a quick solution without necessarily considering the multitude of factors that can affect whether it is used effectively.

Factors such as lighting, audio, placement of cameras and monitors, picture quality, and network connectivity affect the quality of interactions and how closely remote interactions mimic those that occur in person. Without standards and protocols regarding the technical aspects of telepresence technology, court purchasers often lack knowledge about the type of equipment needed. Those responsible for the setup of the equipment might not understand the implications of their decisions regarding viewing arrangements, network connectivity, and sound quality and clarity and might not know how to troubleshoot any problems that occur. In some jurisdictions, the lack of available information and guidance on how to set up and use telepresence technology results in a hesitance to adopt it at all; in other jurisdictions, it means that the quality and feel of interactions among parties might differ widely from one court proceeding to the next.

Little research has been conducted to evaluate the impact of differences between in-person and remote interactions or differences in the quality of remote interactions on court

outcomes. One panel member referred to telepresence technology as being “guilty until proven innocent.” In other words, without rigorous efforts to assess the impact of telepresence technology on such outcomes as bail hearing decisions, sentencing decisions, defendants’ perceptions of procedural justice, and the protection of defendants’ constitutional rights to due process and confrontation of accusers, perhaps the default should be to assume differential outcomes from the use of telepresence technology versus in-person appearances. One panel member expressed the belief that, until there is evidence that telepresence technology does not have an impact on defendants, it should not be used. Another participant stated that “You lose something when you use video. That concerns me.” However, to date, there has been little research to understand what, if anything, is sacrificed through remote versus in-person appearances and what impact this has on court outcomes.

As technology continues to advance and more and more court stakeholders feel pressure to adopt or expand the use of telepresence technology, panel members expressed the opinion that the development of technical standards and training protocols is essential for reducing differences from one remote proceeding to the next and ensuring that the potential cost savings of technology are realized. As demonstrated through the workshop, courts should be involved in the development of all standards, protocols, and best practice guidelines to ensure that they reflect the diversity of needs and experiences from one court and one court proceeding to the next. The need to understand the potential for differential case outcomes and perceptions of the justice system is as important as ever. Telepresence technology will play a major role in the future of the court system, but only through strategic, research-driven introduction and use will its full potential be realized.

TECHNICAL APPENDIX

In this appendix, we present additional details on the workshop agenda and the process for identifying and prioritizing technology and other needs specific to the use of telepresence technologies in the courtroom. Through this process, we developed the research agenda that structured the topics presented in the main report. The descriptions in this appendix are adapted from those in previous Priority Criminal Justice Needs Initiative publications and reflect adjustments to the needs identification and prioritization process implemented at this workshop.

Pre-Workshop Activities

The RAND and RTI team recruited panel members by identifying knowledgeable individuals through existing professional and social networks (e.g., LinkedIn) and by reviewing literature published on the topic. We then extended invitations to those individuals and provided a brief description of the workshop's focus areas.

In advance of the workshop, participants were provided an opportunity to identify the issues and topics that they felt would be important to discuss during the workshop. Using a comprehensive literature review and input from the workshop participants, the workshop agenda and discussion were structured as shown in Table A.1.

Identification and Prioritization of Needs

During separate sessions of the workshop, we asked the participants to discuss the challenges that they face during the pretrial and trial phases of a case, which panel members had identified prior to the workshop. While conducting this review, participants suggested additional areas that potentially are worthy of research or investment. Participants also considered whether there were areas that were not included in the existing list and suggested new ones.

To develop and prioritize a list of technology and policy issues that are likely to benefit from research and investment, we followed a process similar to one that has been used in previous Priority Criminal Justice Needs Initiative workshops (see, for example, Jackson et al., 2015; Jackson et al., 2016, and references therein). Participants discussed and refined problems related to each court telepresence category and identified potential solutions (or needs) that could address each problem. In addition, needs could be framed in response to opportunities to

improve performance by adopting or adapting a new approach or practice (e.g., applying a new technology or tool in the sector that had not been used before).

At the end of the discussion of each topic, participants were given an opportunity to review and revise the list of problems and opportunities they had identified. The participants' combined lists for each topic were displayed one by one using Microsoft PowerPoint slides that were edited in real time to incorporate revisions and comments.

Once the panel members agreed on the wording of each slide, we asked them to anonymously vote using a handheld device (specifically, the ResponseCard RF LCD from Turning Technologies). Each participant was asked to individually score each problem or opportunity and its associated need using a 1–9 scale for two dimensions: importance and probability of success.

For the *importance* dimension, participants were instructed that 1 was a low score and 9 was a high score. Participants were told to score a need's importance with a 1 if it would have little or no impact on the problem and with a 9 if it would reduce the impact of the problem by 20 percent or more. Anchoring the scale with percentage improvements in the need's performance is intended to help make rating values more comparable from participant to participant.

For the *probability of success* dimension, participants were instructed to treat the 1–9 scale as a percentage chance that the need could be met and broadly implemented successfully. That is, they could assign the need's chance of success between 10 percent (i.e., a rating of 1) and 90 percent (i.e., a rating of 9). This dimension was intended to include not only technical concerns (i.e., whether the need would be hard to meet) but also the effect of factors that might lead courts to not adopt the

Table A.1. Workshop Agenda

Day 1

Welcome and Introductions

Initial Discussion of Workshop Functions and Objectives

Pretrial: Negative and Positive Impacts of Telepresence Technology on Courtroom Parties

Trial: Negative and Positive Impacts of Telepresence Technology on Courtroom Parties

Do Impacts of Telepresence Technology Vary by Type of Case or Type of Court?

Review Key Benefits and Challenges Identified During Day 1, Prioritize Discussion for Day 2

Day 2

Summary of Day 1 and Overview of Agenda for Day 2

Additional Considerations Related to Telepresence Requirements

Review and Final Brainstorming Session

Final Needs Prioritization

Panel Review and Next Steps

new technology, policy, or practice even if it were developed. Such factors could include, for example, cost, staffing concerns, and societal concerns.

After the participants rated the needs displayed on a particular slide (i.e., for either importance or probability of success), we displayed a histogram-style summary of participant responses. If there was significant disagreement among the panel (the degree of disagreement was determined by the research team’s visual inspection of the histogram), the participants were asked to discuss or explain their votes at one end of the spectrum or the other. If a second round of discussion occurred, participants were given an opportunity to adjust their ratings on the same question. This second-round rating was optional, and any rating submitted by a participant would replace their first-round rating. This process was repeated for each question and dimension at the end of each topic area. Figure A.1 shows an example of a slide on the importance dimension, with related issue, need, and histogram. Figure A.2 shows a slide on the probability of success dimension.

Once the participants had completed this rating process for all topic areas, we put the needs into a single prioritized list. We ordered the list by calculating an expected value using the method outlined in Jackson et al., 2016. For each need, we multiplied the final (second-round) ratings for importance and probability of success to produce an expected value. We then calculated the median of that product across all of the respondents and used that as the group’s collective expected value score for the need.

We clustered the resulting expected value scores into three tiers using a hierarchical clustering algorithm. The algorithm we used was the “ward.D” spherical algorithm from the “stats” library in the R statistical package, version 3.5. We chose this algorithm to minimize within-cluster variance when determining the breaks between tiers. The choice of three tiers is arbitrary but was done in part to remain consistent across the set of technology workshops we have conducted for NIJ. Also, the choice of three tiers represents a manageable system for policymakers. Specifically, the top-tier needs are the priorities that should be the primary policymaking focus, the second-tier needs should be examined closely, and the third-tier needs are probably not worth much attention in the near term (unless, for example, they can be addressed with existing technology or approaches that can be readily and cheaply adapted to the identified need).

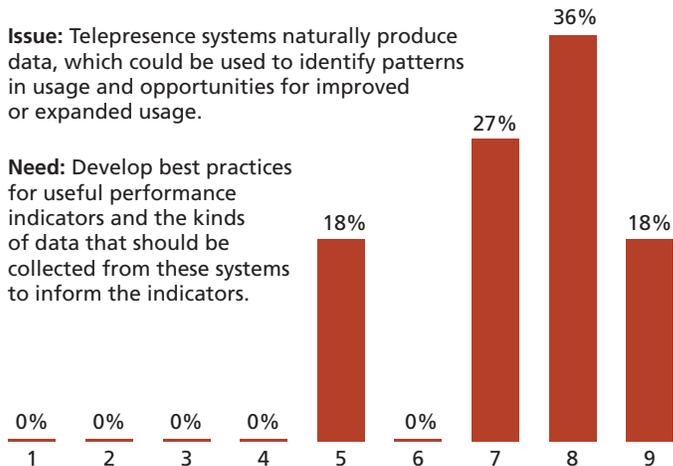
Because the participants initially rated the needs by one topic area at a time, we gave them an opportunity at the end

Figure A.1. Example Slide for Rating the Importance of a Need

18a. How *important* is it to solve this problem?

Issue: Telepresence systems naturally produce data, which could be used to identify patterns in usage and opportunities for improved or expanded usage.

Need: Develop best practices for useful performance indicators and the kinds of data that should be collected from these systems to inform the indicators.



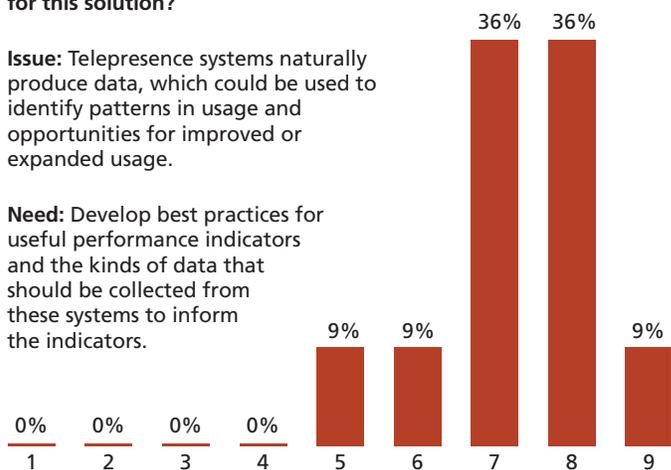
NOTE: Percentages on each question did not always sum to 100 percent due to rounding and variation in the number of participants who voted on each need.

Figure A.2. Example Slide for Rating the Probability of Success of a Need

13b. What is the *probability of success* for this solution?

Issue: Telepresence systems naturally produce data, which could be used to identify patterns in usage and opportunities for improved or expanded usage.

Need: Develop best practices for useful performance indicators and the kinds of data that should be collected from these systems to inform the indicators.



NOTE: Percentages on each question did not always sum to 100 percent due to rounding and variation in the number of participants who voted on each need.

of the workshop to review and weigh in on the tiered list of all identified needs. The intention of this step was to let the panel members see the needs in the context of the other tiered needs and allow them to consider whether there were some that appeared too high or low relative to the others. To collect these assessments, we printed the entire tiered list and distributed it to the participants. This step allowed the participants to see all of the ranked needs across the court telepresence categories,

providing a top-level view that is complementary to the rankings provided session by session. Participants were then asked to examine where each of the needs landed on the overall tiered list and whether this ordering was appropriate or needed fine-tuning. Participants had the option to indicate whether each problem and need pairing should be voted up or down on the list. An example of this form is provided in Table A.2.

We then tallied the participants’ third-round responses and applied those votes to produce a final list of prioritized and tiered needs. To adjust the expected values using the up and down votes from the third round of prioritization, we implemented a method equivalent to the one we used in previous work (Hollywood et al., 2016). Specifically, if every panel member voted “up” for a need that was at the bottom of the list, then the collective effect of those votes would be to move the

need to the top. (The opposite would happen if every participant voted “down” for a need that was at the top of the list.) To determine the point value of a single vote, we divided the full range of expected values by the number of participants voting.

To prevent the (somewhat rare) situation in which small numbers of votes have an unintended outsized impact—for example, when some or all of the needs in one tier have the same or very similar expected values—we required that at least 25 percent of the workshop participants must have voted on that need (and then rounded to the nearest full participant). In this workshop, there were 12 participants, so for any votes to have an effect, at least four participants would have had to have voted to move the need up or down.

After applying the up and down vote points to the second-round expected values, we compared the modified scores with

Table A.2. Example of the Delphi Round 3 Voting Form

Question	Tier	Vote Up	Vote Down
Tier 1			
Issue: Courtrooms need high-quality network connections (bandwidth) to support telepresence solutions in addition to existing network traffic. Need: Conduct research into options for improving network connectivity.	1		
Issue: Courts have not established whether remote witness testimony (including two-way video and cross-examination processes) affects confrontation and due process. Need: Conduct research to determine whether there is a difference in cross-examinations that occur in person versus via telepresence technology.	1		
Tier 2			
Issue: Little is known about the actual cost savings associated with the use of telepresence technology and who benefits from these savings. Often, the savings are not experienced by the entities that would incur the costs. Need: Conduct a cost-benefit risk analysis from the perspective of a local court system to understand best practices for using telepresence technology in a manner that would achieve cost savings.	2		
Issue: It is unknown whether telepresence technology is used effectively to mitigate witness and victim risk in high-risk scenarios. Need: Conduct research to assess the impact of telepresence technology on the experiences of witnesses and victims.	2		
Tier 3			
Issue: There is the potential for decisionmaking to suffer when some or all of the participants are remote (judge, court reporter, prosecutor, defendant, etc.). Need: Conduct research on the impacts on decisionmaking, communication, and perceptions of satisfaction with the process when one or more parties are participating remotely.	3		
Issue: Courts have yet to determine the constitutionality of remote testimony from witnesses. Need: For cases in which remote witnesses are necessary, identify best practices that would eliminate all solvable issues so the appellate courts can focus on the constitutional issues.	3		

NOTE: Shaded cells indicate that up or down votes were not possible (e.g., Tier 1 is the top tier, so it was impossible to upvote items in that tier).

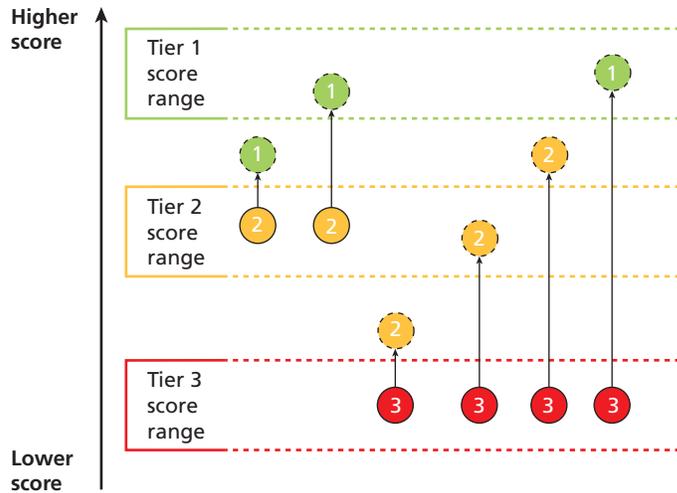
the boundary values for the tiers to see whether the change was enough to move any needs up or down in the prioritization. (Note that there were gaps between these boundaries, so some of the modified expected values could fall between tiers. See Figure A.3.) As with prior work, we set a higher bar for a need to move up or down two tiers (from Tier 1 to Tier 3, or vice versa) than for a need to move to the tier immediately above or below. Specifically, a need could *increase by one tier* if its modified expected value was higher than the highest expected value score in its initial tier. A need could *decrease by one tier* if its modified expected value was lower than the lowest expected value in its initial tier. However, *to increase or decrease by two tiers* (which was only possible for needs that started in Tier 1 or Tier 3), the score had to increase or decrease by an amount that fully placed the need into the range two tiers away. For example, for a Tier 3 need to jump to Tier 1, its expected value score had to fall within the boundaries of Tier 1, not just within the gap between Tier 1 and Tier 2. Figure A.3 illustrates the greater score change required for a need to move two tiers (i.e., the need on the far right of the figure) compared with one tier (all other examples shown).

Applying these decision rules to integrate the participants’ third-round inputs into the final tiering of needs resulted in numerical separations between tiers that were less clear than the separations that resulted when we used the clustering algorithm in the initial tiering. This can occur because, for example, when the final expected value score for a need that was originally in Tier 3 falls just below the boundary value for Tier 1, that need’s final score could be higher than that of some other needs in the

item’s new tier (Tier 2). See Figure A.4, which shows the distribution of the needs by expected value score after the second-round rating process and after the third-round voting process.

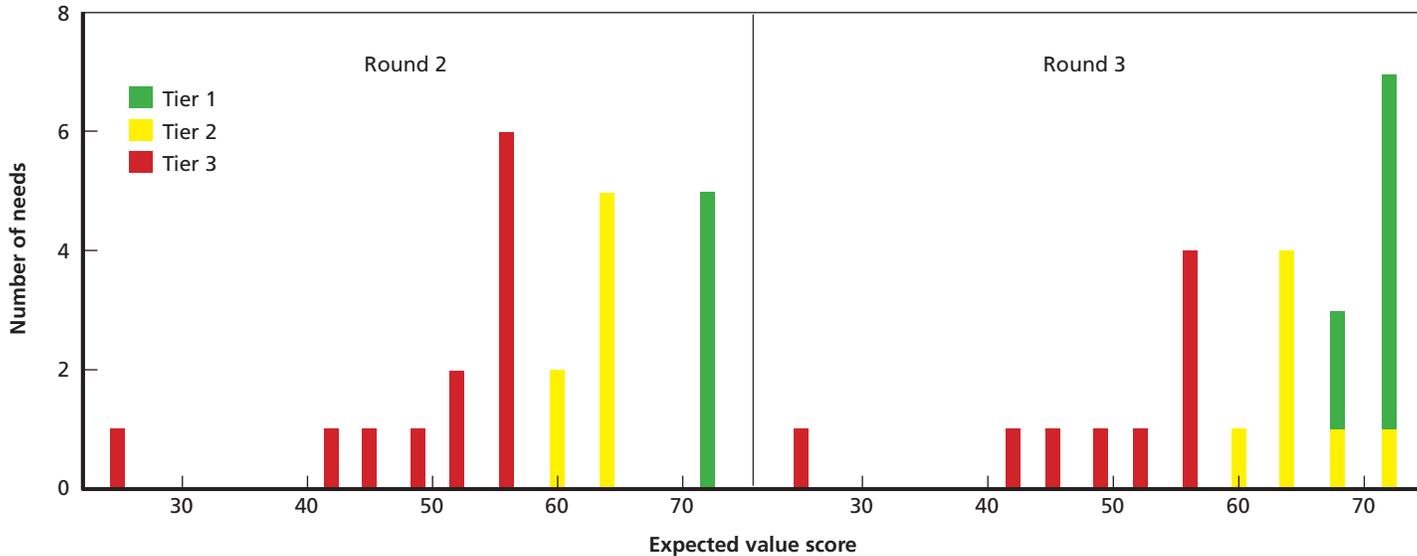
As a result of the third round of voting, 18 needs did not change their position and six needs rose by one tier. No needs fell by one tier or changed by two tiers. The output from this process became the final ranking of the panel’s prioritized results.

Figure A.3. How a Need’s Increase in Expected Value Might Result in Its Movement Across Tier Boundaries



NOTE: Each example need’s original tier is shown by a circle with a solid border (the two needs starting in Tier 2 and the four needs starting in Tier 3). Each need’s new tier after the third-round score adjustment is shown by the connected circle with a dotted border.

Figure A.4. Distribution of the Tiered Needs Following Rounds 2 and 3



Notes

¹ The Sixth Amendment's confrontation clause applies to state court proceedings through the Fourteenth Amendment's due process clause. Many states' legislation, court rules, or state constitutions also contain a confrontation clause further preserving and protecting the defendant's right to cross-examine and confront a witness (Weber, 2013, p. 149).

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About This Report

On behalf of the U.S. Department of Justice, National Institute of Justice (NIJ), the RAND Corporation, in partnership with the Police Executive Research Forum (PERF), RTI International, and the University of Denver, is carrying out a research effort to assess and prioritize technology and related needs across the criminal justice community. This initiative is a component of NIJ's National Law Enforcement and Corrections Technology Center (NLECTC) System and is intended to support innovation within the criminal justice enterprise. For more information about the NLECTC Priority Criminal Justice Technology Needs Initiative, see <https://www.rand.org/well-being/justice-policy/projects/priority-criminal-justice-needs.html>

This report is one product of that effort. It presents the results of an expert workshop that explored the benefits and drawbacks of the use of telepresence technology in criminal courtrooms and identified research needs around the use of this technology for court appearances. This report and the results it presents should be of interest to planners from courts, other judicial agencies, corrections agencies, research and operational criminal justice agencies at the federal level, private-sector technology providers, and policymakers active in the criminal justice field. Mentions of products do not represent approval or endorsement by NIJ or the RAND Corporation.



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ARTICLE

CHARM CITY TELEVISED & DEHUMANIZED: HOW CCTV BAIL REVIEWS VIOLATE DUE PROCESS

By:¹ Edie Fortuna Cimino,² Zina Makar,³ and Natalie Novak⁴

INTRODUCTION

On May 28, 2013, Torrey Johnson⁵ struggles to raise both his hands, handcuffed and seated shoulder-to-shoulder between two other defendants in the first row of the closed circuit television (“CCTV” or “videoconference”) bail review hearing room within the Baltimore Central Booking and Intake Center (“Central Booking”). There are two more rows of defendants behind Mr. Johnson, all in yellow jumpsuits, being watched by correctional officers. Separated by a three-foot wall, Mr. Johnson’s public defender sits out of sight from the video camera’s field of view, about ten feet away from her client. The judge quickly reads through Mr. Johnson’s rights. A representative from the Pretrial Release Services Program (“Pretrial Release”) makes a recommendation that is broadcasted meekly from the courtroom. As the judge looks down at his desk to take notes, Mr. Johnson looks down and shakes his head. He disagrees with something the Pretrial Services representative said, and starts to speak. No one seems to hear Mr. Johnson’s voice in his own bail review hearing.

Mr. Johnson’s experience demonstrates the constitutional violations that many indigent defendants in Baltimore City disproportionately face as

¹ The views expressed herein are those held by the authors’ alone, and do not represent the position of the *University of Baltimore Law Forum*, its editorial board and staff, or any other entity.

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³ Zina Makar, University of Maryland Francis King Carey School of Law, J.D. 2014; Open Society Institute 2014 - 2016 Baltimore City Community Fellow implementing a program with the Office of the Public Defender in Baltimore City to challenge wrongful bail determinations through State habeas corpus petitions.

⁴ Natalie Novak graduated *cum laude* from the University of Baltimore School of Law in 2014. She is currently an Apprentice Fellow at the Maryland Office of the Public Defender, Collateral Review Division.

⁵ The defendant’s name has been changed to protect client confidentiality.

Maryland conducts bail review hearings on a television screen, not in person. Speed and convenience are the driving factors behind the state's decision to hold bail hearings through videoconference systems. Mr. Johnson's case is an example of the procedural problems raised when CCTV is used in bail review hearings, both in district and circuit courts.⁶

Many of Mr. Johnson's rights were stripped away during his bail review hearing. Denied the right to be physically present before a judge, Mr. Johnson's face was grainy and unrecognizable, while his bright yellow jumpsuit fluoresced. Separated from his attorney by correctional officers, he was unable to challenge the facts that the Pretrial Services representative presented against him. He was disoriented without the guidance of his attorney, who should have been within a whisper's distance. In less than two minutes, Mr. Johnson, unable to make the \$50,000 bail, was denied the opportunity to be released before his case is decided.

By contrast, Carl Gibson⁷ was granted a bail review hearing in circuit court, the trial court for his felony charge, approximately six months after he was initially incarcerated. He was physically present in the courtroom during his bail review hearing, accompanied by his attorney and his girlfriend, who was nine months pregnant at the time. Mr. Gibson communicated with his attorney throughout the hearing, providing information to counter the representations made by Pretrial Services. His attorney made arguments regarding his ties to the community and the weakness of the case against him. Ultimately, Mr. Gibson was granted a substantial reduction in money bail.

This article will discuss CCTV bail hearings that take place in district and circuit courts. First, using Baltimore City as a case study, we will detail the importance of pretrial release for trial outcomes and how lengthy pretrial incarceration disproportionately affects both the poor and African-American population. We will then argue that CCTV violates a defendant's right to be physically present within a courtroom, his Sixth Amendment right to confront the witnesses against him, and his Sixth Amendment right to counsel. These constitutional violations, when combined, deprive defendants of their liberty without the due process of law.

I. RIGHT AGAINST EXCESSIVE BAIL

⁶ See Md. R. 4-231 (permitting the use of videoconference systems in bail review hearings that are held in *district court*). From August 2013 to submission of this article for publication, bail review hearings and petitions for writs of habeas corpus were being conducted in circuit court via CCTV. Any use of CCTV equipment in bail review hearings before the Circuit Court for Baltimore City is not permitted by the express language of Maryland Rule 4-231.

⁷ The defendant's name has been changed to protect client confidentiality.

A. *Lengthy Pretrial Incarceration Disproportionately Affects the Poor and African-American Population*

In *Ake v. Oklahoma*, Justice Marshall stated that “justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.”⁸ Justice Marshall’s words are strikingly relevant to the effects that CCTV has on indigent defendants in Baltimore City, where pretrial detainees are overwhelmingly African-American and poor.⁹ Surety bail amounts are acutely significant to poor defendants.¹⁰ When money for food and rent is unsure, the extra expense of paying bail to a corporate bondsman will be an extreme hardship.¹¹ In most situations, bail is paid by the detainee’s friends and family. For the multigenerational poor, when the bail amount skyrockets into the hundreds of thousands, or even millions, of dollars, freedom is out of reach.¹² Although loved ones may dearly want to bring a detainee home, the money is just not there.¹³ To an affluent

⁸ *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

⁹ See Nastassia Walsh, *Baltimore Behind Bars*, JUSTICE POLICY INST. 15 (2010), available at http://www.justicepolicy.org/images/upload/10-06_rep_baltbehindbars_md-ps-ac-rd.pdf (almost ninety percent of Baltimore City detainees are African-American). See also Douglas L. Colbert et. al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1721 (2002) (lower income defendants tend to be disproportionately African-American); *Executive Summary to THE PRETRIAL RELEASE PROJECT: A STUDY OF MARYLAND’S PRETRIAL RELEASE AND BAIL SYSTEM*, ABELL FOUND. ii n.5 (Sept. 12, 2001) (hereinafter “ABELL FOUND.”), available at http://www.abell.org/sites/default/files/publications/hhs_pretrial_9.01%281%29.pdf (“Seventy percent of interviewed arrestees for this Study reported that the expense of the bondsmen’s fee would result in a delay paying rent and utilities and in buying less food.”).

¹⁰ NAT’L ASS’N OF PRETRIAL SERV. AGENCIES, *NAPSA STANDARDS ON PRETRIAL RELEASE* 18 (3d ed. 2004), available at <http://www.napsa.org/publications/2004napsastandards.pdf> (stating surety bail systems “discriminate unfairly against the poor and middle-class persons who cannot afford the non-refundable (and often very high) fees that the bondsman requires as a condition of posting the bond”).

¹¹ See ABELL FOUND., *supra* note 9. See also Walsh, *supra* note 9.

¹² In advocating for the abolition of compensated sureties, the National Association of Pretrial Services Agencies notes “[t]here is no reason to require defendants to support bail bondsmen in order to obtain release (and to pay the bondsman a fee that is not refundable even if they are ultimately cleared of the charges)” See NAT’L ASS’N OF PRETRIAL SERV. AGENCIES, *supra* note 10, at 19.

¹³ See BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, *FELONY DEFENDANTS IN LARGE URBAN COUNTIES: 1994*, (1998), available at <http://www.bjs.gov/content/pub/pdf/fdluc94.pdf> (study demonstrating the inverse relationship between increasing bail amounts and the decreasing probability of

defendant, the dollar amount of bail is less significant.¹⁴ To avoid spending even one night in Central Booking, most would consider paying a hefty sum well worth it.¹⁵

Unfortunately, a defendant's ability to pay bail is rarely taken into account by judges. Typically, a "reasonable bail" is assessed solely on the allegations, a defendant's criminal history, and his ties to the community.¹⁶ However, under *Stack v. Boyle*,¹⁷ the amount set for bail should be no more than is necessary to assure the defendant's presence at trial. Bail is collateral to ensure court appearances, and should not be punishment for crimes yet to be proven. The same dollar amount will be more important to recoup for an indigent defendant than an affluent one; as such, indigence itself should be a factor in favor of lower bail.¹⁸ Because this connection often escapes recognition,¹⁹ it is all the more important that indigent defendants are granted the full spectrum of their rights during bail review hearings.²⁰

release). See also BRIAN A. REAVES & PHENY Z. SMITH, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES: 1992 (1995), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4120>.

¹⁴ See *Executive Summary* to ABELL FOUND., *supra* note 9, at v n.15 ("According to the 1995 national census, the median ([fiftieth] percentile) income for the typical household in Baltimore (\$42,021), Frederick (\$51,220), Harford (48,467) and Prince George's (\$45,281) counties was 75 to 100% higher than for Baltimore City (\$25,918) Consequently, the same dollar amount is likely to represent a greater financial hardship for individuals and families in Baltimore City.").

¹⁵ See Sadhbh Walshe, *America's Bail System: One Law for the Rich, Another for the Poor*, THE GUARDIAN (Feb. 14, 2013), <http://www.theguardian.com/commentisfree/2013/feb/14/america-bail-system-law-rich-poor> ("Until we have the courage to change it, we should at least call bail by its real name: a get-out-of-jail pass for those who can pay, and jail-time for those who can't.").

¹⁶ See Cynthia Jones, *Give Us Free: Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 935 (2013).

¹⁷ *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

¹⁸ See *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988). See also *State ex rel. Bardina v. Sandstrom*, 321 So. 2d 630, 631 (Fla. Dist. Ct. App. 1975); *Mendenhall v. Sweat*, 158 So. 280, 281-82 (Fla. 1934) (stating that a defendant's financial condition must be considered when instating a bail amount required to assure the presence of the defendant).

¹⁹ During a bail review hearing on May 28, 2013, after argument by defense counsel, Edie Cimino, that the defendant could not post the set amount of money bail, the judge noted that the duty to set a reasonable bail, does not impose upon a judge a duty to consider what bail amount the defendant could make.

²⁰ Ronnie Thaxton, *Injustice Telecast: The Illegal Use of Closed-Circuit Television Arraignments and Bail Bond Hearings in Federal Court*, 79 IOWA L. REV. 175, 197-98 (1993) ("Criminal defendants, especially minorities, often feel they are 'outsiders' rather than participants in the adjudication of justice. Given the reality that most racial minorities, especially Blacks, may already distrust and feel intimidated by the criminal justice system, CC[TV]s provide another bar to their full

Videoconference bail review hearings forsake the rights of the poor in the name of convenience and efficiency.

B. Importance of Pretrial Release for Trial Outcomes

When an accused is incarcerated prior to his trial, he is held for a crime of which he is presumed innocent, and forced to live in squalid conditions that are worse than those where convicted criminals are held.²¹ Pretrial incarceration involves sleep deprivation, shockingly unsanitary conditions, and violence.²² A defendant's countenance and posture will reflect those experiences and convey a message to the court and jurors. The state system has determined that he is guilty enough to keep locked up, and he wears that badge of guilt when presented to the court via video during various pretrial proceedings.²³

understanding of the proceedings and reinforce their distrust of the system. CC[TV]s only further magnify this distrust and alienation.”).

²¹ Jonathan Zweig, *Extraordinary Conditions of Release Under the Bail Reform Act*, 47 HARV. J. ON LEGIS. 555, 556 (2010) (citing *Pugh v. Rainwater*, 557 F.2d 1189, 1198 (5th Cir. 1977) (“[I]n a system that prides itself on a devotion to ‘equal justice under the law’, [sic] it is difficult to maintain that conditions common in pretrial detention centers do not punish defendants presumed innocent but that the more wholesome conditions of minimum security prisons do punish convicted criminals.”) (citations omitted) (quoting another source)).

²² James MacArthur, *Jailed Journalist Reports Inhumane Conditions for Pre-Trial Detainees*, INDEPENDENT READER (Apr. 29, 2013), <https://indyreader.org/content/court-date-jailed-journalist-reports-inhumane-conditions-pre-trial-detainees>.

²³ See MICHAEL J. KELLY & EFREM LECY, MAKING THE “SYSTEM” WORK IN THE BALTIMORE CRIMINAL JUSTICE SYSTEM: AN EVALUATION OF EARLY DISPOSITION COURT 13 (2002), available at <http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/004000/004607/unrestricted/20071518e.pdf> (“The defendant threatens to burden the court with a jury trial in order to negotiate a more favorable outcome through a plea bargain. The prosecutor seeks to game the system as well, through increasing the penalties at each new stage in the process, in order to negotiate a more severe penalty for the defendant for burdening the system”). See also *Commonwealth v. Bethea*, 379 A.2d 102, 105 n.8 (Pa. 1977) (“Judge David Bazelon, speaking for the Court of Appeals for the District of Columbia, has suggested the shortcomings of these contentions: ‘Repentance has a role in penology. But the premise of our criminal jurisprudence has always been that the time for repentance comes after trial. The adversary process is a fact-finding engine, not a drama of contrition in which a prejudged defendant is expected to knit up his lacerated bonds to society.’”). See also Steven P. Grossman, *An Honest Approach to Plea Bargaining*, 29 AM. J. TRIAL ADVOC. 101 (2005) (proposing a solution for and argues that differential sentencing of criminal defendants who plead guilty and those that go to trial is a punishment for the defendants exercising their right to trial).

At the most basic level, a defendant's decision-making process is fueled by his traumatic experience in jail. In pretrial detention the defendant has gone sleepless, unshowered, and scared for months. These conditions present the defendant with an added incentive to plead guilty and accept a sentence certain to result in his transfer to a classified institution.²⁴ There the defendant can begin to count down the days to freedom. This certainty brings a defendant relative peace of mind and ends the waiting, fearing the worst, and hoping for finality.

While incarcerated, the accused cannot fully participate in preparing his defense for trial. The defendant is unable to investigate his case, do legal research, or even call his lawyer at a time of his choosing.²⁵ He can read only what is provided to him and he cannot assist in locating witnesses.²⁶ Rather, he must wait for his attorney to visit him and, when she does, chances are their meeting will not be confidential.²⁷ From his cell, the defendant cannot assist in finding witnesses or accompany his lawyer on crime scene investigations to show her where the incident occurred. Often times, a client can educate their lawyer about the particular locations, such as alleyways, backyards, and hangout spots, that are the subjects of the police reports; however, without the defendant's presence, the attorney must often rely on guesswork and a hand-drawn map from her client.²⁸ Finding witnesses is not always an exact science. For example, an accused may know that there was a lady on her porch who saw the event, but not know her name, address, or phone number. While the accused may recognize her face or her house, the lawyer does not.

²⁴ KELLY & LECY, *supra* note 23, at 13.

²⁵ Interview with the Honorable Robert Cooper, J., Baltimore City District Court (June 12, 2013) (Judge Cooper acknowledged that some witnesses in "Baltimore City are very transient." In the district court a trial must occur within thirty days of arrest. Judge Cooper noted that this is a very limited time frame. If a defendant is not on the streets looking for his potential witness because the defendant does not make bail and remains incarcerated pending trial, then "[the defendant] will never get him.").

²⁶ *Id.*

²⁷ Jack Rubin, Letter to the Editor, *Central Booking and Jail are Failing*, BALT. SUN (Aug. 7, 2012), available at http://articles.baltimoresun.com/2012-08-07/news/bs-ed-jail-letter-20120807_1_deplorable-conditions-baltimore-city-detention-center-interviews.

²⁸ NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, *supra* note 10 ("Upon a showing by defense counsel of compelling necessity, including for matters related to preparation of the defendant's case, a judicial officer who entered an order of pretrial detention . . . may permit the temporary release of a pretrial detained person to the custody of a law enforcement or other court officer . . . [t]he burden is clearly on the defense to prove the need for such release, which may be for matters relating to preparation of the defendant's case (for example, a site visit to a particular location, providing an opportunity to review the scene with counsel) . . .").

If a defendant is convicted after trial, the State's sentencing recommendation, and the one actually imposed, will be considerably higher than if he were to accept a plea.²⁹ Nearly every time a guilty verdict is rendered, a "trial tax" is imposed by the sentencing judge. This is, in part, due to the legislature's enactment of various mandatory penalties that take away judicial discretion, which the prosecutor may unilaterally invoke.³⁰ It is also partly due to the personal and philosophical beliefs held by some members of the bench, and may be an attempt to discourage jury trials to prevent overcrowding an already crowded docket. Whatever the reason, a defendant is not likely to gamble with his liberty by demanding a jury trial.³¹

In addition to the pressures to plead guilty, applicable to all defendants, pretrial incarceration creates further inducements for an accused to give up his trial rights.³² Several studies have demonstrated that "released defendants tend to fare far better than those who are held in detention."³³ Specifically, research shows that those "detained in jail while awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period."³⁴ Put another way, those who are not jailed pending trial have much more favorable outcomes.³⁵

²⁹ KELLY & LECY, *supra* note 23, at 12.

³⁰ For example, fourth time drug offenders are subject to a forty-year mandatory minimum if they have previously served three or more separate terms of confinement as a result of three or more separate convictions. *See generally* Grossman, *supra* note 23, at 110–15.

³¹ *See* Grossman, *supra* note 23, at 101 (citations omitted) ("The process by which criminal convictions come about through guilty pleas in exchange for sentencing considerations carries with it the almost inevitable result that those who refuse a plea bargain are punished for exercising the right to trial. This punishment for exercising the right to trial, and the deterrent impact that such a punishment creates for criminal defendants considering whether to go to trial, take place not in rare instances but in the overwhelming number of cases disposed of in federal and state criminal court systems.").

³² *See* Walshe, *supra* note 15 (quoting NORMAN REIMER, EXEC. DIR., NAT'L ASS'N FOR CRIM. DEF. LAWYERS ("Bail is used as ransom to extract a guilty plea. Fact.")).

³³ *See* NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, *supra* note 10, at 9 ("Deprivation of liberty pending trial . . . subjects the defendant to economic and psychological hardship, interferes with their ability to defend themselves, and, in many circumstances, deprives their families of support.").

³⁴ KRISTIN BECHTEL ET AL., *DISPELLING THE MYTHS: WHAT POLICY MAKERS NEED TO KNOW ABOUT PRETRIAL RESEARCH*, PRETRIAL JUSTICE INST. (2012), *available at* [http://www.pretrial.org/download/pji-reports/Dispelling%20the%20Myths%20\(November%202012\).pdf](http://www.pretrial.org/download/pji-reports/Dispelling%20the%20Myths%20(November%202012).pdf). *See* NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, *supra* note 10; Stevens H. Clarke & Susan T. Kurtz, *The Importance of Interim Decisions to Felony Trial Court Dispositions*, 74 J. CRIM. L. & CRIMINOLOGY 476, 503, 505 (1983) (A study of urban felony cases in North Carolina "measured the effects of pretrial detention, *controlling for*

II. THE CASE STUDY: BALTIMORE CITY

A. *The Long Road to Circuit Court for a Felony Case*

An individual faced with the unlucky experience of being arrested in Baltimore City is physically presented to a district court commissioner for a one-on-one interview within twenty-four hours of their arrest.³⁶ Initially, bail is set by a commissioner, who is appointed by the Chief Judge of the District Court of Maryland, but who is not necessarily a judge herself.³⁷ The commissioner communicates with the defendant through a glass partition in Central Booking, and decides whether to set bail, and if so, the appropriate monetary value.³⁸

seriousness of charge, prior convictions, evidence against the defendant, and other variables that might possibly affect both pretrial detention and court disposition [T]he regression analysis [shows] that when two defendants and their cases were alike, but one defendant spent more time in pretrial detention than the other, the former defendant was less likely to have his charges dismissed than the latter and was also more likely to receive a stiffer sentence if convicted.”); JOHN S. GOLDKAMP, *TWO CLASSES OF ACCUSED: STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE* 199 (1979) (In a multivariate regression analysis, the author found a “rather pronounced relationship between defendants’ pretrial statuses and their sentences” The study included 8,171 defendants in Philadelphia. Of those who were convicted, whether in jail or out, 60% were placed on probation or given other non-jail sentences, while 26% of those who were detained until conviction were spared jail sentences.).

³⁵ See Walshe, *supra* note 15 (quoting Robin Steinberg, Executive Director of the Bronx Defenders: “If they have you in jail, the power has shifted to the prosecutorial arm of the system, and they can force you to make a plea. If you are out of jail, the power dynamic is completely different. Our research shows that when bail is posted, at least half the cases are going to be dismissed outright and most will result in no jail time at all. This is why prosecutors fight so desperately for bail.”).

³⁶ See Press Release, Md. Dep’t of Pub. Safety and Corr. Servs., Public Defender’s Office Drops Suit Against Central Booking and Intake Center: Agency Acknowledges “24-hour rule” Violations Virtually Eliminated (Sept. 15, 2006), available at <http://dpscs.maryland.gov/publicinfo/pdfs/pressreleases/20060915.pdf> (dismissing the Baltimore City Public Defender’s Office’s class action suit against Baltimore’s Central Booking and Intake Center for detaining arrestees for longer than twenty-four hours before seeing a commissioner).

³⁷ See ABELL FOUND., *supra* note 9, at n.75 (commissioners are not required to achieve legal degrees; more than three of four Commissioners interviewed stated that their legal training included a paralegal education; about 15% graduated from law school, and one of five commissioners had taken some law school courses).

³⁸ See *Understanding the System*, MD. OFFICE OF THE PUB. DEFENDER, <http://www.opd.state.md.us/Districts/Dist1/YDUHome/ClientFamilyResources/FAQs.aspx> (last visited Sept. 28, 2014).

A charging document is issued to the defendant, which is frequently prepared by the Baltimore City Police Officer who made the on scene arrest and filed an affidavit describing the alleged illegal act.³⁹ Thus, it is the arresting officer who initially decides what crimes to charge the defendant with, including whether they are misdemeanors or felonies.⁴⁰ An individual could also be arrested because of a complaining witness' sworn, handwritten claim alleging that the individual committed a crime.⁴¹ In that situation, a

³⁹ Unfortunately, there are several documented instances of alleged and confirmed dishonesty of members of the police force in Baltimore and nationally. See Michelle Alexander, Opinion, *Why Police Lie Under Oath*, N.Y. TIMES (Feb. 2, 2013), available at <http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html?pagewanted=all>. See also Justin Fenton, *Baltimore Police Officer Charged in Drug Corruption Case*, BALT. SUN (May 31, 2013), available at http://articles.baltimoresun.com/2013-05-31/news/bs-md-ci-police-corruption-indictment-20130531_1_drug-dealer-baltimore-police-officer-west-baltimore; Theo Emery, *Baltimore Police Scandal Spotlights Leader's Fight to Root Out Corruption*, N.Y. TIMES (May 9, 2012), available at http://www.nytimes.com/2012/05/09/us/baltimore-police-corruption-case-tests-commissioner.html?_r=0; Jeff Hager, *Baltimore's Top Cop Turns to Outsiders to Clean up Corruption Inside Police Department*, ABC NEWS (Jan. 27, 2012), available at <http://www.abc2news.com/dpp/news/baltimores-top-cop-turns-to-outsiders-to-clean-up-corruption-inside-police-department>; Patrick R. Lynch, *Police Misconduct: Signs of a Breakdown of Civil Society*, BALT. SUN (Aug. 19, 2011), available at http://articles.baltimoresun.com/2011-08-19/news/bs-ed-police-shooting-letter-20110819_1_police-misconduct-police-officer-civil-society; Justin Fenton, *Lead Detective in Barnes Case Charged in 2012 Incident*, BALT. SUN (Apr. 29, 2013), http://articles.baltimoresun.com/2013-04-29/news/bal-lead-detective-in-phylicia-barnes-case-criminally-charged-in-2012-incident-20130429_1_phylicia-barnes-detective-daniel-t-detective-nicholson; Justin Fenton, *Baltimore Officer Pleads Guilty to Armed Drug Conspiracy*, BALT. SUN (Mar. 11, 2013), available at http://articles.baltimoresun.com/2013-03-11/news/bs-md-ci-police-officer-plea-richburg-20130311_1_kendell-richburg-informant-baltimore-officer; Justin Fenton, *Baltimore Police Officer Charged with Lying in Search Warrant*, BALT. SUN (Nov. 2, 2012), available at http://articles.baltimoresun.com/2012-11-02/news/bs-md-ci-city-officer-perjury-20121101_1_search-warrant-misconduct-charges-baltimore-police-officer.

⁴⁰ MD. RULE § 4-211 (outlining the methods of charging).

⁴¹ *Id.*; *Who Does What in District Court*, MDCOURTS.GOV, <http://www.courts.state.md.us/district/selfhelp/whodoeswhat.html> (last visited Sept. 26, 2014) (many people are surprised to learn that, in Maryland, a private citizen, without any police involvement, can appear before a district court commissioner, any time of day or night, to apply for criminal charges to be issued against another individual; the commissioner decides whether a warrant or summons will issue: "If warrant is issued, the document will be given to a law enforcement agency, which is responsible for finding and arresting the accused person."). This system arguably sets up a mechanism for private persons to use the criminal justice system as a weapon in interpersonal relationships. See *State v. Smith*, 305 Md. 489, 505 A.2d 511(1986) (holding that a district court commissioner, acting on an affidavit of a

district court commissioner will “review the application to determine whether a crime has been committed and if there is reason to believe that the . . . accused committed the crime. If the commissioner determines that there is probable cause, a charging document is issued.”⁴²

When a commissioner approves the misdemeanor charges issued against an individual, the trial date will be set approximately thirty days after the arrest. At that time the individual would receive the State’s offer and have the opportunity to have a trial before a district court judge, pray a jury trial,⁴³ or accept a guilty plea.⁴⁴

When charged with certain felonies,⁴⁵ Maryland law prohibits and individual from being tried in district court, the court in which bail was set.⁴⁶ Under these circumstances, the district court has no jurisdiction. After a preliminary hearing or an indictment by a grand jury, the felony case would be heard in circuit court, where the defendant is afforded the right to a jury trial.⁴⁷

The Maryland Rules require that a preliminary hearing, where live witnesses are required to testify before a judge in support of the State’s case, must take place within thirty days of a defendant’s timely request.⁴⁸ At that time, a judge must decide if probable cause exists to support the felony charge. If the district court judge finds probable cause, the State must file a charging document in circuit court within thirty days.⁴⁹

The State’s Attorney for Baltimore City seems to have adopted a policy of indicting felony cases in lieu of presenting live witnesses at preliminary hearings.⁵⁰ There is no time requirement for the filing of an indictment

private citizen, was authorized to issue a warrant, and that such an issuance did not violate the defendant’s due process rights).

⁴² *Who Does What in District Court*, *supra* note 41.

⁴³ MD. CODE ANN., CTS. & JUD. PROC. § 4-302(e)(2)(i)-(ii) (stating someone who is charged with a misdemeanor which carries more than ninety days of incarceration as a maximum penalty has the option of praying a jury trial, in which case the case would be forwarded to the circuit court).

⁴⁴ Md. R. 4-211(b)(1).

⁴⁵ MD. CODE ANN., CTS. & JUD. PROC. § 4-302(a).

⁴⁶ *Id.* § 4-302(e)(2)(i).

⁴⁷ MD. CODE ANN., CRIM. PROC. § § 4-102, 103.

⁴⁸ Md. R. 4-211(b)(1); MD. CODE ANN., CRIM. PROC. § 4-103.

⁴⁹ Md. R. 4-221(f)(1).

⁵⁰ This has been the experience of the Authors of this Article. *See also* MD. CODE ANN., CRIM. PROC. § 4-103(c)(2) (“If the defendant is charged by grand jury indictment, the right of a defendant to a preliminary hearing is not absolute but the court may allow the defendant to have a preliminary hearing.”). *See also* United States v. Navarro-Vargas, 408 F.3d 1184, 1195 (9th Cir. 2005) (explaining that a grand jury acts as a “rubber stamp” and “affirms what the prosecutor calls upon it to affirm—investigating as it is led, ignoring what it is never advised to notice, failing to indict or indicting as the prosecutor ‘submits’ that it should” (quoting Marvin E. Frankel & Gary Naftalis, *The Grand Jury: An Institution on Trial*, 9, (Farrar Straus

under Maryland statutory law. In fact, the Maryland Rules and the Criminal Procedure Article are both relatively silent on the subject of indictment—no guideposts exist for how the grand jury is convened, what the standard of proof is, or any filing deadlines.⁵¹

If your case is in felony status, then by the time you have wend your way through the process to arrive in circuit court, more than ninety days will have typically passed.⁵² The video bail review hearing in district court will determine the amount of money necessary to gain your freedom. An individual unable to post the designated amount of bail, as set by the district court during the video bail proceeding, may lose his liberty before the government has even “committed itself to prosecute” by filing an indictment (the charging document on which a defendant is “subject to be tried . . .”).⁵³

B. The Importance of a Bail Review Hearing for Felony Cases in a General Jurisdiction Court:⁵⁴ Speedy Trial Concerns

The Sixth Amendment guarantees criminal defendants a speedy trial. One of the primary purposes of this right is “to prevent undue and oppressive

Giroux) (1977)); *People v. Carter*, 566 N.E.2d 119, 124-25 (1990) (Titone, J., dissenting) (Arguing that the prosecutor who presented the case to a grand jury was unlicensed but the majority held that this did not undermine the underlying prosecutorial jurisdiction; Titone, J., dissenting, notes that “a Grand Jury can indict *anyone* or anything—even a ham sandwich. Now, under the majority’s holding, apparently *anyone* can present the People’s case to the Grand Jury—even an unadmitted layperson masquerading as an attorney.”).

⁵¹ *Clark v. State*, 364 Md. 611, 643, 774 A.2d 1136, 1155 (2001) (“Maryland has no statute prescribing a time limit for seeking an indictment for felonies and penitentiary misdemeanors.”). *But see* ABA STANDARDS FOR CRIMINAL JUSTICE, SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES 8 (3d ed. 2006) (“An indictment, information, or other formal charging instrument should be filed within thirty days after the defendant’s first appearance in court after either an arrest or issuance of a citation or summons . . .”).

⁵² *See* Walsh, *supra* note 9, at 40.

⁵³ *State v. Gee*, 298 Md. 565, 574-75, 471 A.2d 712, 716 (1984). *But see* Vernon’s Ann.Texas C.C.P. Art. 12.01, 17.151 (2013) (requiring that a “defendant who is detained in jail pending trial of an accusation against him must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within . . . [ninety] days from the commencement of his detention if he is accused of a felony . . .”; Texas also outlines time limits within which a case must be indicted, even when the accused is released on his own recognizance).

⁵⁴ Md. Code Ann., Cts. & Jud. Proc. §1-501 (explaining that the Circuit Court is also referred to as a court of original jurisdiction and that “[t]he circuit courts are the highest common-law and equity courts of record exercising original jurisdiction within the State.”); Walsh, *supra* note 9, at 39 (describing the unlimited jurisdiction).

incarceration prior to trial”⁵⁵ The four-factor test of *Barker v. Wingo*⁵⁶ is used to determine whether a case should be dismissed for the lack of a speedy trial.⁵⁷ The “speedy trial clock” starts upon “a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge”⁵⁸ As discussed, the district court does not have jurisdiction over felony cases.⁵⁹ The defendant cannot be tried on a statement of probable cause, which is “an accusation made by a peace officer or other person.”⁶⁰ Therefore, the speedy trial clock for a felony does not start upon filing of a statement of probable cause alone, but upon the arrest alleged in the charging document.⁶¹

Multiple postponements in felony cases are common in the Circuit Court of Maryland for Baltimore City.⁶² Frequently, cases are postponed due to a lack of court availability, despite neither party requesting additional time.⁶³ In analyzing a constitutional speedy trial claim, overcrowded courts are considered a more neutral reason, but “nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.”⁶⁴ Many times, the State or the defense requests a postponement to complete more investigation, which sometimes is a result of high caseloads faced by both sides.⁶⁵

In addition to the constitutional right to a speedy trial, Maryland Rule 4-271 requires that a trial be granted within one hundred eighty days of

⁵⁵ *United States v. Marion*, 404 U.S. 307, 320 (1971) (citing *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

⁵⁶ *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972).

⁵⁷ *United States v. Gouveia*, 467 U.S. 180, 190 (1984) (quoting *United States v. MacDonald*, 456 U.S. 1, 8 (1982)). See Part VI, *infra*, for a discussion of other due process violations in the context of video bail review hearings (arguing that the defendant has a due process right to a speedy trial, which is implicated when the defendant appears on video for his bail review hearing, since (1) video bail hearings increase the risk of pretrial incarceration and (2) as the Supreme Court has stated, the “speedy trial right exists primarily to protect an individual’s liberty interest, ‘to minimize the possibility of lengthy incarceration prior to trial’”).

⁵⁸ *United States v. Marion*, 404 U.S. 307, 320 (1971).

⁵⁹ See *supra* Part II.A.

⁶⁰ *State v. Gee*, 298 Md. 565, 572, 471 A.2d 712, 715 (1984).

⁶¹ ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 51, at 8.

⁶² See *Walsh*, *supra* note 9, at 39.

⁶³ See *id.*

⁶⁴ *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

⁶⁵ *Wilson v. State*, 44 Md.App. 1, 10-11, 408 A.2d 102, 108 (1979) (“[D]elay caused by the reasonable preparation and orderly process of the case for some undetermined period will not be weighed against the State.”). But see *Barker*, 407 U.S. at 531 (“[O]vercrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.”).

arraignment⁶⁶ or the date that counsel for defendant filed their written appearance.⁶⁷ For a case to be postponed past the one hundred eighty day deadline, or the “*Hicks* date,” an administrative judge must find good cause for the delay.⁶⁸ In enacting Maryland Rule 4-271, the Maryland “Legislature intended [to] prevent *chronic* delay,” but when the delay is due to “an isolated instance rather than a recurring problem” a finding of good cause is within the administrative judge’s discretion.⁶⁹ Few practitioners would disagree that the court is chronically congested, and defense lawyers must warn their clients about the possibility of no court being available resulting in a postponement.⁷⁰ Regardless of the chronic congestion against which Maryland Rule 4-271 was designed to protect, judges in Baltimore City will routinely find good cause for a postponement when there is no court available.⁷¹

The Circuit Court of Maryland for Baltimore City sporadically operates under a “Differentiated Case Management System” (“DCM”) that outlines the prescribed length of delay from arraignment to trial date for different categories of cases.⁷² The focus of the DCM system is the anticipated length of the trial. Under the DCM, if the trial is expected to take less than three

⁶⁶ Md. R. § 4-271.

⁶⁷ *Id.*

⁶⁸ *State v. Hicks*, 285 Md. 310, 318, 403 A.2d 356, 360 (1979) (holding that dismissal of criminal charges is the appropriate sanction where the State fails to bring the case to trial within the one hundred twenty day period prescribed by the rule and where “extraordinary cause” justifying a trial postponement has not been established).

⁶⁹ *State v. Toney*, 315 Md. 122, 134, 553 A.2d 696, 702 (1989) (quoting *State v. Frazier*, 298 Md. 422, 463, 470 A.2d 1269, 1290 (1984)(emphasis added)). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 51, at 50 (“Delay resulting from chronic congestion of the docket or from failure of the prosecutor to be prepared to go to trial within the allowable period should not be excused.”).

⁷⁰ Dennis Laye, an experienced defense attorney practicing in Baltimore City, remarked, “I advise my incarcerated clients that they will wait at least a year, quite possibly two, before they get a jury trial.” Personal Interview, August 9, 2013. *But see Frazier*, 298 Md. at 458, 470 A.2d at 1288 (explaining that Baltimore City at the time of the trial was not “chronically congested” as the “average disposition time for a criminal case [was] 139 days after *filing*” and, “the proportion of criminal cases which must be postponed by the administrative judge beyond the 180-day deadline, and in which the defendant did not seek or expressly consent to such postponement, [was] less than two percent.”). At the time of publication, officials from the Circuit Court for Baltimore City and Judicial Information Systems in Annapolis, Maryland both indicated that the complete data of the sort cited in *Frazier* was not available. The circuit court did provide the statistic that the average time from filing to disposition was 228 days.

⁷¹ *State v. Bonev*, 299 Md. 79, 81, 472 A.2d 476 (1984).

⁷² CIRCUIT COURT OF MARYLAND FOR BALTIMORE CITY, <http://www.baltocts.state.md.us/criminal/crim-pract.htm> (last visited Sept. 19, 2014).

days, the first trial date should be set within sixty days after the arraignment, while cases that involve “serious personal injury or death” should have a trial date set within one hundred twenty days after the arraignment.⁷³ Despite standards implemented by both the American Bar Association and the National Association of Pretrial Service Agencies distinguishing detained defendants from those on bail for purposes of scheduling, Baltimore City’s DCM system does not consider a defendant’s incarceration as a factor.⁷⁴

Regardless of the reasons for the delay, a defendant who cannot post bail is likely to wait a year or more before being given a trial. Maryland has a two-tier system, “with a limited jurisdiction court responsible for initial proceedings in felony cases and a general jurisdiction court receiving the case only after an indictment or other formal charging instrument has been filed”⁷⁵ In this system, “issues related to the defendant’s custody status are typically addressed first in a limited jurisdiction court (at the defendant’s first appearance following arrest) and again at the formal arraignment on a felony indictment or information in the original jurisdiction court.”⁷⁶

These “re-reviews” of custody status only occur in the Circuit Court of Maryland for Baltimore City upon a written motion by the defendant.⁷⁷ In

⁷³ *Id.*

⁷⁴ ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 51, at 2 (“In establishing statutes or rules for speedy trial and goals and practices for timely resolution of criminal cases, jurisdictions should . . . distinguish between defendants in detention and defendants on pretrial release. The time limits concerning speedy trial for detained defendants should ordinarily be shorter than the limits applicable to defendants on pretrial release.”). *See also* THE NAT’L ASS’N OF PRETRIAL SERV. AGENCIES, *supra* note 10, at 3 (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice. These accelerated time limitations should be shorter than current speedy trial time limitations applicable to defendants on pretrial release. The failure to try a detained defendant within such accelerated time limitations should result in the defendant’s immediate release from detention under reasonable conditions that best minimize the risk of flight and danger to the community pending trial, unless the delay is attributable to or agreed to by the defendant.”).

⁷⁵ ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 51, at 58.

⁷⁶ THE NAT’L ASS’N OF PRETRIAL SERV. AGENCIES, *supra* note 10, at 3.

⁷⁷ Md. R. § 4-216.1(c) (“[s]upervision of detention pending trial. In order to eliminate unnecessary detention, the court shall exercise supervision over the detention of defendants pending trial. It shall require from the sheriff, warden, or other custodial officer a weekly report listing each defendant within its jurisdiction who has been held in custody in excess of seven days pending preliminary hearing, trial, sentencing, or appeal. The report shall give the reason for the detention of each defendant.”).

practice the onus is placed on the defendant to rebut an unspoken presumption of lengthy pretrial incarceration.⁷⁸

The strain on the right to a speedy trial makes the need for a meaningful initial appearance even more pronounced. For reasons discussed below, CCTV bail review hearings lack the necessary safeguards and, therefore, result in erroneous deprivation of liberty.

III. DEHUMANIZING EFFECTS OF CCTV ON THE ACCUSED

A. *How CCTV Communication Affects Perception*

Videoconferencing has been proven to negatively affect perceptions of those depicted in several arenas both inside and outside of the criminal justice system. This section will discuss concepts in social science that explain how personal interactions, from brief encounters to relationships that develop over the course of a lifetime, are based on the ability to experience another's identity and allow people to form judgments of one another. Creating a social interaction in which one can perceive another's identity is what "engenders feelings of engagement or connectedness."⁷⁹ Social interactions are most authentic when individuals can experience one another's identity in a way that reminds them of their own humanity or when they are able to form an attachment to another.⁸⁰

Videoconferencing, as a vehicle for communication, cannot replicate face-to-face communication in real time, despite constant innovation.⁸¹ A technology-based mode of communication creates distance between the interactants, which deprives them of "the richness of social and sensory information that is available face to face."⁸²

⁷⁸ Md. R. § 4-252 ("[M]atters shall be raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise.").

⁷⁹ Bjorn Bengtsson et al., *The Impact of Anthropomorphic Interfaces on Influence, Understanding, and Credibility*, 32 ANN. HAW. INT'L. CONF. SYSTEMS SCI. 1, 3 (1999) ("Normal interaction is comprised of the identities of individuals involved in interaction. Identity creates an impression of the social, which in turn engenders feelings of engagement or connectedness.").

⁸⁰ *Id.* at 5 ("Social interaction with technology seems to arise from the general psychological tendency of people to respond socially in situations in which they are reminded of their own humanity or social selves, or in which they form an attachment to another.").

⁸¹ See Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly Line Justice? The Use of Teleconference in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 267–69 (2008).

⁸² Bengtsson et al., *supra* note 79, at 3 (Researchers found that "despite technological advances that are constantly expanding the frontiers of what is feasible, at present computers still interact awkwardly. They are unable to supply the kind of contingent and fully synchronous interaction that is present in face-to-face

This concept applies to the interaction that occurs when a defendant comes before a judge. The judge's social interaction with the defendant will influence the defendant's perceived credibility, truthfulness, and dangerousness.⁸³ If the interaction between the judge and defendant fails to develop or is critically impaired, they will be unable to adequately experience each other's humanity. In-person interactions are crucial to making these determinations because the synchronistic nature of interaction allows individuals to continuously tailor their speech and conduct to increase their appearance of credibility.⁸⁴ Therefore, it is essential that "the judge [] come face-to-face with the primary informational sources, and probe for what is obscure, trap what is elusive, and settle what is controversial."⁸⁵

A psychological study found that participants who communicated through a computer program, as opposed to in-person, perceived the computer-based communication to be significantly less credible.⁸⁶ This study also found that in-person interactions were seen as "more sociable, likeable, dynamic, and truthful."⁸⁷ In another study, researchers found that mock jurors, who rated the testimony of child witnesses testifying in court against testimony via closed-circuit video, found the in-court testimony to be more believable, despite the fact that the closed-circuit video testimony was actually more accurate.⁸⁸ Child witnesses who testify in court have also been found to be more accurate, intelligent, attractive, and honest than closed-circuit video testimony.⁸⁹ The same study found that jurors were more likely to render a

conversation. Moreover, the sheer interjection of an electronic medium may 'distance' interactants relative to face-to-face interaction. And computer agents, even in multimedia form, do not supply the richness of social and sensory information that is available face-to-face.").

⁸³ See *id.* at 266 ("All aspects of the witness's demeanor-including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other nonverbal communication-may convince the observing trial judge that the witness is testifying truthfully or falsely.").

⁸⁴ Bengtsson et al., *supra* note 79, at 4 ("It is plausible that humans have more behavioral resources at their disposal to achieve an appealing and credible demeanor and that they are better able to adapt their conversation if there are indications that their image is suffering.").

⁸⁵ *United States v. Stanley*, 469 F.2d 576, 582 (D.C. Cir. 1972).

⁸⁶ *Id.* at 12.

⁸⁷ *Id.* at 11 ("Consistent with the argument that social identification is a key consideration in assessing communication formats, partners were seen as more sociable, likeable, dynamic, and truthful when participants engaged in face to face than human-computer interaction.").

⁸⁸ Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 LAW & POL'Y 211, 221 (2006).

⁸⁹ *Id.*

guilty verdict when the child witness testified in court.⁹⁰ Across disciplines, studies have found that real time interactions are more impactful than the video facsimile and the fact-finder's ability to assess characteristics of the defendant via video are critically impaired.⁹¹

Social interaction is comprised of infinite verbal and nonverbal cues. Videoconference bail reviews limit the amount of available information that would be useful to the judge in making a pretrial release determination.⁹² Face-to-face communication allows participants to incorporate nonverbal expression into the interpersonal exchange.⁹³ A defendant's eye contact, posture, and gestures may not be accurately transmitted to the judge, yet these signals provide valuable insight into the defendant's character.⁹⁴ Research suggests that viewing gestures and other nonverbal communication can aid the viewer's comprehension and increase the likeability of the speaker.⁹⁵

Specifically, research has found that eye contact influences the speaker's perceived credibility and trustworthiness.⁹⁶ Eye contact is one of the most important nonverbal gestures that can foster feelings of connectedness.⁹⁷ Witnesses who maintain continuous eye contact with their communication target were considered more credible than the witnesses who held a downward gaze.⁹⁸ Some individuals even associate a downward gaze with deception or distrust.⁹⁹ The logistics of a videoconference interaction makes eye contact impossible, further aggravating the judge's ability to form an adequate assessment of the defendant on the other end of the camera.¹⁰⁰

Voice cues, as well as nonverbal expression, are also altered by the use of videoconference technology.¹⁰¹ Video technology can diminish or amplify the defendant's affect, thus impacting the judge's perception of the

⁹⁰ *Id.* at 221-22.

⁹¹ See Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 879 (2010).

⁹² Walsh & Walsh, *supra* note 81, at 268.

⁹³ Bengtsson et al., *supra* note 79, at 6 ("Additionally, humans have greater ability to be nonverbally expressive and energetic, which may gain them benefits in terms of dynamism.").

⁹⁴ Treadway Johnson & Wiggins, *supra* note 88, at 215.

⁹⁵ *Id.* at 222.

⁹⁶ *Id.* at 268-69.

⁹⁷ *Id.*

⁹⁸ *Id.* at 222 ("These findings are relevant in that a defendant participating in a videoconferenced proceeding might naturally direct his attention to the terminal present at his location, rather than directly into the camera, thus making him appear to be averting his gaze.").

⁹⁹ *Id.*

¹⁰⁰ Treadway Johnson & Wiggins, *supra* note 88, at 222; see also Walsh & Walsh, *supra* note 81, at 268-69.

¹⁰¹ Treadway Johnson & Wiggins, *supra* note 88, at 216.

defendant.¹⁰² Emotion is often conveyed in the lowest and highest vocal frequencies, which is partially lost in video transmission.¹⁰³ This hinders the defendant's ability to show remorse or demonstrate credibility.¹⁰⁴ A psycho-social study concluded: "Overall, it would appear that face-to-face interaction is best for generating positive social judgments and interpersonal relationships."¹⁰⁵

The most troubling aspect of videoconference bail hearings is the physical distance between the judge and the defendant that causes the defendant to be dehumanized.¹⁰⁶ Impaired perception, diminished credibility, and inability to view nonverbal cues diminish the social interaction between the judge and defendant. Psychologists have found that "perceive[ing] another in terms of common humanity activates empathetic emotional reactions through perceived similarity and a sense of social obligation."¹⁰⁷ If "[m]oral actions are the products of the reciprocal interplay of personal and social influences[.]" then a judge, his perception of the defendant as a full, social person now impeded, is less likely to take the "moral action."¹⁰⁸ With CCTV, a judge will be less likely to consider an accused's life circumstances or the impact that incarceration will have on him, reducing his chance of pretrial release.¹⁰⁹

B. Filling in the Gaps of Larose:¹¹⁰ Empirical Evidence from the Cook County and Asylum Hearings

Others have argued that video bail reviews deny defendants due process.¹¹¹ *Larose*, a 1997 case, is the only opinion in the United States that deals with the constitutionality of video bail reviews.¹¹² The *Larose* court held that "bail hearings concern a legally protected interest," but reasoned that the petitioners failed to show that the video bail procedure resulted in a

¹⁰² *Id.*; See also Walsh & Walsh, *supra* note 81, at 268.

¹⁰³ Treadway Johnson & Wiggins, *supra* note 88, at 216.

¹⁰⁴ *Id.*

¹⁰⁵ Bengtsson et al., *supra* note 79, at 13–14.

¹⁰⁶ See Seidman Diamond, *supra* note 91, at 879. See also Walsh & Walsh, *supra* note 81, at 269.

¹⁰⁷ Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 PERSONALITY & SOC. PSYCHOL. REV. 193, 200 (1999).

¹⁰⁸ *Id.* at 207.

¹⁰⁹ Walsh & Walsh, *supra* note 81, at 269.

¹¹⁰ *Larose v. Superintendent, Hillsborough Cnty. Corr. Admin.*, 702 A.2d 326 (N.H. 1997).

¹¹¹ Treadway Johnson & Wiggins, *supra* note 88, at 215 ("Some commentators have argued that, because of the effects of videoconferencing on the behavior and perceptions of participants in a criminal proceeding, its use amounts to a denial of due process for the defendant.").

¹¹² *Larose*, 702 A.2d 326.

“greater risk of erroneous deprivation of that liberty” as enumerated in the *Matthews v. Eldridge* test.¹¹³ No data was presented to demonstrate that technology based hearings adversely affected the defendant’s liberty interest.¹¹⁴

The *Larose* court considered the testimony of the petitioners’ expert witness, a psychologist, who opined that “teleconferencing procedure would adversely bias a judge’s opinion of a defendant” even though “he testified that he had never seen a tape of a video bail hearing, [] none of the articles to which he referred related directly to the issue, and that he had never spoken with either a judge or a defendant who had participated in such a hearing.”¹¹⁵ The court considered a defense attorney’s testimony that “conducting a bail hearing by video affected his ability to be an effective advocate for a client ‘to some extent[,]’” but that “he had no knowledge of how the video bail hearings were currently being conducted”¹¹⁶

A subsequent study demonstrates that videoconference bail review hearings result in significantly higher bails than live hearings.¹¹⁷ In 1999, the Circuit Court of Cook County, Illinois issued a general order requiring that bail reviews, with limited cases excepted, “be conducted by means of closed circuit television.”¹¹⁸ In 2006, Locke Bowman of the MacArthur Justice Center filed a class action lawsuit, and a study was later conducted to analyze how video bail hearings affected outcomes.¹¹⁹ Locke Bowman and Shari Diamond gathered information from the Cook County Clerk’s Office regarding cases eight and one half years prior to the video bails and eight and one half years after.¹²⁰ A study of 645,117 cases revealed “average bond amount for the offenses that shifted to televised hearings increased by an average of 51% across all of the CCTV cases.”¹²¹ The same study noted that “increases of between 54% and 90% occurred for six major felonies subjected to the CCTV.”¹²² Through statistical analysis, the researchers concluded that the “change cannot be attributed to general trends or seasonal variations.”¹²³ Cook County voluntarily halted its use of CCTV bond hearings on December 15, 2008.¹²⁴ One observer noted:

¹¹³ *Id.* at 329. *See infra* notes 225–26 and accompanying text.

¹¹⁴ *Larose*, 702 A.2d at 329

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 328–29.

¹¹⁷ *See* Diamond, *supra* note 91, at 870.

¹¹⁸ *Id.* at 883.

¹¹⁹ *Id.* at 886.

¹²⁰ *Id.*

¹²¹ *Id.* at 897.

¹²² *Id.*

¹²³ Diamond, *supra* note 91, at 897 (“Indeed, results show that immediately after the [closed circuit television procedure] went into effect, the average bond amount for

The substantial increases in bail levels that immediately followed the implementation of videoconferenced bail hearings in Cook County, and which occurred only for the offenses that shifted to videoconferenced hearings, provide precisely the evidence that was missing in *Larose*¹²⁵ and should raise questions about the harmful effects of videoconferenced hearings on defendants.¹²⁶

In the context of immigration court, CCTV hearings have yielded similar results. A statistical analysis of the outcome of over 500,000 asylum removal hearings showed that in-person litigants fare substantially better than those who appear on camera.¹²⁷ Data from the Executive Office for Immigration Review indicated that the “grant rate for asylum applicants whose cases were heard in-person is roughly double the grant rate for the applicants whose cases were heard via [CCTV].”¹²⁸ It should be noted that even when controlling for the variable of counsel, there was still a statistically significant difference in outcome between live and televised asylum hearings.¹²⁹ Represented applicants who appeared in person showed a 38% chance of having their application granted, while those represented applicants who appeared via video had only a 23% chance of gaining asylum.¹³⁰

IV. DUE PROCESS ARGUMENTS AGAINST CCTV FOR BAIL REVIEWS OF FELONY CASES

Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society’s demand for punishment. It is the particular role of courts to hear these voices, for the

the non-treated felonies rose an insignificant 13% (see Figure 8 and Table 1), while the average for treated felonies rose a significant 51%.”).

¹²⁴ *Id.*

¹²⁵ *Larose v. Superintendent, Hillsborough Cnty. Corr. Admin.*, 702 A.2d 326, 329 (N.H. 1997) (holding that videoconference bail review hearings did not violate due process, as “[n]o evidence was offered to suggest that judges set bail at a higher amount for defendants who were arraigned by the video procedures than by in-person procedures.”).

¹²⁶ *Diamond, supra* note 91, at 898.

¹²⁷ *Walsh & Walsh, supra* note 81, at 259.

¹²⁸ *Id.* at 271.

¹²⁹ *Id.* at 271–72.

¹³⁰ *Id.* at 272.

Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.¹³¹

Bail review hearings are intended to secure the accused's appearance at trial. Modern day conveniences are transforming the culture of bail review hearings, minimizing the role the defendant plays in one of the most crucial stages preceding his trial. At a videoconference bail review hearing, many defendants lose their freedom without being afforded procedural safeguards guaranteed by the Due Process Clause.¹³² Without these necessary protections, the risk that defendants are deprived of liberty without due process of law increases. Pretrial incarceration impacts the financial, emotional, and physical well-being of detainees and undermines their confidence in the criminal justice system.¹³³

This section will discuss the constitutional violations of CCTV bail review hearings, including the Sixth Amendment right to counsel, defendants' right to be *physically* present at the hearing, and their right to confront the witnesses against them. Videoconference hearings erode the safeguards inherent in live hearings, thereby denying the accused their right to due process of law when their liberty is on the line.

Not every defendant's experience is identical. Therefore, it is important to note that, while all of the violations identified are relevant, they exist collectively in varying degrees based on the particular circumstances surrounding the administration of the hearing. Due Process is a prism through which these constitutional and common law rights will be viewed. The rights discussed exist to protect liberty. When they are violated, the risk of erroneous deprivation of liberty increases.

A. *The Sixth Amendment Right to Counsel and Ethical Considerations*

Representing indigent defendants in their first appearance in Baltimore City is a task that takes on a frenzied pace. Public Defender Management arrives at Central Booking at around 7:15 a.m. to prepare the docket for the attorneys, who arrive shortly thereafter. Each docket consists of ten or more felony and misdemeanor cases. The attorneys study the charging documents, manually research their clients' criminal history; and attempt to call family and employers to verify defenses, ties to the community, and to inquire if bail will be posted on the defendants' behalf. By 11:00 a.m., the attorney is ready to meet with her clients and begin the interviews. A meaningful

¹³¹ *McCleskey v. Kemp*, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting).

¹³² Walsh & Walsh, *supra* note 81, at 273.

¹³³ See generally Walsh, *supra* note 9, at 27 ("Even a short stint in jail can disrupt a person's employment, education, and housing and exacerbate existing health conditions (or create new ones) . . ."). See also Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C. R.-C. L. L. REV. 259 (2013).

interview lasts about fifteen minutes, yet if the attorney expects to reach the courthouse from the jail before the docket begins, fifteen minutes per client is too much time spent.¹³⁴

The time constraints CCTV imposes on an attorney undoubtedly have a critical impact on the effectiveness of his representation.¹³⁵ Every day public defenders in Baltimore City face a reoccurring dilemma: Whether to sacrifice time with their client¹³⁶ or their physical presence before the judge.¹³⁷ Neither situation is adequate. Once the initial client interview is over, the accused is banished from his attorney's side and denied access to counsel.

i. CCTV Denies the Accused Assistance of Counsel

The Sixth Amendment guarantees that a defendant has a right to the effective assistance of counsel,¹³⁸ and "unrestricted access"¹³⁹ thereof. In *Gideon v. Wainwright*, the Supreme Court guaranteed indigent defendants the right to appointed counsel; this right is extended to the states by the Due

¹³⁴ CCTV bail review dockets occur in two courthouses: John R. Hargrove, Sr. Building (Southern), which is approximately 5 miles from Central Booking, and Borgerding District Court Building (Wabash), which is approximately 9 miles from Central Booking. The Southern docket is comprised of women, and begins at 1:00 p.m. . The Wabash docket begins at 2:00 p.m.

¹³⁵ In a private interview with Judge Braverman, he discussed a common perception: that private attorneys can often be more effective than public defenders in the bail review setting because they are only committed to a single client. A private attorney has more resources and time to verify the client's facts and is more likely to present compelling information that may appeal to the judge during the hearing. Interview with the Honorable Judge Nathan Braverman, District Court of Maryland for Baltimore City (June 18, 2013).

¹³⁶ Zachary M. Hillman, *Is a Defendant Constitutionally "Present" when Pleading Guilty by Video Teleconference?*, 7 J. HIGH TECH. L. 41, 63 (2007). ("One public defender summed up the situation succinctly: 'An attorney can't be two places at once; we don't want to leave the client alone.'").

¹³⁷ Public Defenders are not mandated to be present at the accused's case before a judge. The decision to remain in Central Booking is purely one for the attorney to decide. See Thaxton, *supra* note 20, at 192 (footnotes omitted) ("[P]lacing the defense counsel in the jail with the defendant denies counsel the opportunity for a full exchange with the judge and the prosecuting attorney.").

¹³⁸ *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Supreme Court has not explicitly extended Sixth Amendment right to counsel to an initial bail review hearing. *Rothgery v. Gillespie Cnty*, 554 U.S. 191, 199 (2008) (requiring states to not unreasonably delay the assigning of counsel, not necessarily establishing a U.S. Constitutional right to counsel at bail reviews).

¹³⁹ *Perry v. Leeke*, 488 U.S. 272, 284 (1989) ("It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess."). See generally *Geders v. United States*, 425 U.S. 80 (1976).

Process Clause of the Fourteenth Amendment.¹⁴⁰ Effectiveness of counsel is interdependent on the defendant's presence, and as such, the defendant's right to counsel, explicitly provided for by Maryland Rule 4-216(e) et seq., will not be fulfilled during a video bail conference.¹⁴¹

The right to counsel first attaches upon the "initiation of adversarial judicial criminal proceedings . . .," and then, only during a critical stage.¹⁴² In 2012, the Court of Appeals of Maryland held in *DeWolfe v. Richmond* ("*DeWolfe I*") that the Public Defender Act mandates that the Maryland Office of the Public Defender provide representation to indigent defendants at bail review hearings, in addition to initial appearances.¹⁴³ Immediately after *DeWolfe I*¹⁴⁴ was decided, the Maryland General Assembly amended

¹⁴⁰ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁴¹ The Supreme Court, in *Halbert v. Michigan*, highlighted data to support its conclusion that if indigent defendants, convicted after guilty pleas, did not have counsel to guide them through the State's complex appellate process, their right to appeal would be meaningless:

[Sixty-eight percent] of the state prison populatio[n] did not complete high school, and many lack the most basic literacy skills. . . . [S]even out of ten inmates fall in the lowest two out of five levels of literacy-marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article.

545 U.S. 605, 621 (2005) (holding that the Due Process and Equal Protection Clauses required the state to provide counsel for defendants who wanted to appeal to the state appellate court) (citing A. BECK & L. MARUSCHAK, *Mental Health Treatment in State Prisons*, U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, pp. 3-4 (Jul. 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtsp00.pdf>); see also MD. CODE ANN., CRIM. PROC. § 16-209(a) ("Communications between an indigent individual and an individual in the Office or engaged by the Public Defender are protected by the attorney-client privilege to the same extent as though an attorney had been privately engaged.")).

¹⁴² *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (holding the Sixth Amendment right to counsel did not attach in an identification that took place before the initiation of adversary judicial proceedings).

¹⁴³ *DeWolfe v. Richmond*, 434 Md. 403, 430-31, 76 A.3d 962, 978 (2012) (hereinafter "*DeWolfe I*"); Public Defender Act, MD CODE ANN., CRIM. PROC. § 16-204(b)(2)(i) (stating that representation shall be provided to an indigent individual in all stages of a proceeding, including a bail hearing before a district court or circuit court judge). This paper will not analyze whether, in fact, bail review is a critical stage, but it is assumed that the Maryland State Legislature found it critical enough to deem representation by counsel necessary during this stage.

¹⁴⁴ See generally *DeWolfe I*, 434 Md. 403, 76 A.3d 962; Public Defender Act, MD CODE ANN., CRIM. PROC. § 16-204(b)(2)(i).

the Public Defender Act to exclude the guarantee of counsel from the defendant's initial appearance before a commissioner.¹⁴⁵ The legislature, however, left intact the guarantee to assistance of counsel during the bail review stage.¹⁴⁶

While the Supreme Court has not held bail review hearings to be a critical stage, in a recent 2013 case superseding *DeWolfe I*,¹⁴⁷ the same court found that Maryland criminal defendants have a due process right under the due process component of the Maryland Declaration of Rights to counsel at their initial bail hearings.¹⁴⁸ The decision holds significant implications for ensuring indigent defendants retain all constitutional safeguards guaranteed during all stages of the trial.¹⁴⁹ Early intervention by an attorney, such as during the bail review stage, has a substantial impact on the outcome of the pretrial hearing, as well as the outcome of the trial.¹⁵⁰

In most cases "if the defendant has a constitutional right to be present . . . undoubtedly he has a constitutional right to . . . counsel at such time."¹⁵¹ The case in Baltimore City poses a unique situation. The Maryland Legislature has implicitly reaffirmed its belief that bail review hearings are a critical stage. Just as the right to counsel flows from the right to presence, so does the right to presence flow from the right to counsel. Case law supports the inference that "an essential concomitant of a defendant's right to effective

¹⁴⁵ Public Defender Act, MD CODE ANN., CRIM. PROC. § 16-204(b)(2)(ii).

¹⁴⁶ *Id.*

¹⁴⁷ *DeWolfe*, 434 Md. 403, 76 A.3d 962, *on reconsideration by DeWolfe v. Richmond*, 434 Md. 444, 456, 76 A.3d 1019, 1026 (2013)(hereinafter "*DeWolfe II*") (further holding that indigent defendants are entitled to counsel before a commissioner).

¹⁴⁸ *DeWolfe II*, 434 Md. at 456, 76 A.3d at 1026.

¹⁴⁹ Steven Lash, *Hearing: Judges, Not Commissioners, Would Set Bail on Work Days*, MD. DAILY RECORD, Jan. 6, 2014. ("Del. Joseph F. Vallario Jr., who chairs the influential House Judiciary Committee, said Monday that he prefers the current bifurcated system of a bail hearing and review. But he added he recognizes the financial strain maintaining the two-tier system would have on the state's coffers following the high court's decision in *DeWolfe v. Richmond* . . . Vallario, however, said he remains deeply opposed to holding bail hearings by videoconference. . . . The justice system must make 'sure that a defendant has the ability to face a judge when he is being detained,' added the delegate, who also handles criminal defense work as an attorney in private practice.").

¹⁵⁰ Colbert, *supra* note 9 at 1758–61.

¹⁵¹ *Leckliter v. State*, 75 Md. App. 143, 153, 540 A.2d 847, 852-53 (1988) (holding that the process of jury separation was merely a housekeeping measure and the defendant was not entitled to be present during that time and accordingly, not entitled to counsel at that time).

assistance of counsel” is the presence of the defendant.¹⁵² The U.S. Supreme Court has recognized:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.... [A defendant] is unfamiliar with the rules of evidence.... He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.¹⁵³

The defendant is presumed innocent, but because he is incarcerated, he suffers from a deficiency of that presumption.¹⁵⁴ He will be presented to the court in an ill-fitting bright yellow jumpsuit. In the courtroom, he would be able to have counsel next to him to humanize him. An attorney cannot stand up next to the client when he is in the detention center.¹⁵⁵ The defendant becomes a miniature character on a screen instead of a human being.¹⁵⁶

While the defendant is in a remote location, his lawyer cannot answer questions, and, perhaps most importantly, she cannot hear any variances her client has to the information provided by the Pretrial Services Representative

¹⁵² *United States v. Washington*, 705 F.2d 489, 497–98 (D.C. Cir. 1983) (defendant had the right to be present during voir dire, and it was error, albeit harmless, to exclude him from the process).

¹⁵³ *Geders v. United States*, 425 U.S. 80, 88–89 (1976) (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)). See also Hillman, *supra* note 136, at 63 (“One can scarcely imagine a more ineffective situation regarding counsel-client private matters than when the defendant and counsel are in different locations. The defendant relies upon his or her attorney to offer sound advice and to argue their case as effectively as possible. When a defendant is separated from his or her attorney, the situation changes dramatically. The reliance and trust created during the attorney client relationship may become suspended by the technology. If . . . the situation serves to ‘chill’ communications, the attorney may not be able to adequately argue on behalf of his or her client, thus rendering the defendant’s situation less fair and just.”).

¹⁵⁴ Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 50 (2005) (“There is a strong correlation between pretrial detainment and conviction.”). See also BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES 16, tbl. 13 (Dec. 2000), available at <http://www.bjs.gov/content/pub/pdf/fdluc00.pdf>.

¹⁵⁵ Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1130 (2004) (“The defense attorney cannot provide the kind of support that positioning in the courtroom offers, such as standing up with and next to the client when the client stands”). See also Hillman, *supra* note 136 (“One public defender summed up the situation succinctly: ‘An attorney can’t be two places at once; we don’t want to leave the client alone.’”).

¹⁵⁶ See *supra* Part IV (for a discussion of the psychological impact of video communication and the dehumanizing effects of CCTV on the accused).

or the Assistant State's Attorney.¹⁵⁷ The attorney renders assistance at bail review hearings by listening to her client's input and forming proffers and arguments based on the information he provides. Counsel may be familiar with the case and the anticipated arguments at the hearing, but the client frequently has firsthand information about the nuances of the information the judge is to consider, such as his "family ties, employment status and history, financial resources, . . . length of residence in the community, and length of residence in [the s]tate."¹⁵⁸ Even if the attorney is able to consult with the defendant in person prior to the hearing, the advocate will not know the Pretrial Services representative's or the State's recommendation until moments before the hearing, or, more likely, during the hearing itself.

District court judges in Baltimore City weigh the factors in determining a defendant's likelihood of returning to trial and his risk to public safety. One district court judge likened the situation to a "crystal ball," noting that "you can never know if a defendant will make bail, if in fact they will return to trial, or be a risk to the community."¹⁵⁹ This judge continued, "It is about balancing these factors and an attorney standing next to the defendant will not change the information that is provided."¹⁶⁰

The issue we face is not whether counsel can "change" the information that is provided, but whether counsel can render effective assistance by eliciting helpful and relevant information from the client and contextualizing the facts in light of applicable law. CCTV in bail review hearings denies communication between the accused and his attorney. The affirmative act of administering CCTV hearings is a form of governmental interference directly related to the denial of counsel. Therefore, the principle established in

¹⁵⁷ The Baltimore defendant would be located at the Central Booking at 300 E. Madison Street, which is 1.7 miles from the Eastside District Court, 5.3 miles from the John R. Hargrove, Sr. District Court, or 8.8 miles from the Borgerding District Court. In light of the proximity from the court to the holding facility, no argument can be made that videoconferencing eases the burden of transporting inmates over long distances. *See* Poulin, *supra* note 155, at 1162 ("Courts may employ videoconferencing even when it seems unnecessary. In some jurisdictions where the detention facility is close to the court, the court nevertheless employs videoconferencing.") (footnote omitted). *But see* Michael D. Roth, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 190-191 (2000) ("A notable example of how remote appearances can save time and money was the arraignment in New Jersey federal court of the alleged Unabomber on charges of, inter alia, first-degree murder. 'The problem was that Theodore J. Kaczynski was being held in Sacramento, California. Estimated costs of transporting the defendant were \$30,000. Using [videoconferencing] the court conducted the arraignment at a cost of about \$45.00'") (footnotes omitted).

¹⁵⁸ Md. R. § 4-216.

¹⁵⁹ Interview with the Honorable Judge John R. Hargrove, District Court of Maryland for Baltimore City, June 13, 2013.

¹⁶⁰ Interview with the Honorable Judge John R. Hargrove, District Court of Maryland for Baltimore City, June 13, 2013 (emphasis added).

Strickland does not apply when analyzing the defendant's denial of his Sixth Amendment right to counsel in the context of videoconference bail review.¹⁶¹ The central issue becomes whether the State shall be permitted to interfere with and restrain the accused's right to assistance of counsel.

In *Geders v. United States*, the Supreme Court distinguished governmental interference with the right to counsel from counsel's failure to provide effective assistance.¹⁶² The Court held that the "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."¹⁶³ Analogous to *Geders*, CCTV displaces the attorney and his client from the traditional seating arrangement¹⁶⁴ where the two have the opportunity to converse privately, prior to, during, and after the hearing. Counsel's inability to represent his client effectively is due to the inherent flaws of a system that was created for the convenience of the government. The promise of *Gideon* is empty when the defendant is removed from his own bail review hearing.¹⁶⁵

¹⁶¹ The *Strickland* Court held that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 669 (1984).

¹⁶² *Geders v. United States*, 425 U.S. 80 (1976) (holding that a trial judge's order preventing defendant from consulting his counsel during a seventeen hour overnight recess between his direct and cross-examination deprived defendant of his right to assistance of counsel and was invalid).

¹⁶³ *Perry v. Leeke*, 488 U.S. 272, 280 (1989), (citing *Geders v. United States*, 425 U.S. 80 (1976)).

¹⁶⁴ CCTV allows the defendant to remain in Central Booking where he will be seated amongst other detainees. Collectively, their image is transmitted through a video camera to the judge's courtroom. The judge's image is simultaneously transmitted to a TV screen where the accused can see him seated. The attorney has the choice to either remain in Central Booking, where the client is located, or to travel to the courthouse and physically represent her clients' cases before the judge. The latter clearly disconnects the two parties by miles. It may seem as if the attorney will be able to communicate with her client if she remains in Central Booking, but her client remains seated amongst others awaiting bail review and she is kept several feet away. The traditional seating arrangement is one in which the attorney and client are seated next to each other, at the same table, and the two are capable of having a private exchange as the hearing progresses. Simply by preventing the attorney and his client from having any communication, CCTV does not sustain the traditional role attorneys are intended to carry out when representing a client.

¹⁶⁵ See *Gideon*, 372 U.S. 335. See also Juliana B. Humphrey, *The Folly of Video Courts*, INDIGENT DEF. (NLADA, Washington D.C., Md.) Sept–Oct. 1998, V.2 No. 4. ("The NLADA Board of Directors in March 1990 resolved that the Association 'strongly' opposed the employment of [CCTV] for criminal arraignments because of the adverse impact on the accused's Sixth Amendment right to the effective assistance of counsel.").

Data demonstrates that representation by counsel positively impacts the outcome of the accused's bail review hearing, so the denial of counsel is a significant factor.¹⁶⁶ With CCTV bail reviews, attorneys have to choose whether to remain in the jail with their client during the hearing or to travel to the courthouse to be in the same room as the judge. Judge Cooper's experience is that representation is hindered if the attorney is not present in the courtroom, but he acknowledges the time constraints attorneys face, stating, "I would rather have the attorney remain with the client so he does not sacrifice important information-gathering time."¹⁶⁷

Proponents of CCTV bail review hearings would suggest that the system operates fairly when the attorney remains at Central Booking with her client. However, there is a lack of consistent training and oversight of correctional officers who organize detainees for the CCTV hearings within Central Booking's videoconference room.¹⁶⁸ By contrast, bailiffs of the court are accustomed to the decorum of courtroom proceedings, and the presiding judge is able to instruct them at any time. When the courtroom is extended to the secured facility through videoconference technology, the judge is not privy to the hostile, demeaning, and potentially unconstitutional conduct of the correctional officers.¹⁶⁹

During one observed instance of CCTV bail review, a correctional officer denied a public defender's request to speak with one of her clients in Central Booking before the videoconference system was activated and before the judge was seated at the bench. The judge was unaware of the controversy. The public defender, Megan Lewis, did not relent, and called for another correctional officer to intervene. Ms. Lewis and her client were eventually

¹⁶⁶ Colbert, *supra* note 9; THE ABELL FOUND., *supra* note 9 (Defendants represented by counsel were "two and one-half times more likely to be released on their own recognizance . . . [t]he bail review judge reduced the bail amount for one out of every two [represented defendants], but only one out of every seven" who were unrepresented).

¹⁶⁷ Interview with the Honorable Judge Robert Cooper, District Court of Maryland for Baltimore City, June 12, 2013.

¹⁶⁸ See, e.g., Ian Duncan et al., *Inside Jail Run From Within*, THE BALT. SUN (Apr. 28, 2013), <http://www.baltimoresun.com/news/maryland/bal-black-guerrilla-family-tavon-white-prison-corruption-20130425,0,7483161.html>; Roger Baysden, *Fix City Jail by Tearing Up Officers' 'Bill of Rights'*, THE BALT. SUN (May 21, 2013), http://articles.baltimoresun.com/2013-05-21/news/bs-ed-city-jail-letter-20130521_1_maryland-voters-correctional-officers-bill-appeals-board; Mismanagement and Failed Leadership Led to the Debacle at Baltimore's Jail, THE BALT. SUN (May 9, 2013), http://articles.baltimoresun.com/2013-05-09/news/bs-ed-prison-scandal-20130509_1_prison-guards-prison-system-failed-leadership.

¹⁶⁹ See NAT'L ASS'N PRETRIAL SERV. AGENCIES, *supra* note 10 ("The first appearance before a judicial officer should take place in such physical surroundings as are appropriate to the administration of justice" with commentary adding that the first appearance should be "conducted with the dignity and decorum that a court should convey.").

allowed to speak, but the two correctional officers hovered over their conversation, failing to recognize attorney-client privilege. Correctional officers maintain order within Central Booking—they are not charged with the duty of protecting the defendants' rights.

Blockades to communication are commonplace. These disputes are not always resolved in such a way that allows for the attorney to consult with her client. Valuable preparation time is lost, and arguing with correctional officers over basic client communication standards creates an unnecessary distraction from the administration of justice.¹⁷⁰

Extending the courtroom to untrained personnel, outside of the judge's reach and view, has grave implications for the accused's constitutional right to access counsel. Whether intentional or unintentional, correctional officers often deny attorneys the opportunity to meet privately and to communicate with their client prior to, or during, a video bail docket.¹⁷¹

ii. Attorneys Cannot Fulfill the Ethical Duties of Advising and Advocating through a CCTV Proceeding

A lawyer has a duty to *advise*,¹⁷² to *communicate* with,¹⁷³ and to *advocate* for her client at all times during the course of the representation.¹⁷⁴ A lawyer

¹⁷⁰ “The right to a fair trial and effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments extends to pre-trial detainees.” *Collins v. Schoonfield*, 344 F. Supp. 257, 280 (D. Md. 1972) (citations omitted) (holding that inadequate facilities in attorney-client visiting rooms constituted denial of effective assistance of counsel when a pretrial detainee in city jail was prevented from communicating with his attorney as a form of discipline). *Collins* can be analogized to the method in which bail review hearings are currently conducted. The separation of the attorney from his client during the hearing hampers the attorney's ability to confer with his client and to riposte statements made by Pretrial Services. If the attorney is in the courthouse and the accused remains in Central Booking, CCTV disconnects the attorney from his client. In the case of Baltimore City, there is no alternative for the attorney and his client to confer during the bail review hearing, in private, without breaking privilege. Attorneys are not provided with a secured phone or fax line in which they can privately confer or share documents with their clients during the hearing. *See also* Jack Rubin, *Central Booking and Jails are Failing*, THE BALTIMORE SUN, Aug. 7, 2012, http://articles.baltimoresun.com/2012-08-07/news/bs-ed-jail-letter-20120807_1_deplorable-conditions-baltimore-city-detention-center-interviews.

¹⁷¹ This has been the experience of the Authors.

¹⁷² Md. R. 16-812 (2005) (also codified and set forth in Appendix as MD. LAWYERS' RULES OF PROF'L CONDUCT R. 1.4 (2005)) (hereinafter “MLRPC”). *See also Ideals of Professionalism*, MARYLAND PROFESSIONAL CENTER, INC., <http://www.marylandprofessionalism.org/images/pdf/2216633.pdf> (last visited Sept. 16, 2014) (“[Lawyers should] keep a client apprised of the status of important matters affecting the client and inform the client of the frequency with which

cannot effectively communicate with her client over a closed circuit television system, as the defendant will not be able to confer in confidence.¹⁷⁵ All exchanges will be audible to the judge, the prosecution, the members of the public in the courtroom, and other inmates and jail personnel located in the room from where the defendant's images are being projected. Communications that would be privileged if the defendant were present become very public. All the defendant's statements will be recorded, and could be used against him.¹⁷⁶

Specifically, the defendant, over CCTV, will not be able to benefit from counsel's advice about decorum.¹⁷⁷ The defendant may want to interject facts or arguments, and counsel will not, over video, be able to discretely

information will be provided, understanding that some matters will require regular contact . . .").

¹⁷³ See the MLRPC, *supra* note 172, R. 2.1. See also Preamble to MLRPC, *supra* note 172 ("[A]s advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.").

¹⁷⁴ See Preamble to MLRPC, *supra* note 172 ("[A]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

¹⁷⁵ Hillman, *supra* note 136, at 63 ("Furthermore, even if the defendant and counsel can speak over a private line, counsel will suffer from the same problems that a judge may encounter when video teleconference is used, i.e., the inability to detect non[verbal [sic] cues and the problems caused by the camera-video setup. . . . [E]ven if privileged communications can be provided, the relationship and conversation between attorney and defendant may be chilled. This will contribute to a lower threshold of advice and communication which weighs unfairly against the defendant.") (footnotes omitted).

¹⁷⁶ *Fenner v. State*, 381 Md. 1, 27, 846 A.2d 1020, 1034 (2004) (holding that the trial court's admission of defendant's statements, made in response to the judge's question, "Is there anything you'd like to tell me about yourself, sir[.]" while defendant was not represented by counsel at an initial appearance, did not violate the Fifth or Sixth Amendments); *Schmidt v. State*, 60 Md. App. 86, 101, 481 A.2d 241, 248-49 (1984) (upholding trial court's admission of a defendant's statement made at a bail review); *Cowards v. Georgia*, 465 S.E.2d 677, 679, (Ga. 1996) (holding that defendant's statements made at bail review were properly admitted in trial); *United States v. Ingraham*, 832 F.2d 229, 237-39 (1st Cir. 1987) (affirming a trial court's admission of statements a defendant made during a "harangue" at his bail review); *United States v. Melanson*, 691 F.2d 579, 584 (1st Cir. 1981) (affirming a trial court's admission of exculpatory statements a defendant made while unrepresented at a bail hearing, and remarking that "factors pertinent to the granting of bail, such as 'the nature and circumstances of the offense charged' and 'the weight of the evidence against the accused,' see 18 U.S.C. § 3146, may inspire an accused to try to show, unadvisedly, that matters were different from what the government portrays, getting him into hot water as a result"). See *United States v. Lentz*, 524 F.3d 501, 523-24 (4th Cir. 2008) (discussing attorney-client privilege and the waiver of that privilege when the defendant knows his telephone discussion with his lawyer is being recorded).

¹⁷⁷ See Poulin, *supra* note 155 at 1129-30.

advise him about the propriety or benefit of doing so.¹⁷⁸ The defendant may feel emotional over the arguments or outcome of the hearing, and may express his disappointment in a way that reflects negatively on him.¹⁷⁹ One of counsel's tasks is to assist the defendant in presenting himself favorably; however, over a video connection, counsel can be of no help to her client in this task.

There is a clear deficiency within the system when an attorney cannot communicate with her client in confidence, and present the information he shares to the trier of fact. If the Public Defender Act mandates representation at bail review hearings, that representation must comport with the rules of ethics.¹⁸⁰

B. Right of Defendant to be Physically Present

The right to presence has deep roots in English common law, where accused felons were traditionally denied the assistance of counsel.¹⁸¹ Denial of counsel gave a defendant's right to presence "a position of even greater importance."¹⁸² American courts did not adopt the English common law provision, as the concept of denying the accused representation was thought to be an "inherent irrationality of the English limitation."¹⁸³ The Fourth Circuit identified two prevalent rationales behind the defendant's right to be present:

- (1) [A]ssuring nondisruptive defendants the opportunity to observe—and . . . to understand—all stages of the trial not involving purely legal matters generally incomprehensible to the layman in order to prevent the loss of confidence in

¹⁷⁸ *Id.* at 1130.

¹⁷⁹ "The risk, of course, is that if the defendant displays inappropriate behavior—any conduct not within the norm for the court—the court will evaluate the defendant negatively. That negative evaluation can precipitate specific negative findings (that the defendant poses a risk to herself or others) or simply prompt the court to exercise discretion against the defendant." *Id.* "[I]f the defendant feels compelled to respond to the prosecution's allegations, but counsel believes it would be imprudent for the defendant to address the court, the physical separation between defendant and counsel will make it more difficult for counsel to calm and silence the defendant." *Id.* at 1148 (footnotes omitted).

¹⁸⁰ *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 16-209 (West 2008) ("Communications between an indigent individual and an individual in the Office or engaged by the Public Defender are protected by the attorney-client privilege to the same extent as though an attorney had been privately engaged.").

¹⁸¹ *United States v. Gregorio*, 497 F.2d 1253, 1257 (4th Cir. 1974), *overruled on other grounds by* *United States v. Rolle*, 204 F.3d 133 (4th Cir. 2000).

¹⁸² *Id.* at 1258–59.

¹⁸³ *Id.* (citing *United States v. Ash*, 413 U.S. 300, 306 (1973)).

courts as instruments of justice . . . [and] (2) protecting the integrity and reliability of the trial mechanism by guaranteeing the defendant the opportunity to aid in his defense.¹⁸⁴

These rationales establish a framework for a fair and just trial, and the reasoning equally applies to physical presence in bail review hearings.¹⁸⁵

Rule 43 of the Federal Rules of Criminal Procedure (“Rule 43”) governs when a defendant is required to be present in federal proceedings.¹⁸⁶ The Fifth Circuit analyzed the plain meaning and context of Rule 43, concluding that “Rule 43(a) requires a defendant’s ‘presence’ . . . at all stages of trial. The rights protected by Rule 43 include the defendant’s constitutional Confrontation Clause and Due Process rights, and the common law right to be present.”¹⁸⁷

The law has developed such that the right for the accused to be physically present at a pretrial proceeding is intertwined with his right to counsel. The Maryland Rules also explicitly require that the “[p]ublic [d]efender shall provide representation to an eligible defendant at the initial appearance[.]”¹⁸⁸

¹⁸⁴ *Gregorio*, 497 F.2d at 1258–59.

¹⁸⁵ “Because many of the defendants at first appearance proceedings are likely to be in an anxious, confused, or physically or mentally unwell state (especially if they have been abusing drugs or alcohol, or have been involved in a physical altercation), it is especially important for the judicial officers and others who interact with them to make sure that they understand what is happening.” See NAT’L ASS’N OF PRETRIAL SERV. AGENCIES, *supra* note 10, (commentary to Standard 2.2(c)): “At any pretrial detention hearing, defendants should have the right to: (i) be present”).

¹⁸⁶ See *United States v. Lawrence*, 248 F.3d 300 (4th Cir. 2001) (defendant had right to be present during sentencing, physically, not by CCTV, despite the fact that he had acted aggressively during court proceedings in the past). See also *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999) (sentencing ought not take place unless the defendant is physically present, and the meaning of the word presence as used in Rule 43 is not satisfied by videoconference); *United States v. Washington*, 705 F.2d 489 (D.C. Cir. 1983) (where the trial judge conducted a portion of voir dire at the bench, out of the defendant’s hearing, defendant’s exclusion from a portion of voir dire was harmless error; however, the court noted that a defendant’s right to be present in order to assist counsel applied during voir dire).

¹⁸⁷ *Navarro*, 169 F.3d at 236.

¹⁸⁸ Md. R. 4-216(e)(2) (“Duty of Public Defender. Unless another attorney has entered an appearance or the defendant has waived the right to counsel for purposes of an initial appearance before a judge in accordance with this section, the Public Defender shall provide representation to an eligible defendant at the initial appearance.”).

and that the judge shall advise the defendant of that right.¹⁸⁹ In *Rothgery v. Gillespie County*, the appellant, originally unrepresented, was arrested and charged with being a felon in possession of a gun, despite the fact that he had no prior criminal history.¹⁹⁰ The court held the accused's right to counsel attached at his initial appearance, and that states cannot unreasonably delay assigning representation to indigent defendants.¹⁹¹

In *United States v. Wade*, the Supreme Court of the United States construed the Sixth Amendment right to counsel to apply to critical stages¹⁹² of the proceeding.¹⁹³ While the Court has not explicitly held that a bail review hearing is a critical stage, counsel's representation is eviscerated without his client.¹⁹⁴ The accused is the center of the defense; for it is his experiences, his memories, and his life that are being discussed. The hearing is a fluid process where information is conveyed quickly, and an attorney needs continuous input from his client.¹⁹⁵ When counsel's representation is required, together both he and the defendant must stand together before the court. When counsel is not present, a defendant's belief that he has no input in his own trial amplifies:

Criminal defendants, especially minorities, often feel they are "outsiders" rather than participants in the adjudication of justice. [They] may already distrust and feel intimidated by the criminal justice system, [and] CC[TV] provide[s] another bar to their full understanding of the proceedings and reinforce[s] their distrust of the system. CC[TV] only further magnif[ies] this distrust and alienation.¹⁹⁶

¹⁸⁹ Md. R.4-216(e)(3)(A)(i) (stating that the judge at a bail review hearing shall advise the defendant that he has a right to an attorney at that proceeding).

¹⁹⁰ *Rothgery v. Gillespie Cnty.*, 554 U.S. 191 (2008).

¹⁹¹ *Id.* at 213.

¹⁹² *United States v. Wade*, 388 U.S. 218 (1967) (holding a post indictment lineup in the absence of counsel was a violation of the Sixth Amendment, in which counsel would remove any taint of unfairness), *abrogated by* *Wood v. State*, 196 Md. App. 146, 7 A.3d 1115 (2010).

¹⁹³ "As early as *Powell v. State of Alabama*, *supra* we recognized that the period from arraignment to trial was 'perhaps the most critical period of the proceedings,' during which the accused 'requires the guiding hand of counsel' if the guarantee is not to prove an empty right." *Wade*, 388 U.S. at 225 (citing *Powell v. Alabama*, 287 U.S. 45, 54 (1932) (citations omitted)).

¹⁹⁴ *See infra* Part V.C.ii.

¹⁹⁵ Colbert, *supra* note 9 ("The [bail review] hearing took slightly more time when an attorney was present: on average, two minutes and thirty-seven seconds, versus one minute, forty-seven seconds without counsel.").

¹⁹⁶ *See* Thaxton, *supra* note 20, at 197–98 (footnotes omitted).

While the Constitution does not guarantee the defendant a right to be confident in his proceedings,¹⁹⁷ the defendant's inability to comprehend the bail review process is further strained by videoconference hearings. The removal of safeguards, such as the right to counsel, furthers a defendant's distrust in the process.¹⁹⁸ A familiar admonishment to the defendant is, "[d]on't speak because what you say is being recorded and will be used against you." This is good advice under the circumstances; the defendant is miles away from his counsel, and his words, if audible at all, will be heard by the judge and made part of the court record.¹⁹⁹ The public defender collects extensive information from her client. Pretrial Service's proffer is not disclosed in advance of the CCTV hearing, however, so counsel is unable to communicate its contents to her client or to prepare a response to that proffer ahead of time. For this reason, the attorney should be within a whisper's distance during the hearing.²⁰⁰

A fair and just trial is kindled by an initial confidence vested in the pretrial stage.²⁰¹ The use of technology must be restrained to ensure fairness

¹⁹⁷ *United States v. Baker*, 45 F.3d 837, 846 (4th Cir. 1995).

¹⁹⁸ *See* Thaxton, *supra* note 20, at 198 ("Keeping a defendant in her jail cell while her attorney is in the courtroom perpetuates a defendant's distrust of her attorney.").

¹⁹⁹ *See* Fenner v. State, 381 Md. 1, 27, 846 A.2d 1020, 1034 (2004) (holding that the trial court's admission of defendant's statements, made in response to the judge's question, "Is there anything you'd like to tell me about yourself, sir[.]" while defendant was not represented by counsel at an initial appearance, did not violate the Fifth or Sixth Amendments); *Schmidt v. State*, 60 Md. App. 86, 101, 481 A.2d 241, 248-49 (1984) (upholding trial court's admission of a defendant's statement made at a bail review); *Cowards v. Georgia*, 465 S.E.2d 677, 679, (Ga. 1996) (holding that defendant's statements made at bail review were properly admitted in trial); *United States v. Ingraham*, 832 F.2d 229, 237-39 (1st Cir. 1987) (affirming a trial court's admission of statements a defendant made during a "harangue" at his bail review); *United States v. Melanson*, 691 F.2d 579, 584 (1st Cir. 1981) (affirming a trial court's admission of exculpatory statements a defendant made while unrepresented at a bail hearing, and remarking that "factors pertinent to the granting of bail, such as 'the nature and circumstances of the offense charged' and 'the weight of the evidence against the accused,' *see* 18 U.S.C. § 3146, may inspire an accused to try to show, unadvisedly, that matters were different from what the government portrays, getting him into hot water as a result"). *See* *United States v. Lentz*, 524 F.3d 501, 523-24 (4th Cir. 2008) (discussing attorney-client privilege and the waiver of that privilege when the defendant knows his telephone discussion with his lawyer is being recorded).

²⁰⁰ The language of Rule 43 of the Federal Rule of Criminal Procedure demonstrates, implicitly, that initial physical presence must be required where the rules affirmatively indicate that a waiver of presence can be made. *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999). *See also* *Illinois v. Allen*, 397 U.S. 337, 351 (1970) (trial judges should allow attorney-client communication when defendant is excluded).

²⁰¹ *See* *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

for the accused.²⁰² The right of the accused to be physically present before a judicial officer is deeply rooted in our system of fostering fair and just trials for all who face the possibility of incarceration.²⁰³

Character evidence is a form of propensity evidence that is not permitted during trial in order to prevent the jury from forming inferences of guilt against the accused.²⁰⁴ Bail review is the only time during the accused's proceeding that his character and prior bad acts are discussed substantively. At bail review, the accused's character is directly at issue, and his absence from the hearing prevents any opportunity to rebut representations made to the court.²⁰⁵ A defendant suffers a severe indignity by being subjected to a discussion about his past acts while he bears the scrutiny silently.

Maryland's bail review hearings have adversarial components that cannot be avoided simply by labeling Pretrial Services a "neutral party." The charges presented against the accused contain evidence from the arresting police officer. A police officer is not a neutral party, as his duty is to ferret out crime. All too often, arresting officers have a motive to embellish on factual information to support an arrest.²⁰⁶ Law enforcement agents'

²⁰² Adding an insightful analogy to our understanding of presence and the intention of the legislature, Justice Widener observes: "The problem presented here is at least as old as the trial of Walter Raleigh, who begged the court in vain to bring Lord Cobham from the Tower. Sending the televised image of a witness from Butner to the City of Raleigh is no different than sending Cobham's writings from the Tower to Winchester." *Baker*, 45 F.3d at 850-51 (Widener, J., dissenting). The case of Sir Walter Raleigh is more prevalent than ever as it reminds parties within the criminal justice system why formalities such as physical appearance were deliberately created and protected. Any substitute for physical presence cannot be as meaningful.

²⁰³ The Honorable Spottswood William Robinson III advocated for the defendant's right to physical presence during the bail review stage, stating: "The trial court is not only the traditional but also the superior tribunal for the kind of information gathering which a sound foundation for a bail ruling almost inevitably requires. For it is there that, at a hearing, the judge can come face-to-face with the primary informational sources, and probe for what is obscure, trap what is elusive, and settle what is controversial." *United States v. Stanley*, 469 F.2d 576, 581-82 (D.C. Cir. 1972).

²⁰⁴ Lester, *supra* note 154, at 35-36 (citations omitted) ("The rules of evidence themselves prohibit the practice of using past actions to prove future actions. This certainly should not be a guiding principle when the future action has not and may never even occur. A presumption of guilt accompanies a defendant instead of a presumption of innocence. The presumption of guilt is not only for the charged crime but also for future crimes.").

²⁰⁵ *Id.* at 35 ("Basing future actions on mere allegations of prior indiscretions necessarily requires a substantive discussion regarding the validity of the alleged crime. To have such a discussion at a point when discovery is minimal, and the availability of important witnesses is not required, places the defendant at a severe information disadvantage.").

²⁰⁶ See generally *supra* note 40.

representations are given great weight at bail review hearings, and go largely unchallenged because the defense has not been provided with discovery.²⁰⁷ The accused's presence is not only intertwined with his access to effective counsel, but also with his ability to challenge the probable cause determination by means of the Confrontation Clause.²⁰⁸

C. Violation of Confrontation Clause

The Supreme Court of the United States has interpreted the Confrontation Clause, with certain exceptions, to guarantee defendants a face-to-face meeting with witnesses appearing before the trier of fact.²⁰⁹ CCTV violates a defendant's right to confrontation during a sentencing.²¹⁰ The term "present" under Rule 43 of the Federal Rules of Criminal Procedure means that, for the purposes of sentencing, a defendant must be at the same location as the judge.²¹¹

²⁰⁷ "Basing future actions on mere allegations of prior indiscretions necessarily requires a substantive discussion regarding the validity of the alleged crime. To have such a discussion at a point when discovery is minimal, and the availability of important witnesses is not required, places the defendant at a severe information disadvantage." Lester, *supra* note 154, at 35.

²⁰⁸ A discussion of how CCTV violates the Confrontation Clause is included in a later section. *See infra* Part V.C.

²⁰⁹ *Maryland v. Craig* and *Coy v. Iowa* are relevant to the interpretation of the right of confrontation in the context of videoconferences in which a witness was given dispensation from personal appearance in court. *Maryland v. Craig*, 497 U.S. 836, 862 (1990); *Coy v. Iowa*, 487 U.S. 1012, 1012 (1988) (holding that under the Confrontation Clause, witnesses can not appear in trial by video unless case-specific findings are made as to why the witness can not be physically present). In both, the child witness was given a pass on coming face-to-face with a defendant. The interest in protecting the complaining witness, due to precise findings of vulnerability, outweighed, in the Court's reasoning, the defendant's right to confront his accusers. In response to the Court's decision in *Maryland v. Craig*, Justice Scalia wrote a strong-worded dissent, in which Justices Brennan, Marshall, and Stevens joined. The four-justice opinion criticized the majority opinion that sanctioned Maryland's procedure of allowing an alleged child victim of sexual abuse to testify in trial via CCTV. Justice Scalia wrote, "the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was 'face-to-face' confrontation." *Craig*, 497 U.S. at 862 (Scalia, J., dissenting) (emphasis in original).

²¹⁰ *United States v. Navarro*, 169 F.3d 228, 236-37 (5th Cir. 1999) (citing *Craig*, 497 U.S. at 849). In *Navarro*, the court held that sentencing by videoconference between judge and defendant violated rule requiring defendant's presence at sentencing. *Id.* Presence was interpreted to describe the defendant's physical presence in court. *Id.*

²¹¹ *Navarro*, 169 F.3d at 236-37 (citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994)). *See supra* Part IV.A (detailing the argument regarding the interpretation of "presence.").

The Confrontation Clause does not guarantee the defendant absolute protection in a criminal trial, but it has some application to pretrial hearings, however limited, on a case-by-case basis.²¹² In order to determine whether the Confrontation Clause is germane to claims arising from pretrial hearings, lower courts have considered: whether the pretrial hearing is adversarial, whether excluding the defendant from the hearing interferes with his opportunity to challenge evidence presented against him, and whether the pre-trial proceeding is considered a critical stage.²¹³ To establish the necessity for the Confrontation Clause's safeguard in bail review hearings conducted through CCTV, this section will apply the various factors identified by lower courts.

i. Pretrial Services Present Adverse Evidence Against the Accused

The Pretrial Services' representatives should present unbiased background information and provide an objective bail recommendation.²¹⁴

²¹² As Scalia explained, the right of confrontation explicitly provides for "face-to-face" confrontation, but also guaranteed are "implied and collateral rights such as cross-examination, oath, and observation of demeanor. These are the specific trial procedures and 'the purpose of this entire cluster of rights is to ensure the reliability of evidence.'" *Craig*, 497 U.S. at 862 (Scalia, J., dissenting).

²¹³ The right of a defendant to be present as guaranteed by the Fourteenth Amendment is triggered "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964). "Rather than analyzing how the right to confrontation applies to pretrial proceedings, the Court instead decided 'it is more useful to consider whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination,' and they found that it did not." Christine Holst, *The Confrontation Clause and Pretrial Hearings: A Due Process Solution*, 2010 U. ILL. L. REV. 1599, 1608 (2010) (the author analyzes various interpretations of precedent by lower courts to determine whether the Confrontation Clause applies to pretrial hearings) (citations omitted).

²¹⁴ See Barry Mahoney Et Al., *Pretrial Services Programs: Responsibilities and Potential*, NATIONAL INSTITUTE OF JUSTICE ISSUES AND PRACTICES, 31-32 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/181939.pdf>.

Subjective risk assessments are based on program staff members' consideration of the relative weight to be given to different factors. Objective risk assessments use instruments such as point scales or pretrial release guidelines that assign weights to variables such as nature and seriousness of the current charge, seriousness of prior record, employment status, housing situation, family ties, and the existence and nature of mental health or substance abuse problems. . . . All three principal sets of national standards in the pretrial release field favor the use of objective criteria, principally on the grounds that they are fairer and more consistent.

The Pretrial Services representative provides information to the court about the alleged crime and the defendant's life circumstances including employment, education, and residential details. The representative lists any prior occasions during which a presiding judge issued a "failure to appear" warrant for a defendant. The record of a failure to appear will be provided to the court regardless of the defendant's reason for not being present in court. To a first time bystander, Pretrial Services' role may seem indistinguishable from that of the State's Attorney, an adversarial party.²¹⁵ The judge gives great weight to Pretrial Services assessment of the accused's likelihood to appear for trial and the risk he poses to public safety.

The Confrontation Clause is sometimes thought to apply only during hearings under oath. Putting adverse witnesses under oath is a protection afforded to the defendant. The oath is a safeguard against unfettered, dishonest testimony without repercussions. Historically, it is made to God, and designed to evoke the scruples in a witness, as his lie would provoke an eternal consequence.²¹⁶

Allowing extensive proffers while maintaining that the Confrontation Clause does not apply in the absence of an oath is an unfortunate misinterpretation of the purpose and meaning of the oath. In his dissent in *Maryland v. Craig*, Justice Scalia made clear that the oath was not a prerequisite to the right of confrontation, but an additional safeguard against false accusation, along with the right of cross-examination: "If unopposed testimony is admissible hearsay when the witness is unable to confront the defendant, then presumably there are other categories of admissible hearsay consisting of unsworn testimony when the witness is unable to risk perjury, un-cross-examined testimony when the witness is unable to undergo hostile questioning, etc."²¹⁷

Crawford v. Washington established that the Confrontation Clause applies to all statements that are testimonial or made with an expectation that they are to be used in court.²¹⁸ Certainly, the statements Pretrial Services delivers during bail review hearings are testimonial, and absence of the oath does not change that fact. Therefore, the defendant should be afforded the right to be present in court to confront the Pretrial Services representative.

Shortly after the time of arrest, a commissioner determines probable cause by reviewing the arresting officer's statement of charges. Pretrial Services then furnishes the commissioner with a report, which will be considered at the defendant's initial appearance. Additionally, the report contains

Id.

²¹⁵ This has been the experience of the Authors.

²¹⁶ *Craig*, 497 U.S. at 862 (Scalia, J., dissenting).

²¹⁷ *Id.* at 866.

²¹⁸ *Crawford v. Washington*, 541 U.S. 36, 50-53 (2004) (holding unanimously that the Sixth Amendment's Confrontation Clause applies equally to both in-court testimony and out-of-court statements).

information gathered during an interview of the accused by a Pretrial Services representative. If a subsequent request for a bail review is filed in circuit court, the information that was initially gathered pursuant to the interview is used again by Pretrial Services, and the accused will not be interviewed again. Counsel may provide updated information prior to the hearing; ultimately, however, the Pretrial Services representative will make extensive representations to the court regarding what family members said or left out.²¹⁹ The Pretrial Services representative is not under oath and will not be subject to cross-examination by counsel.²²⁰

At a bail review hearing, the Pretrial Services representative will provide information, as an officer of the court, about the defendant. Pretrial Services will use the charging document to make recommendations of bail, or denial of bail. The defendant has a right under the Confrontation Clause to confront the witnesses against him, and virtual confrontation is not sufficient. Allowing unsworn, un-cross-examined testimony during a bail review hearing, when the defendant's liberty interest is at stake, withers the rights of a defendant facing criminal charges.

ii. Excluding the Defendant from a Bail Review Hearing Interferes with his Opportunity for Effective Confrontation

The Sixth Amendment of the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him...” The Supreme Court of the United States has made clear that it “is the accused, not counsel, who must be ‘confronted with the witnesses against him’”²²¹ During a CCTV bail review hearing in circuit court, the accused may hear the statements made by Pretrial Services over the video feed. The Sixth Amendment guarantees the defendant a right to confront, not to listen. Though the accused may be in the same room as the Pretrial Services representative during a CCTV bail review hearing in district court, he is unable to directly provide information to his attorney in confidence as Pretrial Services states its findings. In both scenarios, the defendant is stifled by the inability to contest inaccurate statements.

By making representations to the court about the defendant's criminal history, perceived risk of flight, and dangerousness to society,²²² the

²¹⁹ See generally, NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, *supra* note 10, at 59-60.

²²⁰ *Id.* at 13.

²²¹ *Faretta v. California*, 422 U.S. 806, 816 (1975) (holding that the Sixth Amendment grants the defendant the right to make his own defense).

²²² Md. R. 4-216(f)(1) (Maryland Rules provide a detailed list of “factors” to be considered at a bail review. In Baltimore City, an Assistant State's Attorney and an agent from the Pretrial Services Division of the Department of Public Safety provides extensive information.). See also 18 U.S.C. § 3142 (2008).

prosecutor and Pretrial Services' representative essentially become witnesses against the defendant.²²³ The defendant is neither able to confront the prosecutor, nor the representative during a video conference bail hearing.

D. Violation of Right to Due Process of Law

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.²²⁴

In *Mathews v. Eldridge*, the Court established a three prong balancing test to determine those “procedural safeguards due a person whose interests are to be adversely affected by government actions.”²²⁵ Courts should consider the following factors:

(1) The private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.²²⁶

The Due Process Clause is used as a prism to reveal the rights guaranteed to a criminal defendant in protection of his liberty. Thus, the issue that CCTV generates is one of constitutional dimension: Whether the defendant's

²²³ See Poulin, *supra* note 1555, at 1148 (noting that “the prosecution and defense may present conflicting information” at a bail review hearing, and “[i]f the defendant is not in court, the defendant will be hampered . . . in assisting counsel to change the facts presented”). See also Thaxton, *supra* note 20, at 188 (“[B]y making representations to the court as to the defendant's criminal history, perceived risk of flight, and dangerousness to society, the prosecutor becomes a witness that the defendant is unable to confront due to the use of [CCTV].”).

²²⁴ MAGNA CARTA, Cl. 39 (1215), *referenced in*, A.E. DICK HOWARD, TEXT AND COMMENTARY, MAGNA CARTA (1964).

²²⁵ *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (holding that the plaintiff satisfied the first prong of its test, acknowledging that the receipt of benefits was an important private interest—plaintiff accused the federal government of terminating his Social Security disability benefits without an evidentiary hearing prior to termination).

²²⁶ *Id.*

presence at the bail review hearing would reduce the risk of an erroneous deprivation of liberty?

i. Private Interests Affected by CCTV

The accused has an interest in liberty pending trial. It follows that he also has an interest in a bail determination that is based upon a full and fair portrayal of his character and ties to the community.²²⁷ Meaningful assistance of counsel is crucial to a fair hearing. The defendant's ability to obtain a fair bail determination is also dependent on the opportunity to effectively confront the adverse evidence presented against him.²²⁸

Presence allows for the procedural safeguards that are absent in CCTV hearings. Because counsel cannot effectively advocate for his client if the accused is not by his side, the Sixth Amendment right to counsel cannot be fulfilled without the accused's physical presence. Counsel cannot effectively advocate for his client if the accused is not by his side. As discussed above, the right to counsel and defendant's physical presence at the hearing are interdependent. Baltimore City affords indigent defendants the right to counsel during the bail review stage, but with CCTV, this right is hollow. The Maryland Legislature recognized the importance of representation during this stage, which is why the right to counsel during the bail review stage survived after *DeWolfe I*.²²⁹ Moreover, the adversarial components of bail review necessitate the guidance of counsel, and the counselor's need to obtain input from her client at any time during the bail review hearing.

Individualized justice is lost at the bail review hearing when the accused is physically removed from the courtroom. The presumption of innocence is "the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."²³⁰ Where is the presumption of innocence when the accused is banished from the courthouse

²²⁷ *United States v. Salerno*, 481 U.S. 739, 760 (1987) (Marshall, J., dissenting) ("If excessive bail is imposed the defendant stays in jail.").

²²⁸ In Maryland, the preliminary hearing, which is controlled by Maryland Rule 4-221, generally occurs before a district court judge. This hearing is a "critical stage" of the criminal process, within the meaning of *Coleman v. Alabama*, to determine whether there is probable cause to require the defendant to stand trial on the charges. 399 U.S. 1, 9-10 (1970). See also *Green v. State*, 286 Md. 692, 695, 410 A.2d 234, 235 (1980); *Hebron v. State*, 13 Md. App. 134, 151 n.2, 281 A.2d 547, 556 n.2 (1971).

²²⁹ Public Defender Act, MD CODE ANN., CRIM. PROC. § 16-204(b)(2)(i).

²³⁰ *Salerno*, 481 U.S. at 763 (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

and is depicted in a jail surrounding?²³¹ Video bail dehumanizes an individual who is presumed innocent.²³²

The defendant's interest in liberty triggers a due process analysis. Unfavorable bail determinations lead to the deprivation of liberty. When a video bail hearing's removal of necessary procedural safeguards, revolving around physical presence, is the cause of an individual's deprivation of liberty, that deprivation is erroneous. The accused is not afforded his right to counsel when he is removed from counsel's side. He is denied his right to confront adverse evidence and witnesses when he is absent from the courtroom, where the information is being conveyed to the judge. He loses his presumption of innocence when he is depicted, not only in prison garb, but *inside the jail*.²³³ Without presence, the accused is not afforded his full spectrum of rights.

ii. Risk of Erroneous Deprivation of Liberty

The second prong of the *Eldridge* test assesses the risk of the possibility that a person will be mistakenly deprived of their private interests because of the lack of additional or different procedural safeguards.²³⁴ Generally, if the

²³¹ "It is clear that the presumption of innocence must be maintained in the eyes of a jury. But a judicial officer is just as susceptible to bias as a juror. A judicial officer may be more vulnerable to the risk of implied bias based on the mere status of the defendant. A juror may only hear a handful of cases, but a judicial officer will hear thousands." Lester, *supra* note 154, at 9–10 (citations omitted). See also John Tierney, *Do You Suffer from Decision Fatigue?*, N.Y. TIMES: MAGAZINE (Aug. 17, 2011), http://www.nytimes.com/2011/08/21/magazine/do-you-suffer-from-decision-fatigue.html?_r=3&scp=1&sq=willpower&st=cse&.

²³² Lester, *supra* note 154, at 6 ("For the presumption to have its full meaning, it must apply at all stages of the judicial process."). See generally *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964) (holding that the right to counsel under the Sixth Amendment to the Constitution, made applicable to the States under the Fourteenth Amendment to the Constitution, requires counsel to be present when requested by the defendant during all critical stages of the proceedings, including, but not limited to, pretrial interrogations).

²³³ See generally Lester, *supra* note 154, at 54 (explaining how the courts must consider the defendant's due process rights in all stages of the criminal proceedings, including bail review hearings).

²³⁴ In *Mathews v. Eldridge*, the Court ruled that the administrative procedures in place did not violate the plaintiff's due process rights. The plaintiff was offered several methods to address the termination of benefits, but did not choose to employ them. 424 U.S. 319, 346 (1976). However, in *Goldberg v. Kelly*, the Court held that the governmental interest in conserving administrative costs were not sufficient to override public aid recipients' interest in procedural due process, even though the procedures did not permit recipients to present evidence, be heard in person or through counsel, or to confront adverse witnesses. 397 U.S. 254, 268 (1970). The *Eldridge* Court distinguished *Goldberg*, saying the crucial factor in *Goldberg* was

risk of error is minimal, the need for additional procedures diminish. In the alternative, if the risk is high, then additional procedures would be merited.

Videoconference systems disproportionately affect indigent defendants, and there has been no significant effort made by the state to address or remedy the disparate impact. As discussed above, jails are filled with individuals deep in poverty.²³⁵ Indigent individuals accused of a crime should be situated in a manner similar to that of wealthy individuals accused of the same crime; however, their outcomes differ substantially. Rarely does an affluent individual remain in Central Booking long enough to have a bail review hearing; thus, CCTV disproportionately affects indigent defendants. The CCTV images of detainees in a jail setting place a stigma against indigent defendants, that their only identity is that of a criminal. Indigent defendants often cannot afford the bail amounts set by commissioners, but indigency alone does not make them deserving of a sub-par form of justice.

Each defendant's demeanor is different, each judge's perception varies, and never has a video system's transmission been ideal. The risk of error in a video bail review hearing is not minimal. Where the defendant is physically absent, there is a significant risk that the defendant's liberty will be erroneously deprived during a bail review hearing. To avoid the risk of wrongfully depriving the accused of his liberty before being found guilty, pretrial incarceration should be the last resort.

iii. Governmental Interests

The third prong of the *Eldridge* test scrutinizes the government's interests.²³⁶ The *Eldridge* Court made clear that when the procedure at issue was created to alleviate administrative burdens, then a court considers whether the need for "enhanced due process" is merited by the need to assure individuals that administrative actions are procedurally just.²³⁷ Administrative costs should not be considered if enhanced due process is merited. However, if the costs of the additional procedures outweigh the benefits, then the government should not be required to use additional resources.

that welfare recipients are in dire need and assistance is only given to persons on the very margin of subsistence, whereas eligibility for social security disability is not based on financial need. The *Eldridge* Court also recognized an additional factor that adds dimension to its analysis: the fairness and reliability of existing procedures, and the probable value of additional procedural safeguards. *Eldridge*, 424 U.S. at 340. *Goldberg* held that access to financial aid that sustains one's ability to obtain food and shelter are quintessential elements of human survival. *Goldberg*, 397 U.S. at 364.

²³⁵ See generally Walsh *supra* note 9 and accompanying text.

²³⁶ *Eldridge*, 424 U.S. at 335.

²³⁷ *Id.* at 348.

The administrative costs associated with conducting video bail review hearings should not be given any weight. CCTV deprives the accused of essential safeguards, which assist him in obtaining a favorable bail determination. Enhanced due process (i.e., allowing a non-disruptive defendant to be physically present) is required to eliminate the risk of generating a disparate impact on the impoverished.

In *United States v. Salerno*, the Court evaluated the constitutionality of the Bail Reform Act of 1984.²³⁸ The Bail Reform Act requires “courts to detain[,] prior to trial[,] arrestees charged with certain serious felonies if the Government demonstrates by *clear and convincing evidence* after an *adversary hearing* that no release conditions ‘will reasonably assure... the safety of any other person and the community.’”²³⁹

Regarding the respondent’s Eighth Amendment claim, the *Salerno* Court concluded, “Where Congress has mandated detention on the basis of some other *compelling interest*—here, the *public safety*—the Eighth Amendment does not require release on bail.”²⁴⁰ Justice Rehnquist’s opinion reasons that the Eighth Amendment “has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail.”²⁴¹

The respondent in *Salerno* argued that pretrial detention of the sort contemplated in the Bail Reform Act required substantive due process; however, the Court disagreed, holding that procedural due process was all that was required.²⁴² The Court reasoned that the Bail Reform Act’s aim was regulatory in nature, as it was designed to prevent crimes committed by those released on bail, and not to punish those held in pretrial detention.²⁴³

²³⁸ *United States v. Salerno*, 481 U.S. 739, 741 (1987).

²³⁹ *Id.* at 739 (emphasis added).

²⁴⁰ *Id.* at 740 (emphasis added).

²⁴¹ *Id.* at 754 (quoting *Carlson v. Landon*, 342 U.S. 524, 545 (1952)).

²⁴² *Salerno*, 481 U.S. at 752. The respondent also unsuccessfully argued that The Bail Reform Act violated the Eighth Amendment. The *Salerno* Court stated, “Where Congress has mandated detention on the basis of some other *compelling interest*—here, the *public safety*—the Eighth Amendment does not require release on bail.” *Id.* at 740. Justice Rehnquist’s opinion reasoned that the Eighth Amendment “has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail.” *Id.* at 754 (quoting *Carlson v. Landon*, 342 U.S. 524, 545 (1952)).

²⁴³ Justice Rehnquist’s argument has been called into question, as Justice Marshall points out: “The absurdity of this conclusion arises, of course, from the majority’s cramped concept of substantive due process. The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority’s technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as ‘regulation,’ and, magically, the Constitution no longer prohibits its imposition.” *Salerno*, 481 U.S. at 760 (Marshall, J., dissenting). Justice Marshall also comments on the majority’s logic in denying the claim to substantive due process on the

The Court explained that a compelling governmental interest may outweigh an individual's liberty interest, stating, "[f]or example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous."²⁴⁴ *Salerno* set the benchmark for compelling governmental interests in the context of bail review.²⁴⁵ A reasonable inference can be made that the state's purported interests in replacing live bail review hearings with video broadcasts include promoting administrative convenience, save transportation costs and security fees, and reduce the danger of harms associated with the transportation process. On the other hand, the defendant's liberty interest is fundamental, and not easily outweighed.²⁴⁶

Maryland Rule 4-231(b) mandates that a "defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial."²⁴⁷ In applying the *Salerno* standard, the exception carved out for video bail in Rule 4-231(d) deprives defendants of procedural safeguards.²⁴⁸ The government's interest in conducting CCTV bail hearings is neither compelling nor narrowly tailored. The risk of erroneous deprivation of liberty runs high when the accused is not present at his own hearing.

Presumably the state is interested in fostering efficiency. Efficiency is generally met by harmonizing quantity and quality. However, the state is employing procedures that focus on the quantity, not the quality of hearings. Proponents of CCTV allege that videoconference systems are a step in the right direction to meeting the *Riverside* standard.²⁴⁹ However, the state's rationale for utilizing CCTV is not prompt presentment, but convenience and brevity. CCTV bail hearings have not brought Baltimore City any closer to

grounds of an Eight Amendment violation for excessive bail, stating: "The Eighth Amendment, as the majority notes, states that '[e]xcessive bail shall not be required.' The majority then declares, as if it were undeniable, that: 'This Clause, of course, says nothing about whether bail shall be available at all.' *If excessive bail is imposed the defendant stays in jail.* The same result is achieved if bail is denied altogether. Whether the magistrate sets bail at \$1 billion or refuses to set bail at all, the consequences are indistinguishable." *Id.* at 760–61 (Marshall, J., dissenting) (emphasis added) (citations omitted). *See also* Lester, *supra* note 154, at 32–33 (citations omitted) ("The *Salerno* majority did not dispute the premise that punishment with less than proof beyond a reasonable doubt is unconstitutional; it merely found that the detainment set forth pursuant to 18 U.S.C. § 3142 was not punishment, but a regulation. The *Salerno* court thus indirectly recognized this idea when it characterized pretrial detention as regulatory rather than punitive since it would be unconstitutional to punish with the limited proof offered at a pretrial detention hearing.").

²⁴⁴ *Salerno*, 481 U.S. at 748.

²⁴⁵ *Id.* at 739.

²⁴⁶ *Id.* at 750.

²⁴⁷ Md. R. 4-231(b).

²⁴⁸ Md. R. 4-231(d).

²⁴⁹ *See* *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

satisfying the *Riverside* benchmark, requiring the initial appearance be held within 48 hours of detention.²⁵⁰

In *United States v. Baker*, the Fourth Circuit noted that “the goal of a criminal proceeding is to uncover the truth by examining rigorously the reliability of conflicting evidence presented and then engaging in extensive fact-finding. The rights of cross-examination and confrontation, as well as the right to effective assistance of counsel, are all directed toward this goal.”²⁵¹ Quality is not produced by enhanced television resolution, but by effective counsel and the right to confrontation. Quality is promoted by the safeguards that prevent the government from turning an individualized hearing into a dehumanizing, hurried cattle call. Due Process demands that indigent defendants are present, in the flesh, at bail review hearings, as their liberty interests outweigh the government’s interest in alleviating administrative burdens.

CONCLUSION

Studies from the Cook County and Asylum hearings demonstrate the consequences of videoconference bail review hearings for the accused.²⁵² As discussed above, the defendant’s presence is critical. Physical presence adds integrity to the pretrial proceeding, and is the foundation upon which a defendant’s constitutional rights, ensuring a fair and just trial, are based. If the accused is not present, assistance of counsel cannot be effective and confrontation is not possible. Judges making bail determinations should consider that there are months, and potentially years, of pretrial incarceration at stake for each defendant.²⁵³ When making these important decisions that so profoundly affect people’s lives, the accused’s humanity is a critical factor. Their families, jobs, rental payments, health considerations, and human need for freedom, comfort, and privacy are all relevant to a judge’s

²⁵⁰ See *id.*; Ian Duncan, *Lost in Jail, Defendants Wait Weeks for Chance at Freedom*, THE BALT. SUN (Mar 16, 2014), http://articles.baltimoresun.com/2014-03-15/news/bs-md-forgotten-in-jail-20140315_1_brewer-defendants-prosecutors.

²⁵¹ *United States v. Baker*, 45 F.3d 837, 844 (4th Cir. 1995) (citing *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”)).

²⁵² See Seidman Diamond, *supra* note 91 at 898. See also Walsh & Walsh, *supra* note 81, at 271.

²⁵³ *Mason v. Cnty. of Cook*, 488 F.Supp. 2d 761, 765 (2007) (denying the motion to dismiss Plaintiff’s Sixth Amendment and Due Process claims, remarking that bail “is important to anyone charged with an offense—there are days, weeks, or even months of incarceration at stake[—and i]f Plaintiff or others are denied bail because of unconstitutional procedures, they may be entitled to the equitable relief they seek here”).

decision. By excluding an accused from his own bail hearing, his humanity and dignity are forgotten, as he is out of sight and out of mind. Bail amounts reflect the imbalance. The accusation and the defendant's criminal history should not be the only factors a judge considers in reaching a bail determination. There is a person on the other side of the camera who deserves to breathe the same air as the judge deciding his fate.

Videoconferencing affected Mr. Johnson's outcome. Constitutional safeguards, inherent in live bail review hearings, arguably made the difference between Mr. Gibson receiving a favorable bail determination and Mr. Johnson remaining incarcerated pending trial. The Sixth Amendment rights to counsel and confrontation are intended to protect liberty, and are not designed for the convenience of the state.

Pretrial incarceration has reached astronomical levels nationally. Baltimore City, out of the twenty cities with the largest jails, locks up the largest percentage of its population in the country.²⁵⁴ Ninety percent of those in the Baltimore jail complex are awaiting trial, and therefore are presumed innocent until proven guilty.²⁵⁵ Bail review hearings test the presumption of innocence after *Salerno* and that presumption needs championing.²⁵⁶

Videoconference bail review hearings are one brick in the wall around the jail, which, according to recent data collection and scholarship by professors from Northwestern University, result in 51% higher bail amounts than their live counterparts.²⁵⁷ Many jurisdictions face some form of automated justice, which tends to dehumanize the accused. The trend towards the integration of CCTV in criminal proceedings raises an important issue concerning the proper balancing of judicial efficiency and a criminal defendant's constitutional rights. This article seeks to give a voice to indigent defendants who have become disproportionately subject to a subpar process.

In *DeWolfe v. Richmond*, Maryland's highest court affirmed the guarantee of counsel for indigent defendants during bail review hearings.²⁵⁸ However, the Maryland Rules authorize the use of CCTV during such proceedings when held in district court, but not in circuit court.²⁵⁹ Therefore, in the district court context, the holding in *DeWolfe I* and the Maryland Rules act in opposition to each other. This opposition exists because the use of video in an adversarial hearing deprives the defendant of his right to counsel and confrontation.

It is expected that criminal procedure will make technological advances, but these advances must operate to increase efficiency without sacrificing

²⁵⁴ See Walsh, *supra* note 9, at 1.

²⁵⁵ *Id.* at 9.

²⁵⁶ United States v. Salerno, 481 U.S. 739, 766 (1987).

²⁵⁷ See Seidman Diamond, *supra* note 91, at 892.

²⁵⁸ *DeWolfe v. Richmond*, 434 Md. 403, 439, 76 A.3d 962, 983 (2012).

²⁵⁹ See Md. R. 4-231.

fairness. The core concerns that go to the heart of fair and just criminal proceedings and human dignity are being increasingly overlooked as technology advances. CCTV leaves accused individuals without constitutional safeguards and makes them vulnerable to an erroneous deprivation of liberty, which uproots the organization of their lives and negatively affects trial outcomes. As Bryan Stevenson correctly stated:

We will ultimately not be judged by our technology, we won't be judged by our design, we won't be judged by our intellect and reason. Ultimately, you judge the character of a society, not by how they treat their rich and the powerful and the privileged, but how they treat the poor, the condemned, the incarcerated.²⁶⁰

CCTV bail reviews strip away the rights and liberty interests of accused individuals only to further administrative convenience. Sustaining all constitutional safeguards in a meaningful way will ensure fairness and integrity, recognizing the humanity of the accused and their inalienable right to liberty.

²⁶⁰ Bryan Stevenson, *We Need to Talk About an Injustice*, TED TALKS (March 2012), http://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice.html. Addressing the Supreme Court of the United States, Abe Fortas summed it up best during oral argument in *Gideon v. Wainwright*:

I do believe that in some of this Court's decisions there has been a tendency from time to time, because of the pull of federalism, to forget, to forget the realities of what happens downstairs, of what happens to these poor, miserable, indigent people when they are arrested and they are brought into the jail and they are questioned and later on they are brought in these strange and awesome circumstances before a magistrate, and then later on they are brought before a court; and there, Clarence Earl Gideon, defend yourself.

Oral Arg. Tr. at 4, *Gideon*, 372 U.S. 335 (1963).

Private Attorney- Client Communications and the Effect of Videoconferencing in the Courtroom

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Abstract: Courts are experimenting with new technologies in response to increasingly crowded dockets. Videoconferencing is being increasingly employed to streamline legal proceedings and provide the accused greater access to justice. The use of videoconferencing has spread through the federal and state court systems. While no criminal trial has been conducted entirely by videoconferencing, it has been used in arraignments, bail, sentencing, and post-conviction hearings. The impact of videoconferencing technology on the legal process, however, has yet to be measured in any systematic way. Of prime concern is the impact of this technology on the attorney/client relationship and their private communications. Critics argue the use of videoconferencing calls into question the ability of attorneys and clients to communicate effectively, undermining effective representation by counsel. In this first of its kind study, this article examines the impact of videoconferencing on private communications and the wider implications of the impacts of technology on civil liberties. Through a marriage of social scientific and legal analysis, videoconference private communications are analysed with empirical data and conclude with a discussion of how the negative aspects of videoconferencing can be lessened, avoided, and/or remedied.

1. Introduction

In recent years, courts have increasingly turned to videoconferencing as they struggle to balance large caseloads and limited resources.¹ Although scant data is available on its actual use, it is clearly being used in courts across the country in a variety of criminal proceedings, particularly to connect out of court defendants with their attorney in the courtroom.² The impact of videoconferencing on private communications between attorneys and clients has yet to be systematically studied. The essential question is does videoconferencing dilute constitutional guarantees to legal counsel or by limiting communication between defines attorney and client?

A trusting and thorough communication, both direct and nuanced, between attorney and client must be established and maintained in order for justice to be served.³ It is important to examine the expansion

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¹ Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 61-62 (2006). (The author states videoconferencing violate a number of important rights that are fundamental to our concepts of justice: the right to be present in court, the right to confront witnesses and evidence against you, and *the right to effective representation by an attorney*.) Emphasis added.

² Zachary M. Hillman, *Pleading Guilty and Video Teleconference: Is a Defendant Constitutionally "Present" when Pleading Guilty by Video Teleconference*, 7 J. HIGH TECH. L. 41, 41 (2007). (As the author notes, courtrooms around the country are not perceived as fertile grounds for the use of new technology.)

³ See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U.L. REV. 1449, 1452, 1469 (2005) (Anything that disrupts the free flow of private communications between attorney and client effectively silence the defendant. "... speech is the constitutionally celebrated vehicle by which defendants have their "day in court" enforce or waive their constitutional rights, tell their stories to the jury, persuade the judge of proper punishment, and communicate with their constitutionally guaranteed counsel.".) Emphasis added.

of videoconferencing and ensure that its use is not at odds with the fundamental purpose of the access it ostensibly provides.⁴ For courts to enhance a defendants' sense that courtrooms are fair and just, they must focus on improving communications.⁵ Effective communication is crucial to ensuring that defendants perceive their experience as fair and effective.⁶

The effect videoconferencing has on attorney/client private communications in the courtroom is understudied.⁷ Research questions and methodologies have been proposed but not carried out.⁸ Possible avenues of research include the effects of videoconferencing on legal decision-making, perceptions of justice, and legal efficiency.⁹ The underlying concern is to determine whether videoconferencing in legal proceedings violates the due process rights of defendants or whether it violates a defendant's right of confrontation under the Sixth Amendment.¹⁰

This article investigates the claim that videoconferencing is detrimental to attorney-client private communications when the attorney is in the courtroom but the client is in a remote location, such as a jail or prison. I review the literature and research in this area to illustrate how this technology is currently being used and the constitutional issues involved. Data from the National Center for State Courts (NCSC) survey are utilized to explore how these issues currently manifest themselves.

Part 2 defines videoconferencing. This section focuses on attorney-client private communications and the theories of how videoconferencing impacts such communications when the attorney is in the courtroom and the client is located in a remote location. Part 3 discusses the theories of communication that relate to its functions. A review of Emergent Meaning Theory, Information Integration Theory, Communication Theory, and others offer different ways in which videoconferencing are handled. Part 4 examines the pros and cons of videoconferencing with examples of how the courts have addressed these issues and how social scientific theories view videoconferencing. In Part 5, I examine data from the NCSC that suggests videoconferencing is having a negative impact on attorney-client communications, where clients have no opportunity for private communications with their attorney when their lawyer is in the courtroom and they are located at a remote location.¹¹

Little is known about the practical issue associated with attorney-client private communications via videoconferencing, specifically in comparing the difference between videoconferenced and in person

⁴ Harvard Law Review Association: *Developments in the Law – Access to Courts: Access to Courts and Videoconferencing in Immigration Court Proceedings*, 122 HARV. L. REV. 1181, 1182, 1192 (2009) (Videoconferencing obstructs the fact-finding process and prevents courts from fulfilling the adjudicative function for which they were designed.).

⁵ See M. Somjen Frazer, *The Impact of the Community Court Model on Defendant Perceptions of Fairness*, CTR FOR ST. CT. INNOVATION, (Center for St. Ct. Innovation, NY, NY) Sept. 2006 at 24. (This research focused on the perception of fairness in different court models. It was found that the clearer the communication between the defendant and all the other participants in the court, including his defense attorney, the more positive their perception of justice. This emphasis on clear communications is analogous to the use of videoconferencing. If videoconferencing perceptively diminishes communications between a defendant and their attorney, then their substantive right to adequate counsel and procedural rights has been diminished.).

⁶ *Id.* at 29. The policy implications detailed by the author include that effective communication is crucial to ensuring defendants perceive their experiences as fair and that courts should continually work to improve communications.

⁷ Molly Treadway Johnson and Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28:2, LAW & POL'Y, 212 (April 2006). (The authors confirm that there is little empirical information concerning the use of videoconferencing in criminal proceedings. The effects of videoconferencing on the behavior of the participants need to be reviewed and its effects on defendants' rights.).

⁸ *Id.* at 223. Some potential research approaches include the use of previously developed psychological theories on how video conferenced affect communications, especially private attorney-client communications.

⁹ *Id.* Questions about the actual effects of videoconferencing on the perceptions and behavior of participants in criminal proceedings can be answered through survey and the use of experimental design.

¹⁰ Gerald G. Ashdown and Michael A. Menzel, *The Convenience of the Guillotine?: Video Proceedings in Federal Prosecutions*, 80 DENV. U.L. REV. 63, 64-65 (2002). (If efficiency is the issue, then the authors offer the example of the efficiency of eliminating juries. "Without juries there would be no evidentiary objections, no need for conferences at sidebar, and, of course, no jury deliberations. Although defendants might obtain some benefit from the increased efficiency achieved by eliminating juries, it would be trivial compared to the benefits to the government and the cost to defendants of not being tried by their peers.").

¹¹ See Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1110-1112 (2004). (These problematic questions have not been fully studied; that critical aspects of the defendant's communicative efforts will not be conveyed and, conversely, the defendant will not receive the full import of their attorneys' communications.).

communications.¹² The data however, does show there is a difference between the quality, indeed even the possibility, of private communications between attorney and client via videoconferencing.

2. Real-Time Sound and Images

2.1 What is Videoconferencing?

Videoconferencing is comprised of interactive telecommunication technologies that allow two or more locations to interact (via two-way video and audio transmissions) simultaneously.¹³ Electronic communications aims to improve the interchange of information between users.¹⁴ This technology permits both real-time sound and images of conversation between people in different locations¹⁵ through the use of a system of monitors, microphones, cameras, computer equipment, and other devices.¹⁶

As the technology has developed and become more affordable, videoconferencing has gained popularity in a number of fields.¹⁷ The business world praises videoconferencing as an efficient and economical alternative to face-to-face meetings.¹⁸ The drive for saving time and money has spurred its use in the courtroom, with the hope that it would improve the efficiency of the administration of justice.

With video, transporting defendants is not required; the risk to those officers transporting and securing the defendant during a hearing is removed. Proponents maintain that by keeping the accused in the confines of jail, his or her human dignity can be better preserved; they avoid entering a courtroom in an orange jumpsuit and handcuffs.¹⁹ Critics do not agree. Some defence attorneys have reported varying degrees of comfort with the process.²⁰ They believe videoconferenced hearings lack the dignity, decorum, and respect of a personal appearance before the court.²¹ Legal scholars have also expressed concern over the impact of technology on the defendant's rights, including its effect on attorney/client private communication.²² Other criticisms center on situations where the defendant and counsel are physically separated and cannot freely communicate.²³ The courtroom is viewed as the wrong place for

¹² *Id.* at 1104-1111.

¹³ Haas, *supra* note 2, at 62.

¹⁴ Pauline Ratnasingham, *The Importance of Trust in Electronic Commerce*, 8: 4 INTERNET RESEARCH: ELEC. NETWORKING APPLICATION & POL'Y 313, 313 (1998). (This research focuses on issues of trust in electronic commerce. It concludes that confidence in a trustful relationship is necessary to reduce the threat of a breakdown of effective communications.).

¹⁵ Ernst Bekkering and J. P. Shim, *i2i Trust in Videoconferencing*, 29:7 COMM'NS ACM 103 (2006). (This definition was established many years ago from the beginnings of the use of videoconferencing-like technology dating back to the 1964 New York World's Fair where the PicturePhone was introduced.).

¹⁶ ROSALIE T. TORRES, HALLIE PRESKILL, MARY E. PIONTEK, *Evaluation Strategies for Communicating and Reporting* 204 (2ND. ED. 2005) (Cautions that the use of technology impedes communications and highlights specific strategies and techniques to minimize such impediments.).

¹⁷ *Id.* at .62.

¹⁸ Fredric Lederer, *The Legality and Practicality of Remote Witness Testimony*, PRACTICAL LITIGATOR, 22 (September 2009) (The author is a proponent of videoconferencing technology. Indeed, the author states that as the technology improves, there will come a time when physical presence will never be mandated.).

¹⁹ Robert H. Philiposian et al., *Video Arraignments and its Potential for use in the County Criminal Justice System*, LOS ANGELES COUNTY CITIZENS' ECONOMY & EFFICIENCY COMM'N, 6 (November 2004). (This study states that some defense attorneys supported the use of videoconferencing because videoconferencing facilities at the court routinely enabled defense attorneys to interview in-custody clients without the need to the detention facility. Given the communication difficulties stated National Center for State Courts' (NCSC) survey (*See* Data Section), a large percentage makes no accommodations for private communications between attorney and client.).

²⁰ *Id.*

²¹ David A. Davis, *Talking Heads – Virtual Reality and the Presence of Defendants in Court*, FLA. BAR J., 75:2, 27 (February 2001). (The author states that the courtroom is more than a mere location with seats for a judge, jury, witnesses, defendant, prosecutor, defense, counsel, and public observers; the setting that the courtroom provides is an important element in the constitutional conception of a trial contributing to the dignity essential to the trial process.).

²² Hillman, *supra* note 3, at 44. (Often concerning the potential dehumanizing effect of defendants, attorneys, and judges.).

²³ Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 878-879 (2010). (Among the ways that defense attorneys, legal scholars, and judges have argued that videoconferencing impairs the fairness and integrity of criminal proceedings is that when a defendant and their defense are physically separated, they cannot pass notes nor have an impromptu whispered

such experiments.²⁴ Legal and social scientific determinations must be made concerning the impact of videoconferencing on the ability of attorneys and clients to freely communicate and form a relationship based on trust. The essential question is, does videoconferencing represent a dilution of the quality of justice?²⁵

2.2 Videoconferencing and the Justice Process

Calls are being made for more research into how videoconferencing is used for a variety of criminal proceedings.²⁶ A foundation for ensuring fairness is the ability of defendants to consult with their attorneys at key times. The U.S. Constitution, the Rules of Evidence, and the Rules of Criminal Procedure form the cornerstone of fairness and procedural justice. The Rules of Evidence were written to ensure that proper, useful evidence (i.e. evidence that has high probative value) is admitted while evidence that does not is minimized. The Rules of Criminal Procedure are used to tailor the rules of the Constitution and the Rules of Evidence to a legal process that considers the elevated standard of an individual who is accused by the State of a crime, where the individual may be punished by a loss of liberty or death. Interpretation and alteration of these rules jeopardize the chance for a correct outcome in the legal process. Any change in these basic rules must further ensure a correct outcome. Creating more correct outcomes is a benefit to all, ensuring fundamental fairness and establishing legitimacy to the legal process. Many rules impact fundamental fairness and procedural justice. A major rule in the American legal process concerns the ability of the accused to confront the witnesses, evidence, and the state apparatus (the court itself) that threaten his liberty. The use of videoconferencing represents a change to the basic rules, and it must be examined with respect to fairness and procedural justice.

Every criminal defendant has a constitutional due process right to be physically present at all critical stages of their criminal proceeding.²⁷ Where courts have found a defendant's presence a constitutional necessity, it generally has been because of the intuition that the defendant's presence affects perceptions and impacts the outcome.²⁸ Client interviews concerning privacy have been cited as a problem.²⁹ It is necessary to provide a defendant with a way to privately communicate with their attorney.³⁰ Often, there is no provision for privileged communications between attorney and client via videoconferencing.³¹

Videoconferencing invariably detracts from the attorney/client relationship and the private communication between them.³² It highlights the issues and detrimental impact that videoconferencing has on attorney/client communications.³³ The use of videoconferencing leads to decreased personal contact between users and the possible alienation of defendants in the criminal justice system.³⁴

conference. Further, there is a diminishment of the ability to assess credibility, competence, ability to understand the proceedings, wellbeing, and/or the gravity of the proceedings.). See also, note 59.

²⁴ See Johnson & Wiggins, *supra* note 10, at 223. The use of videoconferencing in courtrooms before its effects of the technology on the legal process and the rights of the defendant are fully understood is problematic.

²⁵ Poulin, *supra* note 12, at 1104. The author states that if videoconferencing technology reduces client-attorney contact by separating the defendant from the defense attorney, then courts should instead devote those resources to supporting representation of incarcerated defendants and improving the quality of justice.

²⁶ See Michael A. Stodgill, *Permitting the Use of Videoconferencing in Civil Commitment Hearings*, 55 MD. L. REV. 1001, 1016 (1996).

²⁷ See Hillman, *supra* note 3, at 41. See *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (Courts have been attempting to determine what "physical presence" means ever since.).

²⁸ Diamond et al., *supra* note 24, at 882. Given the example of sentencing where the Fifth Circuit determined that sentencing a defendant by videoconferencing risks the loss of the human element. The technology creates a "disconnect" between a living person and a picture of a person on a screen.

²⁹ Philibosian, *supra* note 20, at 20. The situation cited in the article highlight the concerns of a public defender and their client where the public defender's office in the jurisdiction mandates physical presence of the defense attorney.

³⁰ See Diamond et al., *supra* note 24, at 899. Studies that find that business meetings differ little from face-to-face meetings are not analogous to attorney-client interactions at criminal hearings and/or trials. The dynamics of these situations are different as the average criminal defendant is markedly different from that average business person in terms of education, familiarity with videoconferencing technology, and nature of such communications.

³¹ Poulin, *supra* note 12, at 1129. See note 200. No communication or limited communications (communications that limited non-verbal communications) is a problem of videoconferencing in many jurisdictions.

³² See *Id.* This article highlights the 2002 case of *Rusu v. INS* where the respondent participated in his hearing from a detention facility while his counsel, along with the immigration judge, were convened in a courtroom many miles away. During this hearing, the reviewing court recognized that the participants' mutual inability to understand each other at times.

³³ Harvard Law Review Association, *supra* note 5, at 1189.

³⁴ See Stodgill, *supra* note 27, at 1017.

2.3 The Attorney-Client Relationship: Communication and Trust

An attorney cannot effectively represent a client without effective private communication.³⁵ During a hearing or trial when the defendant is in detention and their defence counsel is in the courtroom, videoconferencing creates major barrier to attorney/client communication.³⁶ Videoconferencing creates two problems regarding access to counsel: 1) not being able to communicate with counsel at all and 2) limited communication with counsel via video.³⁷ One study found, the vast majority of defence lawyers believe that private attorney/client communications is impossible via videoconferencing.³⁸ Via video, a defendant's confidence in his counsel may be reduced, and the crucial trust between attorney and client is minimized.³⁹ In a video appearance, crucial aspects of a defendant's physical presence may be lost or misinterpreted, such as a participants' demeanour, facial expression, and vocal inflections resulting in an inability for immediate and unmediated contact with counsel.⁴⁰

2.4 Counsel and Client

Because defence counsel faces so many difficulties in representing a client via videoconferencing, he or she may be less effectual.⁴¹ This may raise objections of ineffective assistance of counsel based on lack of Attorney-Client private communication or limits on such communications, as a deaf client's attorney might if there is a problem with an interpreter.⁴² Just as a defendant's attorney should ensure that a client is not prevented from communicating with them because of deafness, a videoconferenced client should not be prevented from communicating with their attorney because of videoconferencing.⁴³ Videoconferencing is especially problematic for evidentiary hearings.⁴⁴ If an attorney believes that a situation (videoconferencing) is ineffective, that attorney should promptly advise the court and formally object for the record, if necessary.⁴⁵ A defendant's ability to properly interact with counsel, answer or ask questions, pass notes or view documents is impossible via videoconferencing.⁴⁶ The criminal justice system needs to make resources available for effective client-attorney private communication.⁴⁷ Basic communication between attorney and client is complicated and diminished by videoconferencing separation.⁴⁸

³⁵ See Matthew S. Compton, *Fulfilling Your Professional Responsibilities: Representing a Deaf Client in Texas*, 39 ST. MARY'S L. J. 819, 900-901 (2008) (The ability to communicate is vital to the justice process. Anytime the free flow of information, especially private communications between attorney and their client, justice suffers.).

³⁶ See AMANDA J. GRANT, ET AL., VIDEOCONFERENCING IN REMOVAL PROCEEDINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT, THE LEGAL ASSISTANCE FOUND. METROPOLITAN CHI. & CHI. APPLESEED FUND FOR JUST. 38 (AUG. 2, 2005) ("We found that videoconferencing is a poor substitute for in-person hearings. Among the problems, we observed deficiencies related to *access to counsel*, presentation of evidence, and interpretation."). Emphasis added.

³⁷ *Id.* at 38.

³⁸ *Id.*

³⁹ Davis, *supra* note 22, at 28. Via videoconferencing, crucial aspects of a defendant's or lawyers' appearance may be lost or misinterpreted. Things like a participant's demeanor, facial expressions, vocal inflections, and the ability for immediate and unmediated contact with counsel are necessary.

⁴⁰ See *Id.*

⁴¹ See *Id.*

⁴² See Compton, *supra* note 36, at 855-886. The author highlights the issues that can arise when there is poor communication between the parties in the courtroom. Issues like because of the situation, the defense attorney may not know whether the defendant understands or is failing to communicate.

⁴³ See *Id.* at 899.

⁴⁴ William M. Binder, *Videoconferencing: A Juvenile Defense Attorney's Perspective*, WIS. LAWYER 1 (July 1997). (The author states that the defendant will not see the demonstrative evidence, diagrams or documents discussed in the courtroom, out of sight of the video camera.).

⁴⁵ See Compton, *supra* note 36, at 900. The "situation" can be ineffective interpreting for a deaf client or videoconferencing where an attorney cannot effectively communicate because of the medium.

⁴⁶ Binder, *supra* note 45, at 47. The author relates how Hollywood uses camera angles and other video techniques to evoke opinions and emotions and that videoconferencing in the courtroom may have similar, perhaps unintended, consequences.

⁴⁷ See Compton, *supra* note 36, at 901. This relates to defense attorneys with deaf clients where translation equipment may not be adequate or utilized properly as in the criminal justice system where defense attorneys do not control the videoconferencing equipment.

⁴⁸ Poulin, *supra* note 12, at 1129. Videoconferencing complicates an already difficult situation and will likely contribute to the problem of marginal or inadequate representation.

In a videoconferenced situation, a defendant who has little or no private communication with his/her attorney may believe that their lawyer is merely processing their case without any real connection to them. Such a perception can only weaken the client-attorney relationship.⁴⁹

Attorneys and clients typically “size each other up” evaluating each other’s character, demeanour, experience, the nature of the offense, the defendant’s prior record, and a multitude of other factors that lead (or not) to the necessary trust for a working relationship. Critics argue that videoconferencing may impede this trust building process.⁵⁰ Both counsel and defendant are a critical source of information in determining how to proceed with a defence. The courtroom is the ultimate forum for gathering critical information, the place where people come face-to-face and exchange information to settle what is controversial.⁵¹ If the face-to-face nature of the process is what makes a courtroom so effective, then the question becomes whether a virtual presence is as effective.

2.5 Attorney-Client Interactions

The human interactions that foster trust in the attorney-client relationship are muted by videoconferencing.⁵² Videoconferencing imposes a limit on attorney-client private communication within a system that imposes other limits on such communications.⁵³ Often, when video is used, the attorney is in court and the defendant is present on video from a detention center.⁵⁴ With videoconferencing, some defence counsels state that they might have a more difficult time presenting their case. The prosecution and defence present conflicting information. The prosecution may present evidence to influence the court. If the defendant is not in court, and cannot privately, effectively communicate with defence counsel in court, the defendant will likely be hampered in challenging and evaluating such evidence. Due to the physical separation between the defendant and counsel, a defence attorney might find it more difficult to advise, calm, or control a defendant.⁵⁵

Attorney-client interviews are significant interactions for both lawyers and clients.⁵⁶ Attorney-client conversations are essentially a cooperative activity.⁵⁷ In a typical attorney-client interaction, information is exchanged in an orderly way. That information concerns the clients’ goals and the manner in which the attorney will achieve those goals.⁵⁸ These conversations are different from “ordinary talk.”⁵⁹ A client’s background, interests, and context for what they would consider to be a successful outcome should precede an attorney’s solution.⁶⁰ Many defendants and counsellors are dissatisfied with videoconferencing because it fails to supply enough information about the people with whom they are speaking.⁶¹ Some scholars believe that the benefits of videoconferencing flow primarily to the

⁴⁹ Davis, *supra* note 22, at 28. Consequently, because of videoconferencing, a client’s confidence in his defense counsel may be reduced, and the critical trust between a client and defendant minimized.

⁵⁰ See Ashdown & Menzel, *supra* note 11, at 67.

⁵¹ *Id.* at 66-67.

⁵² Poulin, *supra* note 12, at 1129. The technology changes the basics of communication between attorney and defendant by delivering less communicative information than by face-to-face contact. And, as such, lowers the relationship of trust necessary in the attorney-client relationship.

⁵³ See Natapoff, *supra* note 4, at 1473. Privileged communications that the court assumes has taken place between defense counsel and their client include an understanding of basic constitutional rights, the right to a jury, to testify, appeal, and challenge evidence.

⁵⁴ Poulin, *supra* note 12, at 1129.

⁵⁵ *Id.*

⁵⁶ See Linda F. Smith, Client-Lawyer Talk: Lessons from Other Disciplines, 13 CLINICAL L. REV. 507, 512 (2006) (Attorney-client interactions are essentially conversations and that conversations need to proceed in “orderly” ways. Any impediments to these interactions, such as videoconferencing, detract from effective representation.).

⁵⁷ *Id.*

⁵⁸ *Id.* at 510-512.

⁵⁹ *Id.* at 513.

⁶⁰ *Id.* at 523-524.

⁶¹ Cameron Teoh et al., *Investigating Factors Influencing Trust in Video-Mediated Communications*, (<http://portal.acm.org/dl.cfm>) 313 (2010). (Among the factors investigated were the use of videoconferencing technology and communication and collaborative activities. The study specifically explored the effect of varying the amount of visual information videoconferencing partners receive about each other on several factors: trust, performance, social presence, and satisfaction with performance and task process.).

government.⁶² Some attorneys find the use of videoconferencing to be a “surreal experience” in which clients are turned into a “piece of electronic equipment.”⁶³

Just as with a client who is mentally incompetent to stand trial, a client who cannot privately communicate with their attorney because of an inadequate videoconferencing arrangement is compromised in his ability to make rational decisions, or to produce ideas and thoughts necessary for achieving fundamental fairness.⁶⁴ Attorney-client communication, like competency, is necessary for a fair trial.⁶⁵ As with issues of competency, most defence attorneys are untrained in the use of videoconferencing. Thus defence attorneys unfamiliar with videoconferencing’s inadequacies are concerned that raising competency issues may negatively impact their client’s defence.⁶⁶

Researchers found that the more complex the task, the greater the need for a richer and more subtle communication environment.⁶⁷ The richness of videoconferencing depends on the availability of instant feedback, the use of multiple cues (such as facial expressions, voice inflections, and gestures), the use of natural language for conveying a broad set of concepts and ideas, and the personal focus of the medium.⁶⁸ Videoconferencing systems are notorious for introducing spatial distortions.⁶⁹ Internet videoconferencing is subject to jerky or halting images, depending on the level of Internet traffic and the speed of connections.⁷⁰

Non-verbal gestures and cues form a large part of the way we communicate and express ourselves.⁷¹ Because communicating via videoconferencing often presents timing difficulties, people have to be careful not to interrupt and allow others to finish speaking or alter the way they speak.⁷² People often need to be coached to look into the camera, and not the viewing monitor, when speaking to give the impression of eye contact.⁷³ In some jurisdictions, the defendant stands before the screen, is viewed by the court and audience, but sees only the judge.⁷⁴ Biases and stereotypes of attorneys and defendants may influence perceptions of face-to-face versus videoed communications.⁷⁵

2.6 Communication versus Effective Communication

Some of the strongest predictors of believability in communication are the speaker’s confidence and consistency.⁷⁶ Many non-verbal cues, including gaze and deictic gestures, are dependent on the spatial faithfulness of the video system.⁷⁷ Any technical problem can render videoconferencing exchanges

⁶² Hillman, *supra* note 3, at 47. The author notes savings in efficiency and security which (especially at this time) are concerns of the government. The defendant’s concerns are much more likely to center on constitutional and procedural rights.

⁶³ Haas, *supra* note 2, at 64.

⁶⁴ See Joanmarie Ilaria Davoli, *Physically Present, Yet Mentally Absent*, 48 LOUISVILLE L. REV. 313, 318 (2010) (Impediments to effective representation can take many forms. Unlike mental incompetence, videoconferencing is an impediment introduced into the justice system.).

⁶⁵ *Id.* at 317.

⁶⁶ *Id.* at 318.

⁶⁷ Gail Corbitt et al., *A Comparison of Team Development Stages, Trust and Performance for Virtual versus Face-to-Face Teams*, Proceedings of the 37th Hawaii International Conference on System Sciences 3-4 (2004). (The four task classifications of increasing information requirements and complexity are 1) generating ideas and plans (brainstorming), 2 making choices in situations with and without right answers, 3) negotiating or resolving conflicts of opinion and/or interest, and 4) executing plans (which includes negotiating differences in power). This study found that virtual teams had higher trust coefficients. But this was due to the positive actions the team took, regardless of the medium (either via video or face-to-face)).

⁶⁸ Bekkering & Shim, *supra* note 16, at 104. Media Richness Theory (MRT) states that communication channels differ in the amount and variety of information they carry. As criminal defense is a complex, multidimensional task; a richer communication media is preferred and the richest form of communication is face-to-face.

⁶⁹ Torres, Preskill & Piontek, *supra* note at 17. See *infra* note 124.

⁷⁰ *Id.*

⁷¹ Teoh et al., *supra* note 62, at 313.

⁷² Torres, Preskill & Piontek, *supra* note 17, at 208.

⁷³ *Id.* at 209.

⁷⁴ Binder, *supra* note 45, at. 47. The author stresses that the view of the participants in a videoconferenced proceeding is important.

⁷⁵ See Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children’s Eyewitness Testimony and Jurors’ Decisions*, 22:2 L. HUM. BEHAV. 165, 169 (1998).

⁷⁶ *Id.* at 170.

⁷⁷ David Nguyen and John Canny, *MultiView: Improving Trust in Group Video Conferencing Through Spatial Faithfulness*, CHI 2007 PROCEEDINGS-TRUST & ENGAGEMENT 1465 (2007). (Videoconferencing systems are often

worthless.⁷⁸ Although body language is considered to be extremely important to people who use videoconferencing in establishing trust, the ability to read these non-verbal gestures and cues is limited.⁷⁹ Non-verbal gestures and cues are vital, especially during initial meetings that establish a rapport and trust, enabling the exchange of information necessary to make informed decisions concerning his/her case.⁸⁰

Because of the quality of the connection or age of the video equipment, it can be necessary for all parties to speak slowly and clearly into the microphone.⁸¹ Fast movements are sometimes blurred, or “freeze” on the screen for two to four seconds before returning to live action.⁸² Videoconferencing is a powerful medium, but without a clear connection, it can be a bumpy pothole-riddled section of the information super-highway.⁸³ Many believe, in order to support the complex, multi-layered processes required to conduct effective videoconference hearings, it is necessary to have both the prosecutor and defence attorney at the same place eliminating the need for video.⁸⁴

Research has confirmed that body language and eye/gaze contact are important contributing factors for effective remote communication.⁸⁵ Further, men and women experience, perceive, and use videoconferencing in significantly different ways.⁸⁶ Communicating via videoconferencing effectively is a learned skill where speaking into the camera versus looking at the monitor to see the person with whom they are conversing makes a difference. When the speaker looks only at the screen (monitor) and not the camera, it appears to the listener that the speaker is not looking at them. In face-to-face communication, failure to maintain eye-contact is universally considered to be a sign of deception, leading to feelings of mistrust.⁸⁷ Humans are highly skilled at perceiving eye-contact, and the negative effects of failing to maintain eye-contact and interact smoothly significantly impact the promotion and maintenance of trust.⁸⁸

Teamwork is considered to be necessary to the working relationship between an attorney and their client.⁸⁹ Research shows trust is particularly critical in new relationships and, like partnerships, takes time to establish.⁹⁰ However, trust forms more slowly between people in videoconferences compared to

used in group-to-group meetings where spatial distortions are exacerbated and this research concludes that such systems negatively affect trust patterns.).

⁷⁸ David M. Fetterman, *Videoconferencing On-Line : Enhancing Communication over the Internet*, 25:4 EDUCATIONAL RESEARCHER 23,26 (1996). (Although the research is dated, the conclusions reached are valid. Situations that have a negative impact on the quality of the videoconferenced communications will likely degrade the attorney-client relationship.).

⁷⁹ Cameron Teoh et al., *Body Language and Gender in Videoconferencing*, Info. Sci. Postgraduate Day, 9, 10 (October 2010) (This study identified the importance of body language and eye- and gaze contact as well as the consideration of gender as important contributing factors for effective remote communications.).

⁸⁰ *Id.* at 10.

⁸¹ Binder, *supra* note 45, at 1. The author states that technical flaws and limitations in the equipment diminish the quality of the court proceeding and that they may rise to the level of procedural and substantive violations for a fair hearing.

⁸² *Id.* at 1.

⁸³ Fetterman, *supra* note 79, at 27. Without a clear connection videoconferencing has limited usefulness in the courtroom.

⁸⁴ Lawrence P. Webster, *Evaluation of Videoconferencing Technology Mesa Arizona Municipal Court*, NAT'L CENTER FOR SAT. CTS. (Nat'l Center for Sat. Cts. Williamsburg, Va.) 10 (May 2009). (The author states that the only way for videoconferencing to be used in a way that is both fair and efficient is to have the defendant, defense counsel, and the prosecutor in the same locations (at the jail facility) and have their images videoconferenced to the judge in the courtroom. In this way all the necessary parties can view and converse with each other simultaneously. Interactions between the defendant and counsel can take place in the traditional fashion including private communications. Any disadvantage (or advantage) to the defense would be shared by the prosecution. This scenario seems to satisfy most criticisms of the technology.).

⁸⁵ Teoh et al., *supra* note 80, at 9.

⁸⁶ *Id.* at 10.

⁸⁷ Bekkering & Shim, *supra* note 16, at 105-106. Researchers state that measuring trust can be accomplished in several ways. First, trust may be measured through certain behaviors such as delegating a task (as a client does with their attorney). Another way is through social dilemma games where participants are rewarded for higher levels of trust (this happens in the attorney-client context where clear communications between attorney and client that result in information being exchanged that yield positive outcomes for the client). And finally, trust can be measured by having the participants report their levels of trust on a questionnaire.

⁸⁸ *Id.* at 107.

⁸⁹ Corbitt et al., *supra* note 68, at 1 and 7. Complex relationships need high levels of trust in order to be efficient and effective. This research concluded that for trust to be established and maintained, participants must meet work expectations early in the relationship where the issues with videoconferencing inhibit work expectations and trust negatively impacting the attorney-client relationship.

⁹⁰ Ratnasingham, *supra* note 15, at 341.

face-to-face conversations.⁹¹ Trust, like rapport and partnership, takes time to establish in the initial phase of relationship.⁹² The trust formed by videoconferenced encounters is fragile.⁹³ High trust teams are more effective than low trust teams.⁹⁴ Research found people involved in videoconferenced negotiations there was less trust amongst participants.⁹⁵

Videoconferencing has issues that interfere with the smooth flow of information between people. Small time lags in time when people do not know when the other has finished speaking along with the resulting trust issues.⁹⁶ Non-verbal gestures and cues contribute meaningfully to a conversation, and help one to determine the trustworthiness of others.⁹⁷ There are three stages of trust: 1) deterrence-based trust, 2) knowledge-based trust, and 3) identification-based trust. The first leads to the next, with identification-based trust being the highest form. Further, the development of trust is the same for all types of relationships; be they romantic, manager/employee, or between client and attorney.⁹⁸

Trust in electronic communications reinforces the prospect of continuity in a relationship and a commitment to extend relationships.⁹⁹ The more virtual a relationship, the more the people involved in the relationship need to meet in person. Virtuality (videoconferencing) requires trust to make it work. Research shows that technology alone is not enough.¹⁰⁰ Trust that breaks down in videoconferenced situations can be repaired by face-to-face contact, but then that extra effort has to be made.¹⁰¹

The richness of communication between people increases the learning capacity that comes from shared information, which can contribute to a faster and stronger development of trust.¹⁰² A poor quality video can create artificial cues associated with lying, detrimental to promote trust.¹⁰³ Videoconferencing systems reduce levels of trust as compared to face-to-face meetings.¹⁰⁴ This research has found that people exhibit more cooperative behaviours and have greater trust in their interactions when communicating face-to-face than in a mediated environment.¹⁰⁵ Videoconferencing also inhibits trust by distorting conversational turn-taking cues affecting the normal flow of conversation.¹⁰⁶

⁹¹ Nathan Bos, et al., *Being There Versus Seeing There: Trust Via Video*, SHORT TALKS, 292 (2001). (The study examined the emergence of trust in four different communication situations: face-to-face, videoconferenced, audio, and text chat scenarios. They noted how trust emerges in mediated communications.)

⁹² Ratnasingham, *supra* note 15, at 341. Often a limited time is available for clients and lawyers to establish such a relationship in a criminal case, especially where the attorney is court appointed or a public defender. Because of this limited time, trust needs to be established as quickly as possible. Any medium that inhibits or reduces the establishment of trust must be reviewed.

⁹³ Bos, et al., *supra* note 96, at 292. The authors noted that videoconferenced and audio communications took some time to catch up with face-to-face group in developing trust. Often the decisions needed and the relationship between an attorney and a criminal defendant do not have the time needed to 'catch up.'

⁹⁴ Corbitt et al., *supra* note 68, at 2.

⁹⁵ Teoh et al., *supra* note 62, at 319. The research explains two possible reasons for a lack or drop in trust. The first is that due to the competitive, mixed-motive nature of the environment, people expect untrustworthy behavior and the body language endemic in videoconferencing reinforces judgments of untrustworthiness. Second, due the nature of the task, people are less trustworthy.

⁹⁶ Fetterman, *supra* note 79, at 25. Technological problems can come from many sources. Software glitches, incompatible hardware, improper training of personnel operating the equipment, and outside problems from service providers all can contribute to ineffective videoconferenced communications.

⁹⁷ Cameron Teoh et al., *supra* note 80, at 9. Videoconferencing often does not show or obscures the non-verbal gestures and cues of attorneys or defendants.

⁹⁸ Ratnasingham, *supra* note 15, at 315. Deterrence-based trust is grounded in the fear of punishment and emphasizes utilitarian considerations to maintain a relationship. Knowledge-based trust is where knowledge of the other person (attorney to a client) and the information that is passed between the two builds trust. And Identification-based trust is based on empathy and common values between two people (attorney and client) where this trust revolves around a common task such as a court hearing or trial.

⁹⁹ *Id.* at 313.

¹⁰⁰ *Id.* at 316.

¹⁰¹ See Bos et al., *supra* note 96, at 292.

¹⁰² Bekkering & Shim, *supra* note 16, at 105.

¹⁰³ *Id.* A slow signal makes it appear that that the speaking is hesitating, and hesitation in answering is generally considered a sign of lying.

¹⁰⁴ Nguyen & Canny, *supra* note 78, at 1466. In face-to-face meetings, each participant in the meeting has their own unique perspective defined by his position. Videoconferencing usually only has one camera and that single view is shared by all participants. No matter what angle the participants take, they all take on a shared and perhaps incorrect perspective, defined by the position of the camera.

¹⁰⁵ *Id.* The authors highlight issues of perspective invariance and the Mona Lisa Effect detailing the effect of Mona Lisa's eyes following you as you walk around.

¹⁰⁶ Bekkering & Shim, *supra* note 16, at 105. The authors note the subtleties of tone of voice or eye contact involved in conversational turn-taking.

Trust can be difficult to observe and measure. It can be difficult to build trust via videoconferencing without meeting face-to-face due to a lack of: 1) prior familiarity with each other, 2) prior shared experiences and, 3) expectations of a common future.¹⁰⁷ Low levels of trust can be attributed to the: 1) general uncertainty of the users in technology (videoconferencing), 2) lack of face-to-face initial introductions, 3) lack of enthusiasm and initiative among the parties (attorney/client relationship) and, 4) the unpredictability of communications between the users.¹⁰⁸

3. Theories of Communications via Videoconferencing

The possible negative effects of videoconferencing are examined by some theorists clarifying how people communicate, form working relationships, establish trust, and make informed decisions. These theories posit that how information is assessed depends on how it is gathered.

3.1 Emergent Meaning Theory

Emergent Meaning Theory assesses how people consider various elements of a speaker's story – the story itself, the level of trust between speaker(s) and listener(s), how effectively information is exchanged, and the degree that the speaker is to be believed – to create a *mélange* of understanding.¹⁰⁹ The medium of videoconferencing, often largely unnoticed, contributes to the quality of communication.¹¹⁰ The medium often over-or under-emphasizes certain content on an adjudicator without the adjudicator being aware. Video technology, according to this theory, can never truthfully capture all of the physical and psychological cues that humans understand innately or socialized to consider when forming an opinion about a certain person. Video is two-dimensional while reality is three-dimensional. Camera angles, lighting, and background can either emphasize or minimize certain characteristics that are taken into account when people communicate.¹¹¹ The theory maintains that videoconferencing interferes with the “emergent meaning” assessment that users apply to the quality of exchanged information and retards the building of trust necessary to an attorney-client relationship. Videoconferencing interferes with and distorts the process. With videoconferencing, people are less able to detect sincerity or deception, appreciate cultural differences, or understand non-verbal cues well as if the applicant was before the court in person.¹¹² If the medium has such a strong negative impact on people's perceptions and communications, then videoconferencing will likely interfere with attorney-client communications.¹¹³

¹⁰⁷ Ratnasingham, *supra* note 15, at 316-317.

¹⁰⁸ *Id.* at 317.

¹⁰⁹ Federman, *supra* note 81, at 435. Some of the elements that contribute to impacts on videoconferencing might include: 1) the relative cultural conditioning of television itself, 2) participants' conditioning relative to video camera use in surveillance, 3) the effects of distortion in experiencing non-verbal communications, or those induced by shifted eye-contact (through non-alignment of viewing screen and camera angle), 4) the effects of a video-mediated environment may have on encouraging or detecting deception and, 5) the effects of the participants' relative imbalance in experience with videoconferencing, among other secondary and tertiary ground influences.

¹¹⁰ Marshall McLuhan, *Understanding Media: The Extensions of Man*, New York: McGraw-Hill (1964); See S. R. Ellis, Videoconferencing in Refugee Hearings: Report to the Immigration and Refugee Board Audit and Evaluation Committee, (Unpublished report) Ottawa: Government of Canada (2004).

¹¹¹ Federman, *supra* note 81, at 436. The awareness of these effects is the first step in mitigating the unperceived influences of videoconferencing. But awareness alone is not sufficient to eliminate them. Steps must be taken to alleviate or eliminate them.

¹¹² *Id.* The author states that in some instances these negative issues may not be eliminated from human cognition.

¹¹³ *Id.* at 435-436. Videoconferencing, as well as technology in general, modifies perceptions and manipulates the processes of cognition, and changes the behaviors and interactions with others. The documented negative issues with videoconferencing and its impact on private attorney-client communications is reason enough to slow or stop the process until it can be further studied to alleviate the negative impacts.

3.2 Information Integration Theory

Information Integration Theory argues that videoconferencing technology may have little impact on attorney/client communications in the courtroom.¹¹⁴ This research, backed by previous studies indicates that other factors may be more important than videoconferencing in communicating and formulating opinions.¹¹⁵ This theory assumes that people use a process to combine or integrate information to form impressions and communicate ideas.¹¹⁶ Most of the research relevant to this theory suggests that communication and social judgments, whether towards individuals or groups, are the result of a weighted average of the different sources of available information.¹¹⁷ According to this theory, all pieces of information are not treated equally; some are considered more important and given greater “weight” in forming relationships and opinions. Ebbesen and Konecni used variables to represent the subjective value of each type of information a judge uses to communicate in the courtroom and make decisions. The authors chose five key variables based on observing judges and the types of information most important to their decisions.¹¹⁸ They are: (1) the severity of the crime; (2) a defendant’s prior record; (3) the defendant’s local ties to the community; (4) the recommendation of the district attorney and (5) the defence attorney’s recommendation.¹¹⁹ It was often noted that both prosecutors and defence attorneys often used these factors in support of their recommendations. The main assumption that the authors make and attempt to test is that “... judges would use some type of averaging process to put together the various types of information that they have available when setting bail...”¹²⁰ The research concluded that the five variables were the most important factors judges consider in determining levels of trust. If these factors have a strong impact on communication and conclusions, then videoconferencing would likely have little or no impact on their perceptions of trust (i.e. bail setting).

3.3 Communication Theories

In broad terms, communication theories attempt to explain how information is conveyed and interpreted. A pillar of these theories is Claude Shannon’s Information Theory of communication.¹²¹ This theory assumes that “noise” is the enemy of information. “Noise” is defined as anything that comes between the speaker and the listener.¹²² This is shown, for example, by having someone read a text in a quiet room, in a noisy room, and at a music concert and then quizzing the listeners on their understanding of the text. Information Theory shows that as the amount of environmental noise increases, the amount of information transmitted is reduced. Noise is also categorized as either physical or semantic. Examples of physical noise include background talking, loud music, or bad weather. Semantic noise refers to

¹¹⁴ Orcutt et al., et al., *Detecting Deception in Children’s Testimony: Factfinders’ Abilities to Reach the Truth in Open Court and Closed-Circuit Trials*, 25:4 L. HUMAN BEHAVIOR 339, 366-367 (2001). (The video in this study was not interactive but it does highlight the negative perceptions that the viewers had of subject on video. Because of these negative issues it was the conclusion of the research that such technology may not be in the best interest of the witness on video.)

¹¹⁵ *Id.*

¹¹⁶ See Ebbe B. Ebbesen and Vladimir J. Konecni, *Decision Making and Information Integration in the Courts: The Setting of Bail*, 322: 5 J. PERSONALITY AND SOC. PSYCHOLOGY 806 (1975). (“This theory is primarily concerned with the process that allows people to combine or integrate social information to form impressions and make decisions.”)

¹¹⁷ *Id.* at 807. Information integration theory employs an averaging model to help guide the analysis and interpretation of the results.

¹¹⁸ *Id.* at 808. The primary purpose of the research was to determine how people, in this case a judge, integrates information to arrive at decisions.

¹¹⁹ *Id.* at 812. “There were two purposes of this study. The first was to determine whether the same factors that were important in the judges’ simulated decisions would prove important in their actual bail decisions. The second was to determine whether or not the same integration model used to explain the results from the full factorial design could be generalized to actual bail hearings.”

¹²⁰ *Id.*

¹²¹ See C. E. Shannon, *A Mathematical Theory of Communication*, BELL SYSTEMS TECH. J. (1948); reprinted in MOBILE COMPUTING AND COMM. REV. Vol. 5, No. 1. 3. (Shannon views a major problem with communication, especially through an artificial medium such as videoconferencing, is that of reproducing a message sent from one point to another. The danger of confusion of the message from the person sending the message (the Source) to Receiver is high the more problematic the medium. The negative issues associated with videoconferencing impedes communication and interferes with the attorney-client relationship.)

¹²² Davis Foulger, *Models of the Communication Process*, <http://davis.foulger.info/research/unifiedModelOfCommunication.htm>, 2-3 (2004).

distortions or misunderstanding in the meanings of words between the sender and receiver, usually based on false assumptions, resulting in a breakdown of communication.¹²³ Summarized mathematically, this theory states:

$$\text{Capacity} = \text{Information} + \text{Noise}^{124}$$

The insidious nature of this type of communication breakdown is that the people involved often do not realize that there has been a breakdown or realize it very late in the interaction. In the videoconferencing context, the more environmental noise there is from poor technology, poor training of court personnel, or ignorance of the use of videoconferencing, the less capacity there is for the users to understand the information transmitted.

Shannon's communication process is broken-down into eight components:

1. the Source – the person sending the message;
2. the Message – sent by the Transmitter and received by the Destination;
3. the Transmitter – the Transmitter has two layers: the sound (voice) and (body) gestures of the speaker, and the method used to convey the sound and gestures, either by face-to-face contact or via camera and microphone.
4. the Signal – the Message from the Source that flows from the two layers of the Transmitter.
5. the Channel – how the Signal is carried. In the example of videoconferencing the Signal is carried via the Internet or the hardwires that carry the video.
6. the Noise – ancillary signals that obscure or confuse the Signal.
7. the Receiver – that which receives the Message from the Source. In the example of videoconferencing it is the video monitor from the Transmitter.
8. the Destination – the person who hears/receives the Message.¹²⁵

Videoconferencing is a classic example of Shannon's Information Theory. The Message, the private communications, between the defendant (the source) and their attorney (the receiver), is confused by the video camera and microphone (the Transmitter) or the poor quality of videoconferencing or training of the operators (Noise) negatively impacts defendants' quality of justice. Problems with the Transmitter or Noise as defined by Shannon's theory creates impedes communications between attorney and client.

Other communication studies have focused on issues, including videoconferencing, that impact attorney-client communications. Some studies conclude that attorney-client communications via video have a great deal of ambiguity.¹²⁶ Another study examined the influence of closed-circuit television (CCTV) in open court and the ability to effectively communicate, and also came to an ambiguous conclusion.¹²⁷ This study explored a fact-finders' ability to determine (1) deception or non-deception of a child's testimony via CCTV versus traditional trial settings, and (2) the influence of viewing deceptive and non-deceptive testimony on a person's rating of a witness' credibility and defendant's guilt.¹²⁸ It was found that there was no support for the idea that fact-finders reach the truth better when children testify in open court versus CCTV. Unlike videoconferencing, CCTV is not interactive – it is a visual medium where a person's ability to determine deception is tested.

Low credibility is also associated with videoconferencing.¹²⁹ As previously mentioned, establishing trust via video is difficult because non-verbal cues are unavailable to read.¹³⁰ For videoconferencing to

¹²³ *Id.*

¹²⁴ Graham Williamson, *Communication Theory*, <http://www.speech-therapy-information-and-resources.com/communication-theory.html> 2 (visited 2012).

¹²⁵ Fougler, *supra* note 123, at 2-3.

¹²⁶ Orcutt et al., *supra* note 115, at 365-367. This study highlights the problematic issues associated with this technology. Issues of accuracy, believability, consistency, confidence, attractiveness, and intelligence are all detailed in this research. These issues in the context of private communications between an attorney and their client via videoconferencing, underscore the dangers of how such communication can be diminished to the point of failure.

¹²⁷ *Id.* at 807.

¹²⁸ *Id.* at 368.

¹²⁹ Torres, Preskill & Piontek, *supra* note 17, at 178.

¹³⁰ Teoh et al., *supra* note 62, at 313. Participants stated that they were dissatisfied with videoconferencing because it did not provide enough visual information about the people they were conferencing with. They felt that being able to clearly see each other's' body language was an essential aspect of face-to-face meetings that were absent in videoconferencing.

work in the courtroom when an attorney is present but their client is being held in prison, some basic safeguards must be implemented. The introduction of videoconferencing should be gradual, allowing law enforcement, judges, attorneys, and court administrators to implement fair and effective procedures.¹³¹ Videoconferencing can have a place in the legal process, but such systems must be employed in a way that does not diminish trust between parties.¹³² Research has shown that video, whether interactive or not can lead to a negative bias.¹³³ Data clearly shows that there are issues with defendants being able to clearly and privately communicate with their attorneys. Clear, private communication channels must be established between attorney and client.

Research also suggests that videoconferencing may be more useful when participants are already acquainted and have a pre-existing relationship.¹³⁴ This is seldom the case, especially with defendants represented by public defenders. Important decisions need to be discussed between an attorney and their client prior to going to court. Case strategies, fact gathering, and basic decisions (such as pleas and the ramifications of such decisions) are better hashed out in person. Studies clearly show that negotiation and intellectual tasks are better performed using face-to-face communication.¹³⁵ Researchers question some of the basic procedures that happen at many videoconferenced hearings. In some jurisdictions, it is mandated that defence attorneys be physically present with their client during videoconferenced hearings.¹³⁶ Other studies state that videoconferencing cannot eliminate the need to transport defendants to the courthouse.¹³⁷

Video conferencing is a poor substitute for in-person hearings.¹³⁸ A courtroom is more than a mere location. The setting is an important element in the constitutional conception of American justice, contributing to a dignity essential to the judicial process.¹³⁹ In *A Theory of Justice*, John Rawls maintains that fundamental fairness and procedural justice rely on rules that are reasonably expected to be to everyone's advantage.¹⁴⁰ If a rule does not benefit everyone, it is likely that the rule is unfair. This does not imply that everyone must benefit equally for a rule for it to be considered fair, only that everyone, to some degree, benefits. A set of rules, properly followed, make up a process. Nowhere are rules and processes more important than in a legal setting. The American criminal court system is a near-perfect example of a people's attempt to put into action a set of rules that depends upon fundamental fairness and procedural justice. This process-driven activity strives for a desired outcome that a defendant is found guilty only if that defendant committed that crime through strict adherence to the legal process. Strict adherence to the legal process is necessary to ensure consistency in all proceedings, as well as an expectation of reliability on the part of the society instituting the legal process. It is through consistency and reliability that the legal process attains correct outcomes and legitimacy. A defendant's speech has personal, dignitary, and democratic import beyond its instrumental within a criminal case.¹⁴¹ Criminal defendant speech is perhaps the quintessential example of the individual defending his or her life and

¹³¹ Philiposian et al., *supra* note 20, at 22. This research admits that there are problems with the technology and its implementation. It recommends that more thinking needs to be done to capitalize on the capabilities of videoconferencing and that all participants must work together to identify the problems and mutually work out solutions.

¹³² Nguyen & Canny, *supra* note 78, at 1467 and 1474. As stated earlier (*supra see* note 132) where research states that the only way to alleviate the negative effects of videoconferencing is to have multiple cameras and multiple viewing monitors, such systems also need: 1) distances of videoconferencing equipment must mimic that of face-to-face meetings, 2) image quality must be good enough for the perception of precise eye contact and, 3) projectors must be placed so they are comfortable for prolonged meetings.

¹³³ Goodman et al., *supra* note 76, at 170. The use of closed-circuit television (CCTV) was associated with a negative bias.

¹³⁴ Toeh et al., *supra* note 64, at 313-314. A videoconferenced hearing is often the first meeting between a client and their attorney, especially a public defender or court appointed attorney.

¹³⁵ *Id.* at 314. A client-lawyer communication, especially during initial meetings and pre-trial hearings involve negotiation and intellectual interactions between client and lawyer.

¹³⁶ Philiposian et al., *supra* note 20, at 20. Indeed, the jurisdiction in question in the article is one where physical presence of a defense attorney is a mandatory condition of the Public Defender's participation in videoconferencing.

¹³⁷ Webster, *supra* note 85, at 6. This evaluation assumed that the defense attorney and the client were together at the jail facility.

¹³⁸ Grant, *supra* note 39, at 5.

¹³⁹ Davis, *supra* note 22, at 28. The author states that clients, via videoconferencing, do not behave the same as those participating in person in a courtroom due to the nature of the technology. The author attributes this to a lack of dignity, decorum, and respect of videoconferencing versus a traditional courtroom.

¹⁴⁰ John Rawls, *A Theory of Justice* 110-112 (1971).

¹⁴¹ See Natapoff, *supra* note 4, at 1450.

liberty against the state.¹⁴² Poor defendants, in addition to their socioeconomic and educational disadvantages, are often represented by public defenders or low-paid attorneys who lack the resources and/or time to fully interview and listen to their clients – adding to an often poor client-attorney communication.¹⁴³ Proceedings conducted by videoconferencing raise a number of concerns that have not been fully explored, particularly in light of the growing body of scientific evidence that shows video-mediated personal interactions are perceived as significantly different by the participants and observers than in-person interactions.¹⁴⁴

Many legal scholars believe that the use of videoconferencing may cause defendants to underestimate the importance of the proceedings. Judge Joseph Goodwin of the Southern District of West Virginia believes that no video monitor can exert the same psychological impact as does a physical presence in the courtroom. The judge in robes, the raised bench, the witnesses, the attorneys, the families and spectators, the flags, the seals, and the armed bailiffs are all elements that invest the solemnity and seriousness that the courtroom warrants. They are designed to impel people to reflect on the legal process and their responsibilities to the law and greater society. They are more than mere trappings. The form and the process are pillars that support the structure of the criminal justice system just as ceremony and ritual reinforce religion practices.¹⁴⁵ Judge Goodwin further states that videoconferencing may taint the general public's perception of integrity of the criminal court process. He maintains that the court's moral authority rests on the perception that its proceedings are humane, fair, and just.¹⁴⁶ The criminal court process depends on this perception, and the court should not take this confidence for granted. Any practice that threatens to demean the dignity of defendants will likely reduce the respect for the court and imperil the criminal justice system.

Given the mixed conclusions that research has reached, more research is necessary to determine if videoconferencing has an impact on effective, private communication and whether that impact, if any, results in a lack of adequate legal representation for defendants.

4. Pros and Cons of Videoconferencing

4.1 Cons of Videoconferencing

Researchers detail the drawbacks of synchronous electronic communications (communications that include videoconferencing). First is a lack of access or experience with videoconferencing technology.¹⁴⁷ Often, court personnel do not have experience with videoconferencing equipment, which creates communication problems. These problems in turn change the behaviour of videoconference users in the courtroom. It becomes difficult for defendants to see, hear, and understand what is taking place, and at a remote location therefore they do not behave as those in a courtroom.¹⁴⁸ Some defendants are impressed that they are “on TV,” which might also alter the way they behave.¹⁴⁹ Not all people are comfortable with communicating via videoconferencing.¹⁵⁰ One judge noted that the some defendants are so unaccustomed and uncomfortable with videoconferencing or speaking on camera that they appear to act “like zombies.”¹⁵¹

A second drawback is failures or problems associated with videoconferencing technology.¹⁵² Issues with the videoconferencing equipment are detrimental to effective communications. Videoconferencing

¹⁴² *See Id.* at 1451.

¹⁴³ *See Id.* at 1453-1454 .

¹⁴⁴ Haas, *supra* note 2, at 61.

¹⁴⁵ Ashdown & Menzel, *supra* note 11, at 68 (quoting a letter from Judge Joseph Goodwin, District Court Judge for the Southern District of West Virginia, to Judge Robin J. Cauthron, Chair, Defender Services Committee (Sept. 6, 2001)).

¹⁴⁶ *Id.*

¹⁴⁷ Torres, Preskill & Piontek, *supra* note 17, at 198-199.

¹⁴⁸ Davis, *supra* note 22, at 27. The author states that many observed that there was often no proper meaningful, private communications between clients, located at a detention center, and their attorneys, located in the courtroom.

¹⁴⁹ Binder, *supra* note 45, at 1.

¹⁵⁰ Torres, Preskill & Piontek, *supra* note 17, at 209.

¹⁵¹ Davis, *supra* note 22, at 27. Conversations via videoconferencing are difficult and problematic especially in situations that are emotionally charged and filled with anxiety.

¹⁵² Torres, Preskill & Piontek, *supra* note 17, at 198-199.

systems are notorious for the spatial distortions they introduce.¹⁵³ Many videoconferencing systems are low quality, limited and offer or no interaction between client and lawyer, leading to reduced trust between the two sides with obvious negative outcomes.¹⁵⁴ Inferior, problematic videoconferencing yields inferior, problematic communications.

Third is an inability (through scheduling or as a result of the technology) for attorneys and clients to set an agenda ahead of time.¹⁵⁵ Defence attorneys and clients must be able to meet ahead of time to discuss and strategize the issues of their case. The give and take of information exchanged before a hearing or trial has an impact on what happens at that hearing or trial. The defendant may, for example, be able to point out errors in the record or provide some illuminating piece of evidence that will assist his counsel in the case. Often, such private communications must occur immediately as in a fast-paced hearing (such as a bail hearing). In this context, separating the defendant from counsel via videoconferencing can infringe on the Sixth Amendment right to counsel.¹⁵⁶ In a 2010 study of the effect of videoconferencing on bail hearing outcomes, researchers found that there were “extremely limited” opportunities for private attorney-client communications.¹⁵⁷ The results of the research showed that the average bond amounts rose substantially following the introduction of videoconferencing at bail hearings and that there was a steady rise in bond levels over time.¹⁵⁸

Another detriment is a reduced opportunity for full participation among videoconference users.¹⁵⁹ Communications in the courtroom, whether they are private communications between attorney and client or in open court, are complex. Studies show that the more complex the communications, the less effective videoconferencing is in the courtroom. To be sure, any medium that inhibits confident and consistent testimony in attorney-client communications must be viewed with caution.¹⁶⁰ It is clear that the larger the audience, the more issues emerge with videoconferencing.¹⁶¹ Studies show that videoconferencing overloads the cognitive processing of users involved in a complex task and biases their perceptions of one another.¹⁶²

Videoconferencing also does not present the same opportunity for mutual understanding and trust building that is unique to face-to-face meetings.¹⁶³ Via videoconferencing, an attorney may not gauge the emotional state of their client.¹⁶⁴ An attorney cannot personally comfort or defend their client by placing a hand on an arm or shoulder or standing beside the client before the court.¹⁶⁵ In some jurisdictions, videoconferencing means that there is no proper opportunity for meaningful, private communication between attorney and client.¹⁶⁶ Electronic communications often lack security and reliability arising from issues of trust among users.¹⁶⁷ In some jurisdictions, courts provide a separate telephone line for

¹⁵³ Nguyen & Canny, *supra* note 78, at 1465. The authors state that the only way to alleviate the negative effects of videoconferencing is to have multiple cameras and multiple viewing monitors available for all participants.

¹⁵⁴ See Corbitt et al., *supra* note 68, at 6-7.

¹⁵⁵ Torres, Preskill & Piontek, *supra* note 17, at 198-199.

¹⁵⁶ Diamond et al., *supra* note 24, at 881-882. The author highlight that during bail hearings judges are required to make a determination on a defendant’s trustworthiness and character concerning the likelihood of a defendant’s returning for trial if released and that the opportunity to physically observe a defendant would add useful information to a judge in making a determination.

¹⁵⁷ *Id.* at 884-885.

¹⁵⁸ *Id.* at 897-898.

¹⁵⁹ Torres, Preskill & Piontek, *supra* note 17, at 198-199.

¹⁶⁰ Goodman et al., *supra* note 76, at 169.

¹⁶¹ Fetterman, *supra* note 79, at 25. The more people involved in the videoconferencing process, the more issues that can arise. Multiple people require multiple points of view or a wider angle will result in a diminution of detail in each participant.

¹⁶² James H. Watt et al., *Asynchronous Videoconferencing: A Hybrid Communication Prototype*, Proceedings of the 35th Hawaii International Conference on System Sciences, 3 (2002) (This paper reviews the literature on the costs and benefits of synchronous and asynchronous interactions.).

¹⁶³ Torres, Preskill & Piontek, *supra* note 17, at 198-199.

¹⁶⁴ Poulin, *supra* note 12, at 1130.

¹⁶⁵ *Id.*

¹⁶⁶ Davis, *supra* note 22, at 27. The author highlights four problems of videoconferencing: 1) the authority for defendants to appear via videoconferencing, 2) the Six Amendment right of confrontation, 3) the Sixth Amendment right to effective assistance of counsel and, 4) due process rights under state and federal constitutions.

¹⁶⁷ Ratnasingham, *supra* note 15, at 313. The author defines trust as “the willingness of a party to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor...” This can be a working definition of the attorney-client relationship where a defendant is vulnerable to the actions of their attorney with an expectation that their defense attorney will effectively represent and inform them throughout the representation.

privileged communications between attorney and client, but even then nonverbal communication is limited.¹⁶⁸ Many attorneys' experience with videoconferencing involves speaking with the client by telephone the day before, with no convenient means for attorney-client private communication during the videoconferenced hearing the day of the hearing.¹⁶⁹ Even with a private telephone line, extemporaneous communications between attorney and client via videoconferencing is difficult.¹⁷⁰ If the attorney needed to discuss any point with his client (in a remote location) before or during the hearing, everyone in the courtroom would have to leave.¹⁷¹ The need for attorney-client confidentiality renders videoconferencing cumbersome and impractical if the courtroom needs to be cleared for every question.¹⁷² The court also deemed "private" any attorney-client communication and the communications could not be used in anyway by any party or agency since the security of the transmission was in question.¹⁷³

And lastly, videoconferencing may not be suitable for users unfamiliar with communicating electronically.¹⁷⁴ Attorneys and clients not familiar with videoconferencing communicate less effectively, and can do themselves harm by projecting themselves in a negative light. As noted previously, child witnesses who testified via Close Circuit Television CCTV were viewed as less believable than those who testified face-to-face despite the fact they testified more accurately.¹⁷⁵ Surprisingly, witnesses on video were also viewed as less attractive, less intelligent, less accurate, and more likely to make up a story.¹⁷⁶ Due to the negative biases toward witnesses using CCTV, attorneys may want to limit its use.¹⁷⁷ The lessons learned from CCTV must be applied to videoconferencing.

4.2 Pros of Videoconferencing

Proponents of videoconferencing claim that the medium has no adverse consequences.¹⁷⁸ However, these studies do not consider the special relationship between attorney and client. One study found no difference in the quality of cancer genetic counselling delivered to the patient via video versus face-to-face by a doctor. This was due to the fact the information was delivered to the patient quickly (lowering the anxiety of waiting for such news), and not from the differences in the medium. This differs from the attorney-client scenario, which requires information to be exchanged for a defence strategy, rather than a one-sided delivering of news.¹⁷⁹ Another study claims that that contact between people via videoconferencing builds trust in the absence of any other contact at all.¹⁸⁰ Of course, some contact is better than little or no contact. Further, another study states that jurors predicted deception by a child witness via video as often as face-to-face. This study differs from the present analysis of

¹⁶⁸ Poulin, *supra* note 12, at 1129.

¹⁶⁹ Binder, *supra* note 45, at 1. The author details the only way he could privately speak with his client during the hearing was to request that the judge clear the entire courtroom.

¹⁷⁰ Poulin, *supra* note 12, at 1129-1130. The defendant cannot use nonverbal communication to interact with their defense counsel. Similarly, defense counsel will have difficulty giving advice. The loss of non-verbal communication on the attorney/client relationship can be significant.

¹⁷¹ Binder, *supra* note 45, at 1. Such procedures may lead to a chilling effect on attorney-client communications by making them so cumbersome that attorneys are reluctant to use them for fear of slowing the process down to a point where the other participants (judges, clerks, opposing counsel) become exasperated.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Torres, Preskill & Piontek, *supra* note 17, at 198-199.

¹⁷⁵ Goodman et al., *supra* note 76, at 199. Any warping of perceptions in communications would detrimentally affect attorney-client communications.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Lederer, *supra* note 19, at 22.

¹⁷⁹ See Jordanna Joaquina Coelho et al., *An Assessment of the Efficacy of Cancer Genetic Counseling using Real-Time Videoconferencing Technology (Telemedicine) Compared to Face-to-Face Consultations*, 41 EUR. J. CANCER 2257, 2259-2260 (2005). (This study concludes that videoconferencing is effective for providing information in a doctor-patient relationship. This type of communication differs from attorney-client communication in the courtroom in obvious ways. The fast pace of the courtroom and the adversarial nature of the proceedings are the more prominent differences.)

¹⁸⁰ See Dominic Thomas and Robert Bostrom, *Building Trust and Cooperation through Technology Adaption in Virtual Teams: Empirical Field Evidence*, INFO. SYSS. MGMT. 25:45 45, 51-54 (2008). (When traditional face-to-face meetings are not possible due to cost and time required for travel, business people using videoconferencing can regain some of the lost connections and trust through technology adaption and specific management techniques. The technology adaptations included better training and equipment to facilitate the task and the management techniques included a more cooperative model to establish trust and integrity among the participants.)

videoconferencing involving the interaction between client and attorney in that the study did not involve interactive video (merely a one-sided taping of testimony), involved children rather than adults, and involved witnesses and not clients represented by counsel.¹⁸¹

4.3 Examples of Videoconferencing in the Courts

Videoconferencing is most frequently used for a jailed defendant, following arrest. At this stage in a criminal proceeding, the court, counsel, and the defendant have important functions to perform. Communications with defence counsel define the parameters of a defence strategy and begin the relationship of trust necessary for proper representation of counsel. These initial attorney-client interactions require a delicate feel for the defendant and the case. A defendant with information that changes the dynamics of the case must be able to privately communicate this to his attorney as early as possible.

In many courts, videoconferencing is being employed to avoid bringing defendants to the courtroom for certain proceedings. Case law on this subject extends back fewer than twenty years, but sheds light on the use of video both in the trial and non-trial stages of the criminal court process. The following cases detail federal court decisions during the first appearance/arraignment, testimony, and sentencing. Each stage is unique and has different consequence concerning the impact of interactive video. During the pre-trial phase, the impacts can be especially important. Because most cases do not go to trial, the determination of whether to reach a plea agreement and what the terms of the plea agreement might be are especially impacted by pre-trial procedures.

4.3.1 Arraignment

In *Valenzuela-Gonzalez v. United States District Court for the District of Arizona* (915 F.2d 1276 1990), the court held that arraignments of an accused must take place in open court with the accused physically present in the courtroom.¹⁸² In this case the court. The court cites the Federal Rules of Criminal Procedure, Rules 10 and 43, as its basis for ruling. Rule 10 states:

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called to plead.¹⁸³

Rule 43 states:

- (a) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impanelling of the jury and the return of the verdict and at the imposition of sentence, except as otherwise provided in this rule.¹⁸⁴

The court did leave room to allow the Federal Rules of Criminal Procedure to be construed more broadly in future decisions, by including the allowance that “substantial compliance” with Rule 10 might include interactive video. At this time there have been no federal challenges to altering the courts stand on video arraignments.

¹⁸¹ Holly Orcutt *supra* note 115, at 365-367. This research found participants that observed videoed witnesses were able to discern the truth. But the study also found that videoed witnesses (children in this study) were viewed as less accurate, believable, consistent, confident, attractive, and intelligent.

¹⁸² See *Valenzuela-Gonzalez v. United States District Court for the District of Arizona* 915 F.2d 1276, 1280-1281 1990. (Videoconferencing was proper absent a showing that the procedure was necessary as opposed to convenient. “Arraignment by closed circuit television constitutes a violation of Federal Rules of Criminal Procedure 10 and 43.” “Absent a determination by Congress that closed circuit television may satisfy the presence requirement of the rules, we are not free to ignore the clear instructions of Rules 10 and 43.”).

¹⁸³ FED. R. CRIM. P. 10.

¹⁸⁴ FED. R. CRIM. P. 43.

4.3.2 Testimony

In *Maryland v. Craig* (497 U.S. 836 1990), the court reviewed the question of whether the confrontation clause categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial by one-way closed circuit television (outside the defendant's physical presence).¹⁸⁵ The court found that such testimony did not violate the confrontation clause but the prosecution must show a finding of "necessity" on a case specific basis. In this case, the court state that a defendant's right to confrontation is not absolute and that Sixth Amendment rights must be interpreted in the context of the necessities of trial and the adversarial process. The court articulated a two-part test that must be met to deny confrontation: (1) to further an important public policy and (2) where the reliability of the testimony offered is otherwise assured.¹⁸⁶ In the *Craig* case, the court identified the protection of children as an important state interest. To satisfy the second requirement of the test, the court stated the testimony was reliable in that the child witness was: (1) deemed competent to testify, (2) under oath, (3) the defendant, the judge, and the jury were able to view the demeanour of the child witness through a video monitor during testimony and, (4) the defendant retained the opportunity for contemporaneous cross-examination.¹⁸⁷

The *Craig* case, a five to four decision, sparked a strong dissenting opinion. In the dissent, the four quoted the Constitution's Sixth Amendment directly: "In *all* criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."¹⁸⁸ To these Justices, "to confront" plainly means to encounter physically, face-to-face. The Justices also held that if this is a defect in the Constitution, then it should be amended by proper procedures, not by judicial pronouncement.¹⁸⁹

The issue was further explored in *Harrell v. Florida* (709 So.2d 1364 1998).¹⁹⁰ In *Harrell*, the court held that the admission of a victim's testimony via interactive video did not violate the defendant's right to confrontation.¹⁹¹ In this case, the victims were tourists visiting the United States from Argentina who was assaulted and robbed while on their way to the airport to return home, the court refined the two part test articulated in the *Craig* case. Part one of the test states the use of interactive video must: (1) be justified, on a case specific finding, based on important state interests, public policies, or necessities of the case and (2) must satisfy the three elements of confrontation, that is, the oath, cross-examination, and the observation of the witness's demeanour.¹⁹² The first part of the test was satisfied in that the victims were home in Argentina, beyond the subpoena power of the court, in poor health, and that their testimony was absolutely essential to the case. The second part was fulfilled by the interactive video transmission by swearing of an oath, the opportunity for interactive cross examination, and video monitor's image that allowed observation the witness's demeanour. The *Harrell* case gave further precedent to the use of interactive video as well as further refining the situations of when it will be allowed.

United States v. Gigante (166 F.3d 75 1999) concerned a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), RICO conspiracy, conspiracy to murder, extortion conspiracy, and a labour payoff conspiracy.¹⁹³ The court ruled a witness's testimony via two-way, closed circuit television

¹⁸⁵ See *Maryland v. Craig* 497 U.S. 836, 848, 852 1990. (The Confrontation Clause reflects a "preference" for face-to-face confrontation at trial and that preference must give way to necessities of the case and public policy considerations. The physical and psychological well-being of child abuse victims at trial can qualify as such a public policy.)

¹⁸⁶ *Id.* at 850. "That the face-to-face requirement is not absolute does not, of course, mean that it may be easily dispensed with." The majority, in applying their reasoning, believed that it could be dispensed with.

¹⁸⁷ *Id.* at 844-846.

¹⁸⁸ *Id.* at 861-862. The dissent states that majority indulges in mental gymnastics that make the "impossible plausible" by re-characterizing the Confrontation Clause as an abstraction of observation rather than physical presence.

¹⁸⁹ *Id.* at 861-862. The dissent opined that the text of the Sixth Amendment is clear and meant to protect against, rather than conform to current beliefs that can qualify as a public policy.

¹⁹⁰ See *Harrell v. Florida* 709 So.2d 1364 1998.

¹⁹¹ *Id.* at 1372. The Court recognized that there are costs associated with technological change and that it is incumbent on the judge to monitor problems that threaten the reliability defendant rights and court proceedings. Further, the Court is confident that, when properly administered, this technology will advance both access to and the efficiency of the justice system.

¹⁹² *Id.* at 1369. The Court stated that there is a strong presumption in favor of face-to-face testimony. Further, the burden would be on the moving party to provide substantial justification for the use of the technology.

¹⁹³ See *United States v. Gigante* 166 F.3d 75, 81 1999. (The Court states that this technology should not be considered commonplace substitute for in-court testimony by a witness. Further, that there are intangible elements of the ordeal of testifying in a courtroom that are reduced or eliminated by remote testimony.)

did not violate the defendant's Sixth Amendment right of confrontation.¹⁹⁴ In this case, the witness was terminally ill and part of the witness protection program. The court reasoned that the testimony retained the salutary effect of in court testimony and the remote testimony afforded greater protection of the defendant's rights than would be provided by pre-trial deposition, which would have been permissible under the circumstances. The court reiterated that the right to face-to-face confrontation is not absolute but qualified the statement, stating that face-to-face confrontation will only be denied under "exceptional circumstances."¹⁹⁵ The exceptional circumstances requirement was met by the witness. Further, the court states that the testimony does not have to fulfil the test articulated in *Craig* because the situation in the instant case employed a two-way video system whereas the video system in *Craig* was a one-way video system. This case further defined the use of interactive video in the courts.

In *Minnesota v. Sewell* (595 N.W.2d 207 1999) the court ruled that the testimony of a prosecution witness on interactive television (ITV) did not violate the defendant's confrontation rights.¹⁹⁶ Here the court found that the use of ITV was akin to the use of videotaped deposition testimony, and thus was authorized. Further, because the witness had recently undergone surgery and his physician informed the court that the witness would not be able to travel for a minimum of three months, the court ruled that the video testimony was acceptable. This case further clarified some technology issues inherent in video testimony. The court held that any distortion in the prosecution witnesses testimony via ITV by occasional transitory and insignificant static-type interference with the video image and slight time delay between questions and answers did not preclude an effective cross-examination or interfere with the jury's assessment of the witness's demeanour. Further, the court stated that once the unavailability of a witness and the necessity of testimony have been demonstrated, the focus of the confrontation clause analysis shifts to the reliability of the testimony. The reliability of the testimony of an unavailable witness is ascertained, for the purposes of confrontation clause analysis, by examining four features: (1) whether the testimony was given under oath, (2) whether there existed an opportunity for cross-examination, (3) whether the fact-finder has the ability to observe demeanour evidence, and (4) whether there exists and increased risk that the witness will wrongfully implicate an innocent defendant when testifying out of his presence.¹⁹⁷ Please note the court used the test introduced in the *Craig* case and altered the fourth criteria of the test concerning the reliability of testimony from "the defendant retained the opportunity for contemporaneous cross-examination" to the risk of wrongfully implicate an innocent defendant.

4.3.3 Sentencing

In *United States v. Navarro* (169 F.3d 228 1999), the court held that sentencing by interactive video violated the rule requiring presence at sentencing.¹⁹⁸ The court stated that "presence" at sentencing means physical presence. The court in *Navarro* went to great lengths to establish a legal basis for physical presence being required at sentencing.¹⁹⁹ The Court ran through a thorough analysis of Rule 43 of the Federal Rules of Criminal Procedure forming the basis of the physical presence requirement. Further, the court expanded its examination of the definition of "presence" by invoking its definition in *Blacks Law Dictionary*, *Webster's Third International Dictionary*, and through the plain, ordinary meaning of the English language.²⁰⁰ The analysis of the definition focused on the words "in sight" and whether this key

¹⁹⁴ *Id.* Because this technology may provide at least as great protection of confrontation rights and the Court declined to articulate a clear standard. (See *United States v. Johnpoll*, 739 F.2d 702, 708 (2d Cir. 1984)).

¹⁹⁵ See *Id.* at 81-82. Here the Court embraces a standard the Federal Rules of Evidence 15 for "unavailable" witnesses where the decision to allow such testimony rests with at the discretion of the trial court and will not be disturbed without a clear abuse of discretion. (See *United States v. Johnpoll*, 739 F.2d 702, 708 (2d Cir. 1984)).

¹⁹⁶ See *Minnesota v. Sewell* 595 N.W.2d 207, 213 1999. (The defense counsel had an unfettered opportunity to cross-examine the witness and did so extensively and effectively. Further, counsel was able to explore the witnesses inconsistent statements, confront him with his criminal background, and the jury saw and heard the cross-examination and the witnesses' responses. The Appellant countered that he could not use common "body language" confrontational techniques, that the jury was deprived of "demeanor clues" (such as face-flushing, perspiration, breathing, and subtle eye movements), and could not see the whole witness because of the camera angle.).

¹⁹⁷ *Id.* at 212-213. (See *United States v. Gigante*, 166 F.3d 75, 80 (2nd Cir. 1999).

¹⁹⁸ See *United States v. Navarro* 169 F.3d 228, 235 1999. (The district court overruled the defendant's objection to being sentenced by videoconferencing and sentenced him to life in prison.).

¹⁹⁹ *Id.* at 235-237. The analysis is based on Federal Rules of Criminal Procedure 43, the plain language in Black's and Webster's Dictionaries, and case law.

²⁰⁰ Blacks Law Dictionary, Webster's Third International Dictionary.

part of the definition is satisfied through videoconferencing. The court definitively concluded that videoconferencing does not satisfy the requirement of presence. The court also touched upon the dignity and ritual of physical presence in court as necessary for the public's perception of justice:

The very ceremony of trial and presence of the fact finder may exert a powerful force for truth telling. The opportunity to judge the demeanour of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend trial. Sentencing a defendant by video conferencing creates the risk of a disconnect that can occur because '[t]he immediacy of a living person is lost.' *Stoner v. Sowders* 997 F.2d 209, 213 1993. "[I]n most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact."²⁰¹

The court opined that video conferencing cannot satisfy the presence requirement outside of extraordinary circumstances as well as a concern the legitimacy of the legal process.

In *United States v. Lawrence* (248 F.3d 300 2001), the court reinforced the *Navarro* decision by stating that "presence" at sentencing means physical presence.²⁰² The court unequivocally reiterated that Rule 43 of the Federal Rules of Criminal Procedure requires a defendant to be physically present at the imposition of sentence.²⁰³ The facts of this case shed light on why the court sentenced the defendant by interactive video. At the sentencing hearing, the defendant was unruly and abusive. The defendant cursed during the hearing, was sarcastic to the court, and repeatedly boasted of his intention to continue breaking the law. The defendant, who was six feet eight inches tall and weighed about three hundred pounds, had to be restrained during some of his court appearances by a 50,000 volt stun belt. The defendant was incarcerated in a federal super-maximum security facility and was deemed by the Bureau of Prisons to be "a danger to transport" and a "very dangerous individual due to his past behaviour." Rule 43 states that a defendant can be removed only "after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom."²⁰⁴ The court further stated that the warning was an integral part of the rule, as well as the constitutional underpinnings of the rule itself. In *Lawrence*, the court found that the defendant was not given proper notice that his behaviour was disruptive and that such behaviour would lead to his being removed from the courtroom for sentencing. Absent of such a warning, found the court, the defendant must be sentenced in the physical presence of the court. The court further stated:

The government maintains that district courts should have the discretion to permit video teleconferencing when circumstances warrant it. The rule reflects a firm judgment, however, that virtual reality is rarely a substitute for actual presence and that, even in the age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it. The Sixth Amendment right of a defendant to be present at trial best ensures the right to consult with counsel and confront adverse witnesses. Presence at sentencing serves additional purposes as well – it gives a defendant one last chance to physically plead his case. If we were to hold that video conferencing satisfies the presence requirement of Rule 43, it would permit the government to substitute such conferences for physical presence for any defendant at anytime for any reason.²⁰⁵

²⁰¹ 997 F.2d 209, 213 1993. ("To allow trial by deposition here (whether by video or written) to substitute for regular trial testimony would over time invite trial by deposition in many, perhaps most, criminal cases. Many witnesses would prefer not to testify in a criminal trial and can often find a doctor who will provide a cursory "doctor's excuse," a statement that the witness's physical or mental health "could" be adversely affected by having to appear.")

²⁰² See *United States v. Lawrence* 248 F.3d 300, 302 2001. (At the sentencing hearing, the defendant was physically located at a federal prison in Colorado while his counsel (with the judge, prosecutor, and other court personnel) was located in the courtroom in South Carolina.)

²⁰³ *Id.* at 304–305. Under FRCP 43 it is necessary that the defendant be sentenced in person unless 1) the defendant knowingly and intelligently waives the right or 2) the defendant is removed from the courtroom for persistent, disruptive conduct after the defendant has been warned that can be removed from the courtroom. Emphasis added.

²⁰⁴ Fed.R.Crim.P.43.

²⁰⁵ 248 F.3d 300, 304 2001. See Fed.R.Crim.P.43; see also Fed.R.Crim.P.43 advisory comm.1974 n. (making clear that closed circuit television is not the same as actually being in the courtroom). See *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

This provocative opinion will likely have far reaching ramifications for future use of interactive video technology.

5. Data

5.1 Introduction

In 2010, the National Center for State Courts (NCSC), through a grant from the State Justice Institute, surveyed the use of videoconferencing in state courts throughout the country.²⁰⁶ This research looks beyond the survey to address the question of how private communication between defence counsel and defendant is impacted and examines the relationship between the age of the videoconferencing program and attorney-client private communications.

In the NCSC survey, there were 164 responses. The courts that have no plans to implement a videoconferencing program were excluded, leaving 111 responses used in this analysis.²⁰⁷ The numbers are based on videoconferencing programs where the attorney is in the courtroom and the defendant is located at a remote facility (jail).²⁰⁸

5.2 Examining the Data

The data was collected by the National Center for State Courts (NCSC) supported by the State Justice Institute in 2010. There were 164 responses from every state in the nation. In a first of its kind study, this research focused on the breakdown of surveyed courts using videoconferencing when the attorney is in the courtroom and the client is at a remote location such as a jail or prison. It employs social scientific techniques to explore the assumptions of proponents and critics of the use of videoconferencing. Using a non-partisan analysis of the data, 111 responses were used from across the nation shedding light on the realities of videoconferencing. The data and results aid courts and policy-makers in the use of videoconferencing and how to move forward with this technology in the future. From the responses, 53 responses (of the 164) of the courts surveyed indicating that they did not use videoconferencing were removed. See Figure 1.

Figure 1.

surveyed courts using videoconferencing when attorney is in the courtroom			
Total Responses 164 n = 111	Responses indicating no videoconferencing 35	Did not Indicate 18	Total Used 111

Of the 111 courts used in this research, 41 courts, or 36.9%, indicated there is no provision for private communications between attorney and client when attorney is in the courtroom and the client is at a remote location. The 41 breakdown into 25 courts that indicated there is no provision for private communications with any explanation and 16 that indicated there no privacy with an explanation. These explanations stated answers such as “cannot ensure” or “don’t know” when it came to issues of privacy.

Figure 2

BREAKDOWN OF SURVEYED COURTS USING VIDEOCONFERENCING WHEN ATTORNEY IS IN THE COURTROOM			
NO PRIVACY IN VIDEOCONFERENCING DESCRIBED 25 n = 111	NO PRIVACY DESCRIBED 16	PRIVACY IN VIDEOCONFERENCING 70	TOTAL RESPONSES 111

²⁰⁶ See <http://www.ncsc.org/services-and-experts/areas-of-expertise/technology/ncsc-videoconferencing>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

Analysis of the data shows some alarming trends. Of the 111 videoconferencing programs observed, 41 (36.94%) have no provisions for private communications between attorney and client. Without the ability of a client to communicate with their attorney during a hearing or trial, the quality of legal representation will likely be diminished. Because such a large percentage of programs enable no private communications between attorney and client, analysing the quality of communications in such circumstances is moot.

5.3 The Results

Specifically in criminal cases the data indicates that courts that use videoconferencing across the nation experience attorney-client communication privacy issues between attorneys located in the courtroom and clients located at a remote facility such as a jail or prison.

The data shows that a significant percentage of cases (79.3%) are criminal cases. Of those criminal cases, 28.8% have privacy issues between an attorney and their client when they communicate via videoconferencing. The importance of private communications between attorney and client in criminal cases cannot be minimized.²⁰⁹ The diminution of such communications can only result in less favourable outcomes (i.e. higher bail amounts, negative results for pre-trial hearings, guilty verdicts) for defendants. See Figure 3.

Figure 3

Criminal Cases and Private Communications Via Videoconferencing between Attorney and Client when Attorney is in the Courtroom			
	privacy	no privacy	total
criminal cases	56	32	88
non-criminal cases	12	11	23
total	68	43	111
N = 111			

The survey results show that a significant number of court videoconferencing systems (36.9%) experience equipment failures with physical components. These failures concern issues with wiring, electricity, and basic structural features. Other failures include various combinations of wiring, electrical, and structural problems with emphasis on bandwidth, aging equipment, and power issues. These equipment failures highlight some of the issues with videoconferencing. These failures can only result in delays in hearings, less or no communications between attorneys and defendants, and increased costs. See Figure 4.

Figure 4

courts using videoconferencing that have experienced equipment failures with physical components				
WIRING FAILURES	ELECTRICAL FAILURES	STRUCTURAL FAILURES	OTHER FAILURES	TOTAL FAILURES
18	6	4	13	41
n = 111				

²⁰⁹ The research shows that the data for the use of videoconferencing for criminal cases is no better than for other cases. In a realm of the law where the ramifications of error are greater and the standards of proof higher, videoconferencing in criminal cases has the same problems and issues as in other cases. Videoconferencing in criminal cases must have higher standards and rules than in civil cases to ensure the rights of defendants are not negatively impacted.

The findings of other studies reflect these conclusions. “Many observers regularly witnessed attorneys and clients becoming frustrated because they had no privacy,” said one.²¹⁰ “The use of videoconferencing is marked by persistent problems with equipment, presentation of evidence, access to counsel, interpretation, and assessment of credibility,” reported another.²¹¹ Problems related to access to counsel took place in one in six hearings (approx. 17%).²¹² Problems experienced during videoconferenced hearing (access to counsel, evidentiary/testimonial, interpretation, equipment/technological) is 44.5%.²¹³

In a separate section, the data shows other commons problems. These problems number 25 accounting for 22.5% of the issues. These problems highlight operator issues including “buy in” (by judges, clerks, and attorneys), training of equipment operators, operator error, and scheduling. See Figure 5.

Figure 5

Courts using Videoconferencing that have Experienced OTHER COMMON PROBLEMS	
COMMON PROBLEMS 25 n = 111	TOTAL RESPONSES 111

The proper training of court personnel to use videoconferencing most effectively would go a long way in remedying many issues. The lack of experience many courts have with the technology is well documented and cited in this article. Videoconferencing equipment vendors and social scientists with experience and training on the proper use of the equipment offer the best way to minimize many of the negative issues of videoconferencing. Court personnel training involve the equipment itself and the manner in which it is used. Some studies have shown that a number of videoconferencing users expressed frustration with ineffective technology because of an inability to set an agenda ahead of time. Further, it has been cited that videoconferencing may not be suited for users unfamiliar with electronic communications.²¹⁴ Trained court personnel can inform attorneys and clients that simple things (looking into the camera rather than the monitor, the placement of the monitor and camera, making allowances for possible lag times in communications, etc.) would benefit more effective videoconferencing communication. Court personnel who control and maintain the videoconference equipment and trained to be aware of these issues, could ensure a more effective use of videoconferencing.

Subpar technology is the most easily remedied. Video technology that offers clear, synchronous communication is currently available. Private communication between defendants and attorneys on a secure line can be offered with little technical difficulty. The problem associated with installing or upgrading suitable technology is more of a fiscal issue rather than a technological one. Tight budgets are more of an impediment to remedying this issue than any other.

Proponents often claim that any problems concerning videoconferencing will be minimized or eliminated by better technology.²¹⁵ The assertion is that as newer video technologies allow pictures to become crisper, clearer, and truer to life, where a client and an attorney can establish a trusting, and working relationship. The data does not bear this out. The study shows there is little difference between the newer and older programs with the percentage of videoconferencing programs that offer no secure privacy for communications between attorneys and their clients with programs 0 to 10 years old offering 39.1% private communications and programs 10 to 20 plus years old offering 32.4%. Not only is there no trend in the newer programs offering a greater percentage of private communications, to the contrary,

²¹⁰ Grant *supra* note 39, at 40.

²¹¹ *Id.* at 51.

²¹² *Id.* at 6.

²¹³ *Id.* at 36.

²¹⁴ Torres, Preskill & Piontek, *supra* note 17, at 198-199.

²¹⁵ There is an assumption among proponents that as time goes on that the issues and problems with videoconferencing will be worked out. Unfortunately, the data does not support this assumption. Procedures used by court personnel become entrenched and are not changed. Further, due to budgetary restrictions and limitations, the videoconferencing technology is not updated as often as necessary. As such, videoconferencing issues and problems become imbedded and are not alleviated over time. Worse still, the newer programs are often patterned on older programs adopting their older procedures and technologies perpetuating the negative aspects videoconferencing.

there are fewer newer programs offering such communications. For critics, this is a disheartening trend to say the least. See Figure 6.

Figure 6.

AGE OF VIDEOCONFERENCING SYSTEM AND PRIVATE COMMUNICATIONS VIA VIDEOCONFERENCING BETWEEN ATTORNEY AND CLIENT WHEN ATTORNEY IS IN THE COURTROOM			
	AGE OF SYSTEM		
	0 TO 10 YEARS	10 TO 20+ YEARS	TOTAL
PRIVACY	43	23	66
NO PRIVACY	27	11	38
TOTAL	70	34	104
N = 104			

It is clear that there are issues with videoconferencing in the courts, especially as it relates to attorney-client privileged communications. It is also clear that many of these issues can be lessened or remedied. The solution lies in installing or upgrading to suitable technology, training court personnel, and educating all users concerning the strategies for building trust and understanding. These steps are necessary to enable the fairest and most effective use of videoconferencing when the defendant is at a remote location and their attorney is in the courtroom.

Allowing videoconference users to set an agenda ahead of time would also alleviate another problem noted by many users - the lack of time available for attorneys and clients to build trust via videoconferencing. The attorney-client relationship done via video requires more time to develop a trusting working relationship than does a traditional face-to-face relationship.²¹⁶ Allowing more private videoconference time between attorney and client would improve video communications and lessen the negative impact of the technology. Further, allowing more time for attorneys and clients to become accustomed and comfortable with videoconferencing before forcing participants to use it under courtroom conditions would help lessen the findings that state that many users believe they have a reduced opportunity to speak and fully participate in the videoconferenced proceedings.

6. Conclusion

It is clear that in many courtrooms today there is little or no private communication between defendants and their counsel, which affects their relationship and representation. The results from this first, large-scale empirical study clearly show there is a problem. Videoconferencing creates a Hobson's choice for defence attorneys: they can either appear at the remote site where they will be able to freely confer with their clients but have reduced access to the court, or they can appear in court, where they will have greater access to the judge, clerk, and file but less access to their client.²¹⁷ The separation of attorney and client will continue to create problems of marginal or inadequate representation.²¹⁸ Jurisdictions across the country use videoconferencing, and while most agree on the benefits of the technology, critics maintain that there is a negative effect on attorney/client communications where no or substandard provisions are made for private communications between the two.

Decisions made concerning videoconferencing will have wider implications as other technologies are introduced into the courts. The introduction of videoconferencing is a gateway to other technologies gaining a foothold in the courts. Technology offers greater speed and efficiency in processing defendants through the courts resulting in cost savings. In these times of shrinking court budgets, saving money is

²¹⁶ *Id*

²¹⁷ *Id.* at 56.

²¹⁸ Poulin, *supra* note 12, at 1129.

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popular but the impact of new technologies introduced in the courtroom on constitutional rights and civil liberties need to be accessed. While the court gains from cost savings and administrative productivity, the negative effects new technology alienates and dehumanizes defendants. Paraphrasing Justice Brennan in *Bruton v. U.S.*, if we secure greater, speed, economy, and convenience in the administration of the law at the price of fundamental principles of constitutional liberty, then the price is too high.²¹⁹ Videoconferencing in the courtroom can be remedied to protect attorney/client communications by instituting proper procedures to ensure free flow of these private communications, safeguarding the ability of counsel to provide adequate assistance.

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²¹⁹ 391 U.S. 123, 135 (1968).

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Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions

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EFFICIENCY AND COST: THE IMPACT OF VIDEOCONFERENCED HEARINGS ON BAIL DECISIONS

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MANYEE WONG*** & MATTHEW M. PATTON******

I. INTRODUCTION

Over the course of the past century, bail decisions have been affected by two important developments that threaten the due process rights of defendants. First, the American criminal justice system expanded the reasons used to deny bail or to set high bond amounts. Second, and perhaps not surprisingly in view of the increasing pressure placed on courts by a growing docket of cases, American courts began to experiment with technology as a way to reduce costs, including those created by the growing volume of cases. The convergence of these two trends culminated in a perfect storm in 1999 when Cook County, Illinois instituted the practice of holding bail hearings for most felony cases using a closed circuit television procedure (CCTP) that allowed the defendant to remain at a remote location during the bail hearing.

The assumption that justified the implementation of the video system, as with many criminal justice system reforms, was that it would reduce costs without disadvantaging defendants. We examine here the history that led Cook County to conduct bail hearings using the CCTP and the actual impact that the change from live hearings to the CCTP produced for bail outcomes. We begin in Part II by tracing the expansion of bail from a mechanism designed to ensure that the defendant would appear for his trial

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to one that reduced the likelihood that the defendant would engage in criminal behavior before being tried, that is, to achieve preventive detention. Next, in Part III, we consider the growth of technology that made it possible to hold remote bail hearings using the CCTP and how courts have generally responded to legal challenges to the growing use of technology in the justice system. Part IV outlines Cook County's change in policy in 1999 that brought the CCTP for bail hearings as well as the federal lawsuit initiated in 2006 that challenged the use of the CCTP for bail hearings, and our analysis of the impact of the change. Specifically, using a time-series analysis, we examine the pattern of bail decisions in Cook County for the eight years prior to and eight years following the implementation of the CCTP. The results are dramatic. We find a sharp increase in the average amount of bail set in cases subject to the CCTP, but no change in cases that continued to have live hearings. The preliminary results from this analysis were disclosed to all counsel in the litigation on December 11, 2008 and were reported in the *Chicago Tribune* the next day.¹ The lawsuit that initially stimulated this analysis was dismissed as moot on December 15, 2008 when Cook County voluntarily returned to live bail hearings for all felony cases and implemented other changes in the bail hearing process. But questions remain about the potential uses of video technology by criminal courts in bail hearings and other proceedings. In Part V of this article, we discuss the future: the prospects and questions that should be addressed as the criminal courts deal with the twenty-first century and beyond.

II. THE HISTORICAL EVOLUTION OF BAIL

The institution of bail is deeply entrenched in our jurisprudence. It traditionally reflected the criminal justice system's purported desire to balance the unfairness of confining, and thereby punishing, a person who has not been convicted of any offense, and is presumed to be innocent, with the need to ensure that the defendant will show up for his trial.

The origin of the bail procedure—and the fairness principle it seeks to safeguard—dates at least to thirteenth century English law. The Statute of Westminster the First of 1275 included an enumeration of non-capital offenses for which pretrial release on bail was available, thereby codifying a right (for those with financial means) not to be jailed and held prior to conviction.² The statutory right of bail in enumerated cases laid out in the

¹ Matthew Walberg, *Video Bond Court to End*, CHI. TRIB., Dec. 12, 2008, at 29.

² Statute of Westminster I, 1275, 3 Edw. 1, c. 12 (Eng.). The most penetrating and thorough treatment of the history of bail that the authors have found is Professor Caleb Foote's pointed account, given to support his (now outdated) argument that the Eighth Amendment's Excessive Bail Clause incorporates a constitutional right to bail. *See* Caleb

Statute of Westminster and in successor statutes had limits in practice, which burst into the foreground in the seventeenth century. In 1627, in *Darnel's Case*, a group of knights who had been peremptorily jailed “by the special command” of the king sought release on bail.³ The judges refused. That arbitrary ruling, and other similar abuses by a judiciary beholden to the monarch, prompted the House of Commons in Parliament to adopt the Petition of Right of 1628, which Charles I accepted. The Petition of Right “brought the force of Magna Carta to bear upon pretrial imprisonment,” affirming that there was a right not to be imprisoned or detained in non-capital cases without the ability to apply for bail.⁴

This ongoing “bail controversy,” which first produced the recognition of the underlying right to bail via the Petition of Right, shifted half a century later to questions regarding the procedure necessary to effectuate that right.⁵ The Habeas Corpus Act of 1679 included a recital regarding judicial reluctance to consider bail even in cases in which bail was appropriate: “many of the King’s subjects have beene . . . long detained in Prison, in such cases where by law they areailable.”⁶ Among the items included in the Habeas Corpus Act, therefore, were detailed provisions designed to ensure that procedural technicalities did not prevent judges from considering the defendant’s right to pretrial release.

Finally, the English Bill of Rights of 1689 included a provision, similar to the Eighth Amendment, forbidding “excessive bail.”⁷ That provision was added to remedy Parliament’s finding that the right of bail was being “subverted” by judges who were setting bail in amounts that could not be met.⁸ These seventeenth century legislative efforts to solidify and protect the institution of bail—the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights—all demonstrate, in Professor Foote’s view, that “relief against abusive pretrial imprisonment was one of those fundamental aspects of liberty which was of most concern during the formative era of English law.”⁹

Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 965 (1965). There is a good, pithy, retelling of the story in CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-17, at 1565-66 (Johnny H. Killian, George A. Costello & Kenneth R. Thomas eds., 2004); see also Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328 (1982).

³ See 3 How. St. Tr. 1 (K.B. 1627).

⁴ Foote, *supra* note 2, at 967.

⁵ CONG. RESEARCH SERV., *supra* note 2, at 1565.

⁶ 31 Car. 2, c. 2 (Eng.).

⁷ 1 W. & M. 2, c. 2, cl. 10 (Eng.).

⁸ Foote, *supra* note 2, at 968.

⁹ *Id.*

The notion that a person should not be unnecessarily detained before trial is an accepted axiom of American law as well. Yet the Eighth Amendment of the United States Constitution includes only a spare, ambiguous reference to the institution of bail: “Excessive bail shall not be required.”¹⁰ The Constitution also prohibits Congress from suspending the “privilege of the writ of habeas corpus.”¹¹ But the Constitution is silent on whether there is an underlying constitutional right to bail.

Unquestionably, though, a long-standing American tradition allows persons with financial means accused of non-capital crimes to post security for their appearance at trial and obtain their release until that time. In America, this tradition can be traced to the seventeenth century pre-revolutionary era, roughly contemporaneous with the English bail controversy. The right to bail in non-capital cases was included in the Massachusetts Body of Liberties of 1641,¹² in the New York Charter of Liberties and Privileges of 1683,¹³ and in the fundamental law of Pennsylvania in 1682.¹⁴ The right to bail was recognized and codified in constitutions and statutes enacted just before the federal Constitution, including the constitution of North Carolina in 1776¹⁵ and the Northwest Ordinance of 1787.¹⁶ A federal right to bail was codified in the Judiciary Act of 1789, which Congress enacted contemporaneously with its approval of the Bill of Rights.¹⁷ Then, over the span of many years following the enactment of the Bill of Rights, a large majority of the states adopted state constitutional provisions guaranteeing the right to bail in non-capital cases,¹⁸ leading one commentator to conclude that “[a] pervasive right to bail developed in America in the years after 1789.”¹⁹

¹⁰ U.S. CONST. amend. VIII.

¹¹ *Id.* at art. I, § 9.

¹² CONG. RESEARCH SERV., *supra* note 2, at 1567; *see also* 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 79, 82 (Zechariah Chafee ed., 1963).

¹³ 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 111, 114 (Robert C. Cumming ed., 1894).

¹⁴ *Laws Agreed Upon in England*, in PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790 25, 28 (1825).

¹⁵ N.C. CONST. of 1776, art. XXXIX.

¹⁶ Northwest Ordinance of 1787, art. II, *reprinted in* 1 U.S.C. LIV (2006).

¹⁷ Ch. 20, § 33, 1 Stat. 91 (1789) (providing that “bail shall be admitted” for a defendant in any non-capital case).

¹⁸ *See Note, supra* note 2, at 351-55 (noting that every state to enter the Union, from Kentucky in 1791 through Alaska in 1958, had a constitutional provision recognizing the right to bail in non-capital cases. As of 1976, the constitutions of 40 states guaranteed a right to bail for non-capital crimes).

¹⁹ *Id.* at 351.

Though the formal recitation of a right to bail in state and federal statutes and in state constitutions may have been commonplace, over the course of American history, pretrial release on bail has not been pervasive or anything like a universal right in practice. First, since the seventeenth century, formal recognition of the right to bail has been limited to non-capital cases.²⁰ Throughout much of our history, capital punishment was available for many crimes other than the aggravated murder cases to which that punishment is now almost exclusively confined.²¹ In any such capital case, American law has always recognized that bail may be denied altogether.

Second, even in the absence of systematic data regarding the availability in practice of pretrial release on bail,²² it is safe to presume that, throughout this country's history, pretrial release—even in non-capital cases—was far from automatic. For accused persons whose poverty precluded the posting of bail in any amount (the great majority of criminal defendants), the ability to gain release prior to trial has always turned on the magistrate's willingness to grant non-financial release. Where the charged offense was a non-trivial one, there is no evidence that such judicial largesse was common. As Professor Foote points out, civil imprisonment for debt was commonplace in the United States throughout the nineteenth and even into the twentieth century.²³ In that context, the routine pretrial incarceration of poor persons accused of a crime of violence or a serious property crime is unlikely to have provoked public ire, or even notice.

A couple of noteworthy nineteenth century judicial opinions pay lip service to the notion that a person not yet proven guilty should not be incarcerated unless doing so is necessary to secure his presence at trial. *United States v. Lawrence* involved the setting of bail for the would-be assassin of President Jackson.²⁴ The record of the case includes Chief Judge Cranch's observation that "to require larger bail than the prisoner

²⁰ *Id.* at 345.

²¹ See generally Raymond T. Bye, *Recent History and Present Status of Capital Punishment in the United States*, 17 AM. INST. CRIM. L. & CRIMINOLOGY 234, 234, 241-42 (1926) (asserting that early colonies had as many as a dozen capital crimes and cataloguing states' wide and non-uniform range of capital crimes as of 1926—including rape, kidnapping for ransom, train robbery, and burglary); see also *Coker v. Georgia*, 433 U.S. 584, 593 (1976) (stating that rape was a capital crime in sixteen states as of 1971 and that within the previous fifty years it had never been a capital crime in a majority of states).

²² The Department of Justice Bureau of Justice Statistics only began its comprehensive data compilations after the Bail Reform Act of 1984. Professor Foote's extensive treatment of bail history cites to a few isolated bail studies from the mid-twentieth century. See Foote, *supra* note 2, at 995-96. We know of no earlier data compilations.

²³ *Id.* at 991.

²⁴ 26 F. Cas. 887 (C.C.D.C. 1835).

could give would be to require excessive bail, and to deny bail in a case clearly bailable by law.”²⁵ Bail was ultimately set at \$1,500.²⁶ In a later case, the Supreme Court rendered this expansive reading of the federal bail statute:

The only “proper security” . . . in a criminal case, is security for the appearance of a prisoner admitted to bail. . . . The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment²⁷

But these isolated pronouncements did not evolve into meaningful doctrine. No American court from the founding through the mid-twentieth century grappled with the federal constitutional question of whether there is a right to bail. There has never been an occasion for any court to seriously address the disconnect between the lofty ideal that the presumptively innocent criminally accused person should not be unnecessarily incarcerated before trial, on the one hand, and the highly discriminatory effects upon the poor of the institution of bail in practice, on the other. During much of our history, there is virtually no record of judicial concern about “relief against abusive pretrial imprisonment,” the issue that Professor Foote found so dominant in the formative phase of English law.²⁸

For a brief window of time, prompted by executive and judicial abuses in the post-World War II era, it appeared that the Supreme Court might recognize a constitutional right to bail as a bulwark against such abuses. In the 1951 case of *Stack v. Boyle*,²⁹ the Court refused to uphold the bail set for twelve defendants accused of sedition under the Smith Act.³⁰ The bail set in that case—\$50,000 for each defendant—was obviously intended to ensure the punitive pretrial incarceration of the defendants, not to guarantee

²⁵ *Id.* at 888. Lawrence had fired a pistol twice in the President’s direction, but had missed both times, leading Judge Cranch to the view that, since no actual battery had occurred, the offense was a bailable one. *Id.* at 887-88.

²⁶ *Id.* at 88.

²⁷ *Hudson v. Parker*, 156 U.S. 277, 285 (1895).

²⁸ Controversies regarding unjustified or arbitrary detention played out in different contexts, such as the availability of the writ of habeas corpus. *See, e.g., Ex parte McCardle*, 74 U.S. (7 Wall) 506 (1869).

²⁹ 342 U.S. 1 (1951).

³⁰ 18 U.S.C. § 2385 (Supp. IV 1951). The Smith Act, which made it a crime, among other things, to “teach[] the . . . desirability” of overthrowing any state or the federal government by violence, *id.*, furnished the basis for a number of controversial prosecutions of union leaders, Communists, and other leftists during the 1940s and 1950s. *See, e.g., ELLEN SCHRECKER, THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS* 49-53 (2d ed. 2002) (describing the Smith Act trial of Communist Party leaders over the course of eleven months in 1948 and 1949, which ultimately reached the Supreme Court as *Dennis v. United States*, 341 U.S. 494 (1951)).

their presence at the trial. Writing in dicta, the Court commented that “[the] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”³¹

Without elaboration, *Stack* also indicated that there were “constitutional standards for admission to bail.”³² If, as *Stack* hinted, a constitutional “right” to bail were to be found—either by implication from the Eighth Amendment’s Excessive Bail Clause or as a requirement of substantive due process—then it could well follow that the sole legitimate purposes for requiring bail as a condition of pretrial release are to ensure the defendant’s attendance at trial, to protect the safety of witnesses, and otherwise to protect the integrity of the criminal trial process to follow.³³ Thus, setting bail for some other purpose—in order to prevent the defendant from committing additional crimes prior to trial and to protect the public from the defendant’s perceived criminal propensities, for example—would be “excessive,” procedurally unfair, or both.

The *Stack* decision led Professor Foote, writing in 1965, to envision a “[c]oming [c]onstitutional [c]risis in [b]ail”³⁴ in which the Court would address the existence of a constitutional right to bail and, Foote imagined, would be forced to confront, as a constitutional matter, the pervasive and disturbing “pretrial imprisonment of the poor solely as a result of their poverty, under harsher conditions than those applied to convicted prisoners.”³⁵ No such constitutional crisis ensued, however. Instead, the Supreme Court shut the door on the existence of a constitutional right to bail in *United States v. Salerno*,³⁶ a case challenging the constitutionality of the federal detention statute’s provision permitting federal judicial officers to consider, *inter alia*, whether pretrial release of the defendant would be a danger to the public.³⁷ The Court upheld this form of preventive detention, approvingly quoted dicta from an earlier case³⁸ to the effect that the Eighth Amendment affords no right to bail, and made clear that neither substantive

³¹ *Stack*, 342 U.S. at 4.

³² *Id.* at 6.

³³ See, e.g., Note, *supra* note 2, at 330-32; see also Brief of Respondent, *United States v. Salerno*, 481 U.S. 739 (1986) (No. 86-87).

³⁴ Foote, *supra* note 2, at 959.

³⁵ *Id.* at 960.

³⁶ 481 U.S. 739 (1987).

³⁷ Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (Supp. III 1982).

³⁸ *Carlson v. Landon*, 342 U.S. 524, 544-46 (1951).

due process nor the Excessive Bail Clause regulate what factors may be considered in setting bail.³⁹

Salerno thus placed a judicial imprimatur upon the legislative movement of the 1970s and early 1980s authorizing preventive detention of defendants whose alleged crimes (or criminal histories) made them appear to be a threat to public safety; by 1984, over two-thirds of the states had adopted some kind of provision authorizing consideration of the defendant's "dangerousness" in setting bail.⁴⁰

Pretrial release on bond, of course, remained (and remains) a fixture of the federal and state criminal justice systems, without which these systems could not continue to function.⁴¹ Nonetheless, while many defendants are granted some form of pretrial release, substantial numbers remain in custody prior to trial, either because they have been denied bail or because the bail set by the court exceeds what they can provide to be released on bond. In 2004, the most recent year for which data are available, almost three-quarters (72.6%) of all defendants accused of violent offenses were not released from custody prior to trial (either on bail or on some form of recognizance or conditional release). In murder cases, 77% of defendants remained in custody prior to trial.⁴²

As the Supreme Court was approving more restrictive rights to pretrial release, the crime rate in the United States was approaching an all-time high, a level reached in 1991.⁴³ In Illinois, the site of the empirical study described here, as in the rest of the country, the rate of both violent and property crime rose dramatically from 1967 through the 1980s.⁴⁴ The violent crime rate in Illinois peaked in 1991 at 250% of its 1967 rate, remaining at more than double the 1967 level through 1998.⁴⁵ The property crime rate also grew substantially, doubling between 1967 and 1991, and

³⁹ 481 U.S. at 741-55.

⁴⁰ John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 74 (1985).

⁴¹ See, e.g., *Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir. 1983) (upholding a judicial order directing the release on bond of persons accused of non-violent crimes in order to eliminate jail overcrowding).

⁴² BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004 46 tbl.3.1 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf> (reflecting data from October 2003 through September 30, 2004).

⁴³ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2008 192 tbl.299 (127th ed. 2008).

⁴⁴ Bureau of Justice Statistics, U.S. Dep't of Justice, Crime and Justice Data Online, 1960-2007, <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/RunCrimeStatebyState.cfm> (search "Illinois" and "Violent crime rates" and "Property crime rates" from years 1960 to 2007; then follow "Get Table" hyperlink) (last visited Aug. 28, 2010).

⁴⁵ *Id.*

staying well above its 1967 rate throughout the 1990s.⁴⁶ Thus, the support for restrictive bail policies and increased pressure on the system caused by high crime rates converged to encourage courts to find efficient ways to handle the demands placed on them. They found welcome potential in developing technology.

III. THE EXPANSION OF TECHNOLOGY AND JUDICIAL RESPONSE

The legal system is generally slow to embrace new technology. Yet many courts have responded with enthusiasm to video technology, with its promise of convenience and cost savings. Although videoconferencing was technologically “possible since the creation of the television,” it became less prohibitively expensive by the early 1990s with the advent of digital technology.⁴⁷

Videoconferenced hearings have become increasingly common in legal proceedings, where their adoption is fueled by the attractions of convenience and the reduction of transportation and other costs associated with live proceedings. Videoconferenced hearings also have the benefit of reducing safety concerns when prisoners or potentially volatile mentally disturbed individuals are involved, because transporting those individuals to court for a live hearing may pose a security risk. All of these considerations have led to sharp increases in the use of remote video feeds in conducting administrative and civil proceedings, as well as hearings dealing with criminal matters ranging from bail to sentencing.⁴⁸

Courts are not the only beneficiaries of this technology. Some courts report that defendants who wish to avoid the travel costs of appearing for a hearing in a misdemeanor case appreciate the availability of a lower cost method of participating in the proceeding.⁴⁹

Illinois was a pioneer in the use of video technology, but it was followed soon by other states. “An Illinois court first used video technology to conduct videophone bail hearings in 1972.”⁵⁰ Soon after, in 1974, “[a] Philadelphia court installed a closed-circuit television system for

⁴⁶ *Id.*

⁴⁷ Jim Poniente, *The History of Videoconferencing*, EZINEARTICLES.COM, Aug. 28, 2007, <http://ezinearticles.com/?The-History-of-Videoconferencing&id=707634>.

⁴⁸ MICHAEL G. NEIMON, NAT’L CTR. FOR STATE COURTS, CAN INTERACTIVE VIDEO WORK IN WAUKESHA COUNTY? AN ANALYSIS AND SURVEY 14 (2001), *available at* <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/tech&CISOPTR=120> (“With 29 states engaging in the use of video for court proceedings, video use can no longer be perceived as new.”).

⁴⁹ Patricia Raburn-Remfry, *Due Process Concerns in Video Production of Defendants*, 23 STETSON L. REV. 805, 812 (1994).

⁵⁰ NAT’L CTR. FOR STATE COURTS, BRIEFING PAPERS: VIDEOCONFERENCING (1995), *available at* http://www.ncsconline.org/d_tech/archive/briefing/vc.htm.

preliminary arraignments.”⁵¹ “In the . . . 20 years [following] these initial experiments, . . . courts in 17 states . . . invested in videoconferencing systems,” primarily for use in arraignments.⁵² By 2002, over half of the states permitted some types of criminal proceedings to be held by videoconference.⁵³

The use of videoconferencing also spread to the federal courts, spurred on by the Prison Litigation Reform Act of 1995, which required courts “to the extent practicable” to avoid removing petitioners from the prison facility for pretrial proceedings in prison condition cases.⁵⁴ The Act permitted proceedings “in which the prisoner’s participation is required or permitted” to be held “by telephone, videoconference, or other telecommunications technology.” The 1996 legislation that followed endorsed this technology “as a way to [reduce] security [threats] and costs associated with transporting prisoners to court,” but also to reduce “frivolous claims by prisoners . . . looking for a way to spend . . . time out of prison.”⁵⁵ Amendments to Federal Rules of Criminal Procedure 5 and 10, which went into effect on December 1, 2002, permit videoconferencing for initial appearance and arraignments, but only with the defendant’s consent.⁵⁶ Although a proposed amendment to Rule 26 would have permitted videoconferencing for presentation of live testimony during trial, the change was rejected by the Supreme Court because of concerns under the Confrontation Clause of the Sixth Amendment.⁵⁷

Defense attorneys, legal scholars, and judges have offered a variety of arguments against the use of videoconferencing in criminal cases. They have argued that the use of videoconferencing impairs the fairness and integrity of criminal proceedings in a variety of ways:

Where witnesses testify outside of the presence of the defendant, the defendant is deprived of the opportunity for a physical meeting—a

⁵¹ *Id.*

⁵² *Id.*

⁵³ Gerald D. Ashdown & Michael A. Menzel, *The Convenience of the Guillotine?: Video Proceedings in Federal Prosecutions*, 80 DENV. U. L. REV. 63, 76 (2002). “Arraignments and initial appearances [were] the proceedings most commonly permitted to be conducted by [videoconference].” *Id.* at 76 n.95.

⁵⁴ Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 LAW & POL’Y 211, 213 (2006) [hereinafter *Videoconferencing in Criminal Proceedings*] (quoting Prison Litigation Reform Act, 18 U.S.C. § 3626(f)(2) (2006)).

⁵⁵ *Id.*

⁵⁶ *Id.* at 213-14.

⁵⁷ *Id.* at 214; see J. ANTONIN SCALIA, STATEMENT ON AMENDMENTS TO RULE 26(B) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 1-2 (2002), available at <http://host4.uscourts.gov/rules/CR-26b.pdf>.

confrontation—with those who provide evidence against him, an arguable violation of the Sixth Amendment’s Confrontation Clause.⁵⁸

Where the defendant and his counsel are physically separated during a hearing, the defendant loses the opportunity to pass notes to his counsel or to have an impromptu whispered conference with counsel, arguably an infringement of the Sixth Amendment right to counsel.⁵⁹

Where the defendant is “present” for a proceeding as no more than an image on a video monitor, there is a diminution of the court’s ability to gauge such matters as the defendant’s credibility, his competence, his physical and psychological wellbeing, his ability to understand the proceedings, and the voluntariness of any waivers of rights that the defendant may be called upon to make—all of which raise serious procedural due process concerns.⁶⁰

Finally, whenever the defendant is not physically present before the court, the court or other fact-finder loses the opportunity to respond to the immediacy of the defendant’s human presence and the gravity of the proceeding is diminished, arguably causing a violation of procedural and substantive due process.⁶¹

Conducting a full criminal trial using CCTP would undoubtedly present grave Confrontation Clause concerns, among others. Before a court may receive testimony from even a single witness by means of videoconference, the state must demonstrate, as to that witness, that

⁵⁸ In *Maryland v. Craig*, 497 U.S. 836, 844 (1989), the Supreme Court noted that a “face-to-face meeting” between the defendant and the witnesses appearing against him is a literal requirement of the Confrontation Clause. The Court went on to hold that an “important state interest” can trump that requirement; found such an interest in sparing a child victim-witness the ordeal of meeting her abuser in court; and therefore upheld the decision to allow the child’s testimony by closed circuit video. *Id.* at 852. As we point out in the text below, the use of CCTP to transmit the *defendant’s* image into the courtroom in criminal cases has largely been confined to hearings in which no witnesses are anticipated to testify—and, thus, the Confrontation Clause issue has not been addressed in any of the reported decisions regarding CCTP that the authors have found.

⁵⁹ Commentators have noted that the inability of an attorney to in be two places at once (both in the courtroom and at a remote location with her client) poses communication problems that could inappropriately burden the right to counsel. *See, e.g., Videoconferencing in Criminal Proceedings, supra* note 54, at 217. A version of this contention was laid out in the complaint in *Mason v. County of Cook*, No. 06 C 3449 (N.D. Ill. 2006), discussed in Section IV, *infra*. But the court never ruled on the Sixth Amendment question.

⁶⁰ *See, e.g., United States v. Algere*, 457 F. Supp. 2d 695, 700 (E.D. La. 2005) (rejecting the defense argument and reasoning that video afforded the court an equal opportunity to observe the defendant and assess his competence as if the defendant were physically present).

⁶¹ *See, e.g., United States v. Navarro*, 169 F.3d 228, 239 (5th Cir. 1999) (“[T]elevision is no substitute for direct personal contact. Video tape is still a picture, not a life.”) (quoting *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993)); *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001).

videoconferencing, as opposed to live testimony, is “necessary to further an important state interest.”⁶² Such an interest has been found where videoconferencing will protect the emotional and psychological wellbeing of a child sexual assault victim.⁶³ But, to the authors’ knowledge, no jurisdiction has suggested that achieving the kinds of efficiencies that CCTP affords is sufficiently “necessary” and “important” to justify dispensing with the defendant’s physical presence for a criminal trial.⁶⁴

In contrast, the lower federal and state courts have been generally, though not universally, receptive to the use of CCTP for criminal proceedings prior to the trial itself. At the far end of the spectrum, the courts have had little difficulty with videoconferenced arraignments, which have been uniformly upheld.⁶⁵ No witnesses testify at arraignment, eliminating Confrontation Clause concerns. Although in some states arraignment is considered a “critical stage,” and the defendant is therefore entitled to counsel under the Sixth Amendment, the largely ceremonial and perfunctory nature of the arraignment process leaves little or no need for on-the-spot consultations between the defendant and his lawyer.⁶⁶ No judicial decisions are made at arraignment, and, thus, due process concerns are also absent.

Significantly more problematic are proceedings in which the court must accept a defendant’s waiver of rights, make a judgment regarding the defendant’s competence, suitability for involuntary medication, or the admissibility of evidence, or render a decision as to the appropriate punishment. Here the decisions are divided. Some courts have held that a court may accept a defendant’s plea of guilty and waiver of rights using CCTP,⁶⁷ while others have held that the Constitution requires the defendant’s physical presence for such hearings.⁶⁸ One court has held that

⁶² *Maryland v. Craig*, 497 U.S. 836, 852 (1989).

⁶³ *Id.*

⁶⁴ The Supreme Court’s ongoing concern with protecting the Confrontation Clause rights of defendants was on display in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), where the court found that the admission of certificates claiming the substances analyzed were cocaine, offered in place of testimony from the analysts, violated the Confrontation Clause. *Id.* at 2532. This case, and the Court’s rejection of proposed amendments to Rule 26 of the Federal Rules of Criminal Procedure, suggests that the Court would swiftly and firmly condemn use of CCTP for a criminal trial. See *Videoconferencing in Criminal Proceedings*, *supra* note 54, at 214.

⁶⁵ See, e.g., *In re Rule 3.160(a)*, Fla. Rules of Criminal Procedure, 528 So.2d 1179 (Fla. 1988); *People v. Lindsey*, 772 N.E.2d 1268 (Ill. 2002); *Commonwealth v. Ingram*, 46 S.W.3d 569 (Ky. 2001); *State v. Phillips*, 656 N.E.2d 643 (Ohio 1995); *Commonwealth v. Terebieniec*, 408 A.2d 1120 (Pa. Super. Ct. 1979).

⁶⁶ See *Hamilton v. Alabama*, 368 U.S. 52 (1961).

⁶⁷ See, e.g., *State v. Peters*, 615 N.W.2d 655 (Wis. Ct. App. 2000).

⁶⁸ See, e.g., *People v. Stroud*, 804 N.E.2d 510, 519 (Ill. 2004).

it is permissible to use CCTP to conduct a *Sell*⁶⁹ hearing on whether the defendant should be involuntarily medicated to render him competent to stand trial.⁷⁰ Another court has held that it is constitutionally permissible to conduct a sentencing hearing by videoconference.⁷¹ Other courts have held or implied that it would violate the defendant's constitutional rights to use closed circuit video for a sentencing hearing.⁷²

The authors have found only one case ruling on the constitutionality of using CCTP to conduct a bail hearing.⁷³ Bail hearings are not typically an occasion for witnesses to testify against the defendant (the state usually proceeds by way of proffer as to the seriousness of the crime and the defendant's criminal history) and, thus, Confrontation Clause problems are generally absent. On the other hand, bail hearings do require a judicial determination as to the defendant's trustworthiness and character—i.e., the likelihood that he will in fact appear for trial if released.⁷⁴ There is certainly reason to believe that the opportunity to physically observe the defendant would contribute information that would be useful for that determination.⁷⁵ Given that the defendant's freedom prior to trial is a matter of great consequence, there is at least a serious argument that procedural due process requires the defendant's physical presence at a bail hearing.

It is important that the defendant and his counsel be able to communicate effectively during the course of a bail hearing. The defendant may, for example, be able to point out errors in the records of his criminal history or to provide mitigating details regarding past convictions that will greatly assist counsel in presenting the case for a non-financial release or a low bond. Obviously, such communications must occur immediately if counsel is to be able to make use of his client's information during a fast-

⁶⁹ *Sell v. United States*, 539 U.S. 166 (2002).

⁷⁰ *United States v. Algere*, 457 F. Supp. 2d 695 (E.D. La. 2005).

⁷¹ *Scott v. State*, 618 So.2d 1386 (Fla. Dist. Ct. App. 1993).

⁷² *See, e.g., United States v. Lawrence*, 248 F.3d 300 (4th Cir. 2001); *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999).

⁷³ *LaRose v. Superintendent, Hillsborough County Corr. Admin.*, 702 A.2d 326, 329 (N.H. 1997), discussed *infra* at Section V, holds that videoconferenced bail hearings are constitutionally permissible.

⁷⁴ Under the federal detention statute, for example, the judicial officer conducting the hearing is required to assess the "character, physical and mental condition" of the defendant in assessing his suitability for pretrial release. *See* 18 U.S.C. § 3142(g)(3)(A) (2006).

⁷⁵ In *United States v. Stanley*, 469 F.2d 576 (D.C. Cir. 1972), where the court held that the decision as to the defendant's eligibility for bail pending appeal must be made in the trial court in the first instance, the court noted that the trial court is the "superior tribunal" for making that determination because it "can come face-to-face with the primary informational sources, probe for what is obscure, trap what is elusive, and settle what is controversial." *Id.* at 581-82.

paced bail hearing. In this context, therefore, separating the defendant from counsel might be argued to infringe on the Sixth Amendment right to counsel.⁷⁶

Where the courts have found the defendant's presence to be a constitutional necessity, it has generally been because of the intuition that the defendant's presence affects perceptions and contributes to the outcome. For example, in holding that the defendant's presence was required for sentencing, the Fifth Circuit reasoned: "Sentencing a defendant by video conferencing creates the risk of a disconnect that can occur because 'the immediacy of a living person is lost.' . . . '[T]elevision is no substitute for direct personal contact. Video tape is still a picture, not a life.'"⁷⁷ In contrast, courts that have approved the use of videoconferencing have assumed that closed circuit video does not detract in any meaningful way from the quality of judicial decision making: "[T]he Court finds that its opportunity to continuously observe [the defendant] by video teleconference during the hearing is as effective as if [the defendant] were to appear in person before the Court."⁷⁸

Thus, the decisions and the arguments embody empirical assumptions about how videoconferencing is likely to affect case outcomes and perceptions of justice. Does video rather than live interaction deprive the defendant of effective attorney-client communication and thus impair adequate representation? Does video reduce the ability of the judge to

⁷⁶ The Supreme Court has never ruled definitively on whether a bail hearing is a "critical stage" of the criminal process to which the Sixth Amendment right to counsel would attach. In *Gerstein v. Pugh*, 420 U.S. 103, 122-23 (1975), the Court held that counsel was not required at a hearing to determine probable cause and went on to suggest that states might wish to experiment with combining bail hearings with probable cause determinations. *Gerstein*, thus, casts considerable doubt on whether there is a constitutional right to counsel at a bail hearing. But *Gerstein* did not decide the question. More recently (in an opinion that also did not definitively rule on this question) the Court indicated that counsel might be constitutionally required at such a combined hearing. See *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2592 (2008) ("[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."). Only the District of Columbia and eight other states have enacted provisions ensuring that all indigent persons within their borders are represented by counsel at bail or bond hearings. See Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1724 nn.6-8 (2002) (collecting statutes). Although in practice in many jurisdictions lawyers do not represent bond applicants, there has never been a significant Sixth Amendment challenge to the lack of representation at a bail or bond hearing.

⁷⁷ *Navarro*, 169 F.3d at 239 (quoting *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993)).

⁷⁸ *United States v. Algere*, 457 F. Supp. 2d 695, 700 (E.D. La. 2005) (approving videoconferenced *Sell* hearing).

appreciate the humanity of the defendant and reach an appropriate decision? Yet no prior empirical research has directly tested how—or even whether—videoconferencing produces results that differ from those produced by live hearings.⁷⁹ Molly Treadway Johnson and Elizabeth Wiggins reviewed the available literature in 2006 and called for experimentation to fill that gap.⁸⁰ We report here on a study we conducted that responds to that empirical challenge.

IV. THE CCTP: VIDEOCONFERENCED BAIL HEARINGS IN COOK COUNTY

A. THE IMPLEMENTATION OF VIDEOCONFERENCED BAIL HEARINGS AND THE GENESIS OF A LAWSUIT

Cook County, which includes Chicago and the greater metropolitan area, decided in 1999 to implement an extensive program mandating that bail hearings for most defendants arrested within the City of Chicago and charged with a felony be held via videoconference rather than at a live bail hearing attended in person by the defendant. Mirroring the approach taken with other reforms embracing video technology, Cook County implemented a general order directing that most bail hearings in felony cases conducted in Chicago's Central Bond Court "shall be conducted by means of closed circuit television."⁸¹ The only felonies excluded from this 1999 General Order were the most serious felony cases (typically homicides and serious sexual assaults) in which Illinois law permitted the State to seek denial of bond in any amount.⁸²

Cook County's introduction of the CCTP was the final step in a staged process of centralizing the bail hearing procedure for Chicago arrests. In the last months of 1998, all such bail hearings were transferred for hearing to the Chicago criminal courts building on the city's West Side. This replaced a system, in effect for many years previously, in which bail hearings had been conducted in police "branch" courts located throughout Chicago. It was felt that a centralized approach would further the interests of uniformity and efficiency.⁸³ The bond amounts would be more uniform—and, in that sense, fairer—if they were all set by judges in a centralized court rather than by a half dozen different judges sitting in

⁷⁹ There is even a possibility that videoconference technology helps some defendants by making them appear less dangerous than they might in person.

⁸⁰ *Videoconferencing in Criminal Proceedings*, *supra* note 54, at 225.

⁸¹ General Order 99-6 of the Circuit Court of Cook County, Illinois (1999).

⁸² *Id.*

⁸³ Comments of Judge Robert A. Bastone, one of the architects of the Central Bond Court reform, in a meeting with bar leaders held in the chambers of the Chief Judge in mid-July 2005.

courtrooms around the city.⁸⁴ Efficiency would also be served: all persons arrested within the past twenty-four hours anywhere in Chicago would be transported to holding pens in the basement of the Chicago criminal courts building.⁸⁵ That building is connected by underground tunnel with the Cook County Jail, which would enable relatively swift processing of the defendants (either their release or their admission to the jail) following the hearings. Adding the CCTP to the Central Bond Court in 1999 was intended to further promote efficiency by enabling swift disposition of all the cases on the call by allowing the defendants to “appear” at the bail hearing via video transmission from a basement room located a few steps from the holding pens.⁸⁶

No research was conducted before or during the initial period when the 1999 General Order was implemented to evaluate its likely or actual effect. In practice, use of CCTP in Central Bond Court had several troubling features:

Poor-quality technology. The defendant’s image was shown on video monitors visible to the judge and to spectators (who sit in a gallery separated from the well of the courtroom by a Plexiglas shield), but not to the prosecutor or defense counsel. The image on the monitors was black and white, the contrast was poor (making dark-skinned defendants particularly difficult to see) and the screens sometimes flickered.⁸⁷

Inadequate defense preparation. Because of the logistics of transporting arrestees to the criminal courts building each day, public defenders (who handled the overwhelming majority of the cases) complained that their opportunity to consult with their clients prior to the hearings was extremely limited.⁸⁸ On a daily basis, 100 to 150 bail cases were heard on the Central Bond Court call.⁸⁹ An investigator employed by the Cook County Public Defender’s Office met each bail applicant for a few seconds at the front of the holding pen, recording basic information about each defendant onto a chart.⁹⁰ The assistant public defender in the courtroom (who had never met the

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Two of the authors made this observation when they observed proceedings in Central Bond Court in the fall of 2008. *See also* Letter to Cook County Chief Judge Timothy C. Evans, Circuit Court of Cook County & Judge Paul P. Biebel, Jr., Circuit Court of Cook County (June 20, 2005) (on file with author).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

bail applicant) parroted the information from the chart into the record as the defendant's image flickered on the monitors in the courtroom.⁹¹

Extreme brevity. The cases were heard rapid-fire. In each case, the court made a probable cause finding,⁹² set bond, and continued the case for hearing on a future date—all in the space of about thirty seconds on average.⁹³ In so short a time frame it was impossible for the court to give any meaningful, individualized consideration to the multitude of factors that Illinois law deems relevant to the setting of bail.⁹⁴

Complaints about this system began to surface. For years, defense lawyers decried Central Bond Court as a grossly demeaning “cattle call.”⁹⁵ In March 2005, a committee of prominent bar leaders wrote an open letter to the Chief Judge of the Circuit Court of Cook County questioning the constitutionality of Central Bond Court and calling for its abolition.⁹⁶ A December 2007 report by the Chicago Appleseed Fund on the Cook County criminal justice system recommended eliminating the CCTP in Central Bond Court.⁹⁷ Privately, public defenders contended that a return to the decentralized branch court system would be preferable: under the old system, cases had received more individualized attention from the public defenders assigned to the branch courtrooms (those public defenders had handled a dozen or more bail cases each day as opposed to the 100-plus daily cases at Central Bond Court); under the old system, it was easier for family members and friends of the defendant to attend (and to be available for testimony) at a bail hearing relatively near to the defendant's neighborhood; and under the old system the defendants had the advantage of being physically present in the courtroom.⁹⁸

⁹¹ *Id.*

⁹² See *Gerstein v. Pugh*, 420 U.S. 103 (1975).

⁹³ On several occasions during the pendency of the litigation described below, students from Northwestern University School of Law's MacArthur Justice Center observed Central Bond Court and timed a sampling of the bond hearings. See also Tom McNamee, *50 Minutes ÷ 113 People = 26.55 Seconds per Case; Court System Forces Attorneys through Fast and Furious Pace, with Hardly a Hint of Justice*, CHI. SUN-TIMES, June 20, 2005, at 22.

⁹⁴ 725 ILL. COMP. STAT. 5/ 110-5 (2005).

⁹⁵ The term “cattle call” was frequently used to describe Central Bond Court in conversations that one of the authors had with Cook County Public Defenders and private criminal defense practitioners in 2005 and 2006.

⁹⁶ A copy of the letter is on file with the authors.

⁹⁷ CHI. APPLESEED FUND FOR JUSTICE CRIMINAL JUSTICE PROJECT, A REPORT ON CHICAGO'S FELONY COURTS 60 (2007), available at http://www.chicagoappleseed.org/uploads/view/1/download:1/criminal_justice_full_report.pdf.

⁹⁸ In conversations with one of the authors in 2005 and 2006, high level members of the Cook County Public Defender's Office, including the public defender himself, expressed their preference for conducting bail hearings in the branch courts, for the reasons stated in the text.

In 2006, Locke Bowman, of the MacArthur Justice Center, filed a class action suit in federal court in Chicago alleging that the bail hearings in Cook County's Central Bond Court violated due process and denied bail applicants the effective assistance of counsel.⁹⁹ The suit sought injunctive relief on behalf of all present and future bail applicants—primarily elimination of the CCTP and the institution of procedures that would permit counsel to better prepare for the individual hearings—and a declaratory judgment that the Central Bond Court hearings were unconstitutional.¹⁰⁰

The defendants in the case—the Cook County Sheriff, the Cook County Public Defender, and the Circuit Court Judge with administrative authority over Central Bond Court—never challenged the legal sufficiency of the due process and Sixth Amendment claims in the complaint.¹⁰¹ As the case progressed through discovery toward an evidentiary hearing, Locke Bowman and Shari Diamond discussed how to assess whether bail outcomes were affected by the videoconferencing system.¹⁰² We determined that an empirical test would be both valuable and possible. Accordingly, we gathered information from the Cook County Clerk's Office on the initial bail hearings for all felony cases in Cook County covering the period from approximately eight and one-half years before the video system went into effect through the eight and one-half years after it was implemented.¹⁰³

⁹⁹ *Mason v. County of Cook*, No. 06 C 3449 (N.D. Ill. June 26, 2006).

¹⁰⁰ *Id.*

¹⁰¹ The defendants did argue that the federal court should abstain from hearing the case under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). The court rejected that argument. *Mason v. County of Cook*, 488 F. Supp. 2d 761, 765 (N.D. Ill. 2007).

¹⁰² It could, of course, have been argued that even in the absence of actual injury (in the form of higher bond amounts than would have been imposed in in-person and appropriately counseled hearings) the bond applicants' constitutional rights were being violated by deficient procedures. See *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) ("Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, . . . we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.") (citing *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

¹⁰³ The data for the analysis were provided in the form of computer files supplied by Karen Landon, Project Manager in the M.E.S. Division of the Office of the Clerk of the Cook County Circuit Court, in response to a subpoena served on the Clerk of Court in *Mason*, No. 06 C 3449, on June 5, 2007. The subpoena requested computerized data on the felony bail hearings conducted in Central Bond Court in Courtroom 101 of the Criminal Courts building from 1991 through 1999.

B. THE DATA

A total of 645,117 felony bond decision case files¹⁰⁴ were supplied by the Clerk of Cook County for felony cases that had initial bail hearings between January 1, 1991 and December 31, 2007. Each case file included: (1) the date on which a bail applicant appeared for a bail hearing, and (2) the statute number associated with the first offense with which the defendant was charged. Two-thirds of the cases also included a verbal description of the first offense with which the defendant was charged (e.g., “possession of a stolen motor vehicle”) or an abbreviation for the name of the offense (e.g., “psmv” for possession of a stolen motor vehicle).

In addition to examining changes in bond amount over time for the full set of felony cases, we also analyzed changes in bond amount over time for individual offenses. Due to the incomplete or ambiguous verbal offense descriptions in the computer files, we used a series of procedures and checks to identify the offense category for each case. We began with the statute number for the offense. The statute entries in the computer files were not formatted consistently (e.g., whether a hyphen or parenthesis was included). Because the statute numbers were not formatted consistently, we first removed all non-numeric characters from the statute codes. We then used a string function to search these numeric statute codes for the substring that uniquely identified each particular offense, allowing us to identify the offense. For example, statute codes that contained “103” were identified as possession of a stolen motor vehicle.

We used the statute number rather than the verbal offense description as the primary source for identifying the offense associated with the case because: (a) nearly one-third of the cases lacked a written offense description, and (b) the way an offense was described verbally varied substantially across entries (e.g., “psmv” or “poss stol mv” or “possession of stolen motor vehicle”). To test whether this procedure had correctly identified only the appropriate offense, we examined the offense descriptions for these cases (in this example, those with the statute code “103”) to make sure they described the right offense (in this instance, possession of a stolen motor vehicle). To verify that other cases of possession of a stolen motor vehicle had not been missed because the offense was listed under another statute number that did not contain “103,”

¹⁰⁴ The original data files provided by the Clerk’s Office included multiple “cases” for the same bond decision if multiple charges were involved. The single bond amount set at the bond hearing was entered in the data set for each charge. To create a data set using bond decision as the unit of analysis, we used the first (most serious) charge, giving us a total of 645,117 bond decisions. We identified cases from the same bond decision by matching on the following criteria: last name; first name; date of birth, if available; date of bond hearing; and bond amount.

we examined all of the statute numbers associated with common written descriptions of possession of a stolen motor vehicle. We also checked to see that the string function had not identified any group of at least fifty cases that described a different offense. In no instance did this checking procedure produce groups of misclassified cases. Each of the nine offenses we analyzed separately underwent this verification process.

Both verification procedures showed that cases of each offense had been correctly identified, that is, that we did not include cases that did not belong or omit cases that should have been included according to the listed statute number. The only potentially omitted cases were the 0.1% of cases in which no statute number was provided in the data file.

We also conducted a second check on the data used in the analyses. We identified thirty-three cases (sixteen in the pre-videoconferencing period and seventeen in the videoconferencing period) with unusually high bond levels, in light of the charged offense (e.g., \$9,000,000 for possession of a stolen motor vehicle). We were able to obtain the paper court files on twenty-nine of those cases and found that ten had been entry errors, typically involving an extra zero or two that made the amount appear ten or one hundred times its actual value. We corrected the entries for all analyses. We were unable to obtain the case files for two armed robbery case outliers that had hearings in October of 1999, just after videoconferencing was implemented. Each had a bond amount recorded as \$5,000,000. Although we conducted all analyses with and without these two cases and found no difference in the results, the charts and table presented here exclude the two cases because the exclusion provides more conservative estimates of the effects.¹⁰⁵

C. THE ANALYTIC APPROACH

We began our analysis by examining changes in bail level over time for all cases involving offenses that were subjected to the CCTP. Then, to examine the consistency of results across different offenses, we conducted separate analyses on a series of offense categories that could be identified accurately from the available data.¹⁰⁶ These offenses were nonresidential

¹⁰⁵ We conducted an additional check on the ten cases which appeared in the computer file from the Clerk's Office as first degree murder and released on recognizance. We obtained seven of the original ten paper files which showed that all were entry errors, two not involving first degree murder and five having bail decisions that were not "released on recognizance." We corrected the errors and removed the remaining three cases from all specific offense analyses.

¹⁰⁶ Drug offenses were not examined separately because the recording method used in the files did not permit us to accurately identify them. They were, however, included in the aggregate felony case analysis.

burglary, residential burglary, possession of a stolen vehicle, unarmed robbery, armed robbery, and aggravated battery. Finally, we examined cases involving offenses that continued to be handled by live hearings following the implementation of the CCTP. They included first degree murder, second degree murder, manslaughter, and sexual assault cases.¹⁰⁷ These offenses account for less than 3% of the felony cases. The virtue of looking at these cases separately is that if the implementation of the CCTP increased bond amounts, it should not have caused an increase for cases that continued to be conducted by in-person hearings. Therefore, they provide a control group for felonies that were subjected to CCTP. We examined these cases separately and compared the pattern of change for these most serious offenses, which continued to have live hearings, with the pattern of change for the remaining felonies, which shifted to closed circuit television hearings after June 1, 1999.

For each of the 204 months between January, 1991 and December, 2007, the average bond amount for cases resulting in bond decisions is computed for all outcomes examined.¹⁰⁸ We graphed the resulting values and modeled the impact of the change in bail procedure that occurred on June 1, 1999 (i.e., implementation of the CCTP). All bond amounts were transformed into constant dollars using the consumer price index (CPI) provided by the Bureau of Labor Statistics to control for inflation over time. The CPI is based upon a 1982 base of 100 so a CPI of 110 indicates 10% inflation since 1982. All graphs and analyses are expressed in constant dollars.

Interrupted time series analysis is used to examine whether the change from in-person hearings to closed circuit television hearings caused a rise in felony bond amounts.¹⁰⁹ We first used time series plots to assess the functional form of the time series and to visually examine the effects of the policy. We then used analytic models to quantify the amount and

¹⁰⁷ We analyzed all cases together as a single group. To examine the sensitivity of the result, we also excluded sexual assault cases and examined homicide cases alone. No difference was observed in the results.

¹⁰⁸ The only cases omitted from these analyses were the small percentage (6%) of cases that resulted in denial of bail. We analyzed these cases separately in order to evaluate whether any change in the bond levels could reflect a shift away from high bond amounts to outright denial of bail.

¹⁰⁹ With extensive time series data and a clear intervention time point—June 1, 1999—an interrupted time series analysis design provides a strong test of the immediate and long term effects of an intervention or policy.

significance of any observed changes.¹¹⁰ The key is to analyze whether the change in average bond mean and growth rate differ significantly from what one would expect (based on prior trajectory) if the policy had not been in place. The null hypotheses for all models are that the mean and growth rate in bond amount do not differ significantly from before to after the implementation of CCTP.¹¹¹

Errors in time series data are often correlated. For example, the bond amounts for a particular felony offense at two adjacent time points may be more similar than bond amounts set at time points that are farther apart. Failure to model this correlation may result in an underestimation of standard errors and overestimation of the significance of intervention effects. To adjust for serially correlated errors, we examine the autocorrelation and partial autocorrelation of each outcome model's residuals to determine its correlation structure. If significant, the correlation is explicitly modeled in the error term.¹¹² For most models, we are able to

¹¹⁰ Depending on the outcome, the functional form of the best fitting model may be linear (1), quadratic (2), or cubic (3). Respectively, their analytic models are as follow:

$$(1) Y_t = \beta_0 + \beta_1(\text{time}_t) + \beta_2(\text{intervention}_t) + \beta_3(\text{time} \times \text{intervention}_t) + \varepsilon_t$$

$$(2) Y_t = \beta_0 + \beta_1(\text{time}_t) + \beta_2(\text{time}_t)^2 + \beta_3(\text{intervention}_t) + \beta_4(\text{time} \times \text{intervention}_t) + \beta_5(\text{time} \times \text{intervention}_t)^2 + \varepsilon_t$$

$$(3) Y_t = \beta_0 + \beta_1(\text{time}_t) + \beta_2(\text{time}_t)^2 + \beta_3(\text{time}_t)^3 + \beta_4(\text{intervention}_t) + \beta_5(\text{time} \times \text{intervention}_t) + \beta_6(\text{time} \times \text{intervention}_t)^2 + \beta_7(\text{time} \times \text{intervention}_t)^3 + \varepsilon_t$$

where Y_t is the average bond amount adjusted for inflation in the month observed at time t ; time is a continuous variable centered at the point of intervention to indicate the month at time t ; the addition of time^2 and time^3 in the model specifies the functional form as quadratic or cubic instead of linear; intervention is an indicator for time t occurring before ($\text{intervention}=0$) or after ($\text{intervention}=1$) the policy change; and $\text{time} \times \text{intervention}$ is a continuous variable specifying the number of months after the intervention at time t , with $(\text{time} \times \text{intervention})^2$ and $(\text{time} \times \text{intervention})^3$ again specifying nonlinear functional forms of the model.

¹¹¹ For average change in bond amount at the point of intervention, the null hypotheses are $\beta_2=0$ if model is linear, $\beta_3=0$ if model is quadratic, and $\beta_4=0$ if model is cubic. To model the change in average bond amount growth rate, a linear model is used to analyze all outcomes. Here, the null hypothesis is $\beta_3=0$ for all outcomes.

¹¹² Most outcomes in the study have been identified as (1) first order autoregressive (AR-1) where error in time t depends on the error in the previous time period; (2) first order moving average (MA-1) where error at time t depends on the random shock in the previous time period; or (3) first order autoregressive, moving average (ARMA) where error in time t depends on both error and random shock in the previous period. The error term, depending on its identified structure, is modeled as follows:

$$\varepsilon_t = \phi_1 \varepsilon_{t-1} + \gamma_t \text{ if the process has been identified as a first order autoregressive; or}$$

$$\varepsilon_t = \gamma_t + \theta_1 \gamma_{t-1} \text{ if the process has been identified as a first order moving average process; or}$$

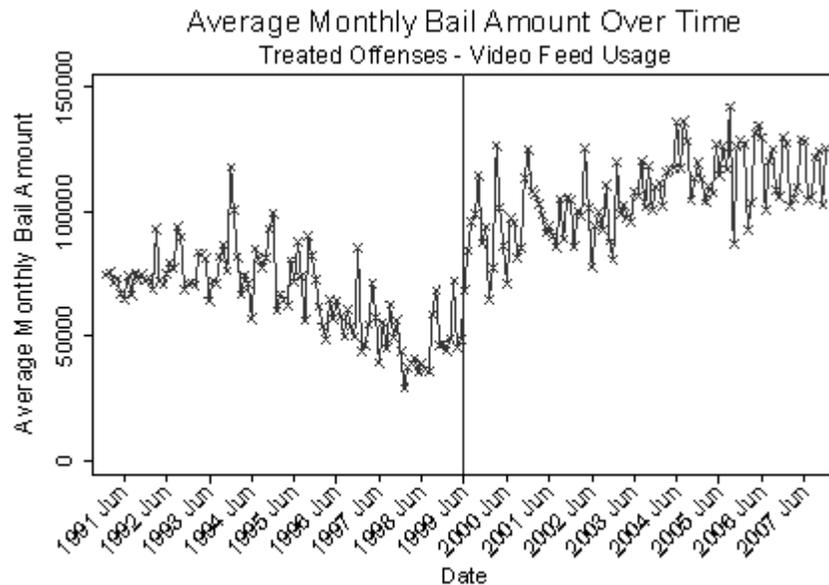
$$\varepsilon_t = \phi_1 \varepsilon_{t-1} + \gamma_t + \theta_1 \gamma_{t-1} \text{ if the process has been identified as a first order autoregressive, moving average (ARMA).}$$

model the autocorrelation in the error term and reduce the model's residuals to white noise. The lone exception is armed robbery which still shows signs of autocorrelation after attempts to identify and control its correlation structure. Nevertheless, the estimates do not affect our overall conclusion and results from the best fitting models are presented.

D. THE RESULTS

The time series graph for the combined offenses subjected to CCTP shows a large change in bond amount immediately after June 1, 1999, the date when the CCTP went into effect (see Figure 1).

Figure 1



The graph also indicates that the increase was permanent. Not only did the average bond amount fail to return to pre-CCTP level, it continued to climb after the intervention. Using a log linear model (data not shown) to obtain an average rate of change in percentages before and after the implementation of the CCTP, results indicated that the average monthly rate of change in bond amount before the CCTP was significantly different from the average monthly rate of change after the CCTP. Specifically, bond amounts were decreasing at roughly 0.66% per month prior to the CCTP, but only at a rate of 0.02% ($0.66 + -0.64$) per month after the CCTP, thus confirming the pattern visible in the graph. Analytic results (see Table 1)

also showed a significantly greater than expected change in the average bond amount immediately after the CCTP implementation.

For all combined offenses that shifted to televised bail hearings, this change was an increase of roughly \$20,958 or 51%.¹¹³

Table 1

	Treated Offenses		Non-Treated Offenses	
	Coef.	Std. Err.	Coef.	Std. Err.
Constant	33083.67***	2564.63	430027.67***	32800.92
Time	612.66**	205.64	2043.88***	597.17
Time x Time	21.87***	4.44		
Time x Time x Time	0.14***	0.03		
Intervention	20958.32***	3708.64	55494.15***	40216.03
Intervention x Time	-394.61	320.56	-3649.42***	748.44
Intervention x Time x Time	-25.01***	6.80		
Intervention x Time x Time x Time	-0.14**	0.04		
ARMA				
MA (moving average - order 1)			-0.71***	0.18
AR (autoregressive component - order 1)			0.83***	0.14
Model Sig.	0.00		0.00	
N. of cases	204		204	
Model Chi Square	4111.32		5242.44	
Akaike	4141.18		5265.67	
Schwarz's information criterion	717.36		142.03	
Portmanteau test for white noise	0.14		0.07	

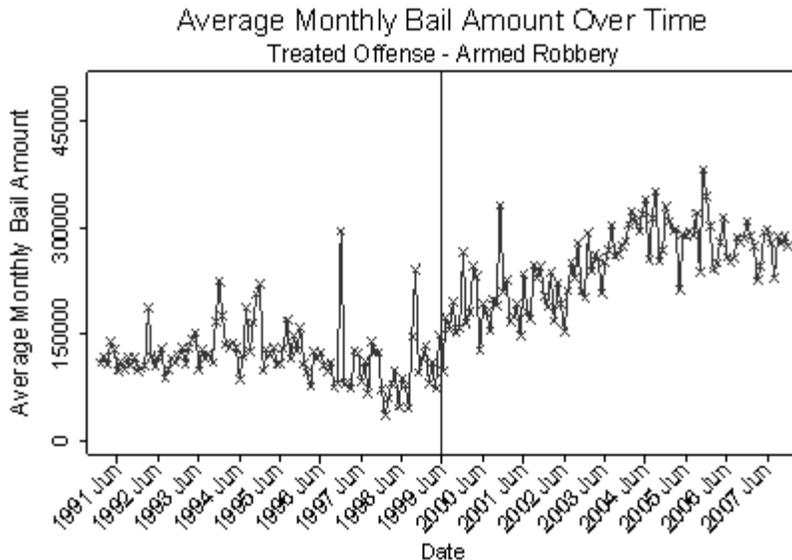
*p<0.05, **p<0.01, ***p<0.001

¹¹³ To be sure that cases with high bond amounts were not occurring in the wake of the CCTP merely because judges were setting bond in cases in which they would otherwise have denied bail, we examined the rate of denied bail cases over time. In contrast to the series involving bond amount for cases subjected to the CCTP, there was little change in the percentage of treated cases that resulted in a denial of bail. The percentage of cases in which bail was denied dropped by 1% at the time that the video hearings began. The drop cannot account for the dramatic rise in average bond amount. Note that our data set and analysis of "denied bail" cases began in 1996, rather than 1991, because for some unknown reason the data set included few cases involving denial of bail prior to June of 1994 and then showed a sharp increase in cases denied bail peaking around June of 1995 before sharply declining. The percentage of cases denied bail then dropped over the time period from 1996 through 2007, from approximately 10% to under 4%. We have no explanation for the complex functional form of this time series, so we confined our analysis to the data between 1996 and 2007.

To test the robustness of this result, we examined separately the change in bond amount for each of the six felonies that were subjected to the CCTP: (1) armed robbery; (2) unarmed robbery; (3) residential burglary; (4) non-residential burglary; (5) possession of a stolen motor vehicle; and (6) aggravated battery. Time series graphs of these offenses (see Figures 2 to 7) again showed a clear and sharp discontinuity at the point of intervention for each of these felonies.

Analytic models confirmed the observed visual change as statistical tests showed significantly greater than expected increases immediately after the intervention.¹¹⁴ The average bond amount increase ranged from 54% to 90% depending on the offense. For armed robbery, the increase was \$74,699, or 58%. For unarmed robbery, the increase was \$54,227, or 86%. Residential burglary showed an increase of \$53,274, or 90%; nonresidential burglary an increase of \$26,592, or 64%; possession of a stolen motor vehicle an increase of \$25,605, or 78%; and aggravated battery an increase of \$73,024, or 70%.

Figure 2



¹¹⁴ Models associated with Figures 2-7 are available from the authors on request.

Figure 3

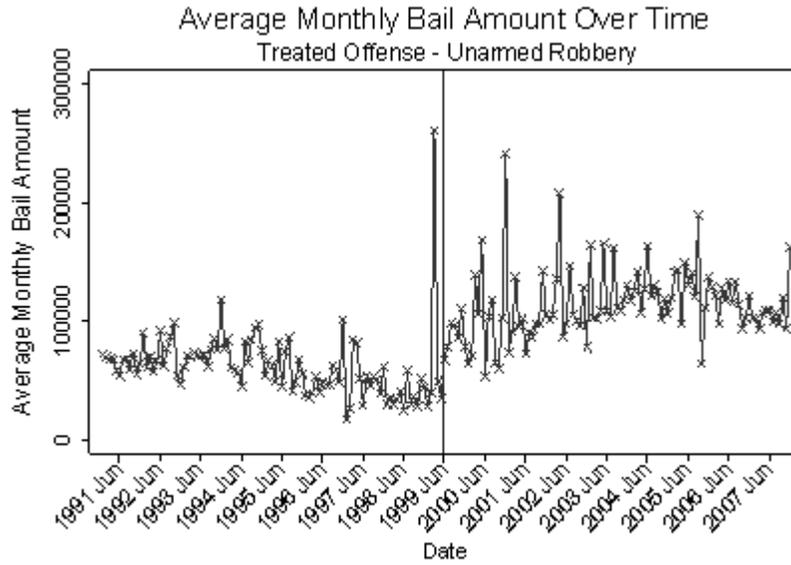


Figure 4

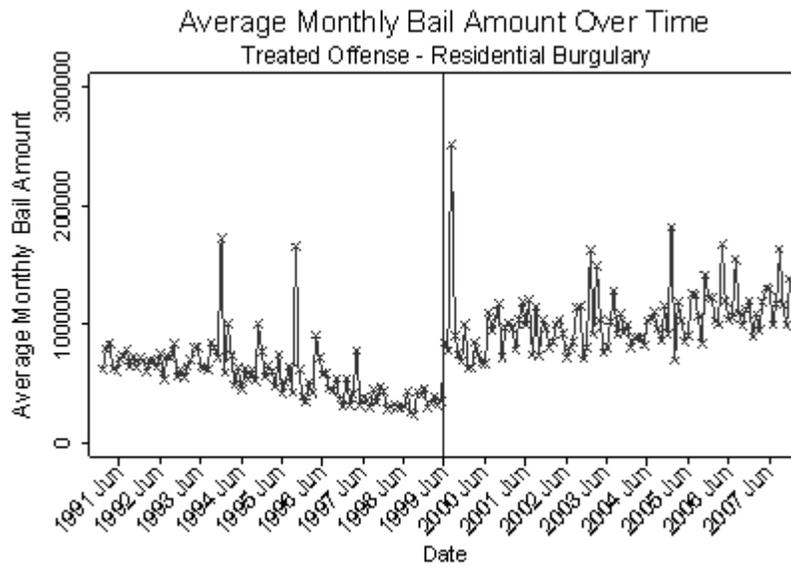


Figure 5

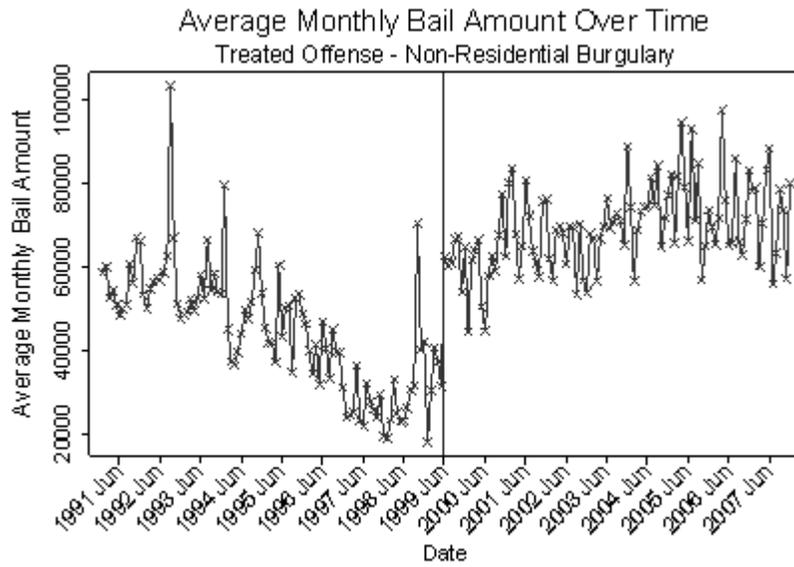


Figure 6

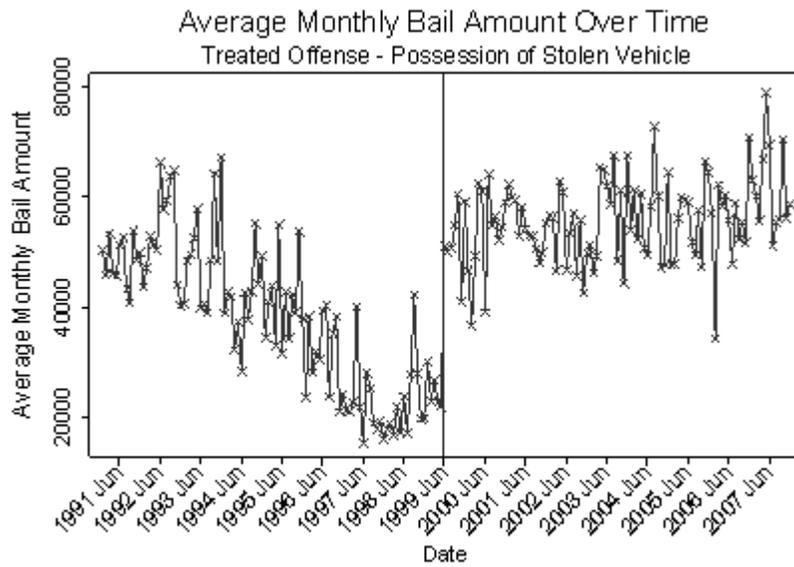
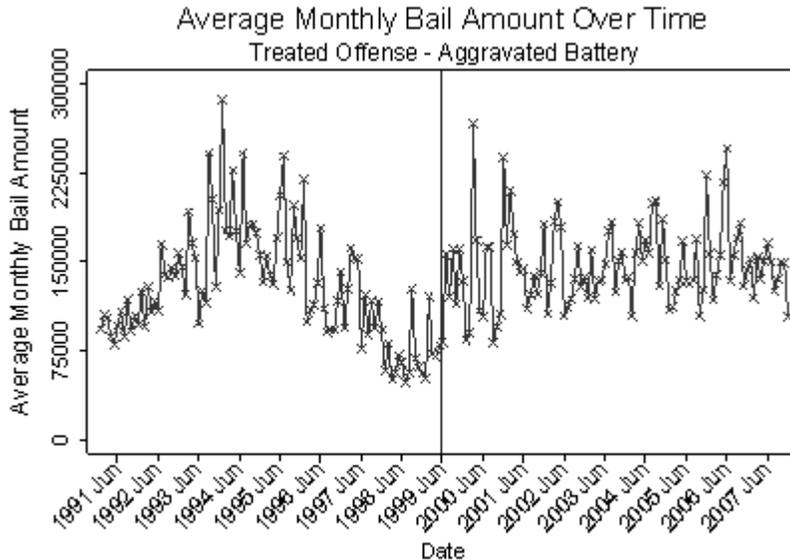


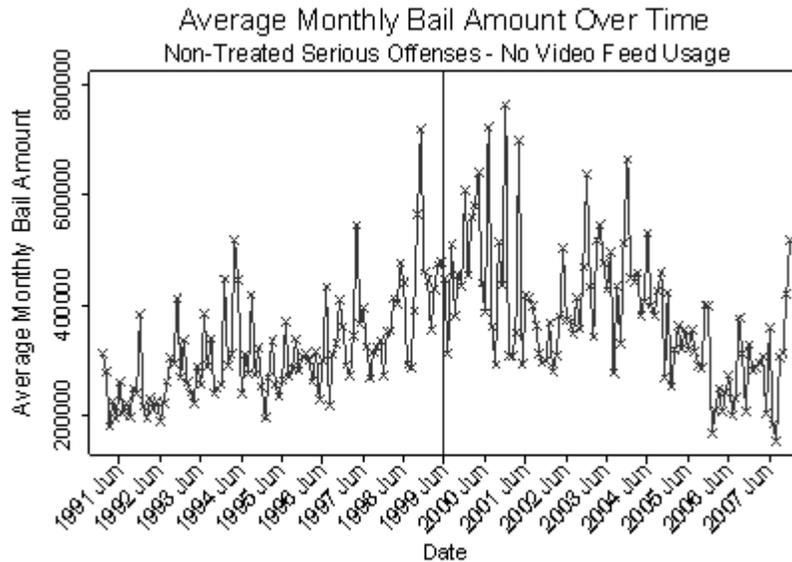
Figure 7

To examine whether the above changes in average bond amounts over time were temporary or permanent after the intervention, we again used log linear models to examine the average monthly rate of change in percentages before and after the implementation of the CCTP. All felony offenses subjected to the CCTP showed decreasing average bond amounts that ranged from -0.2% to -1.0% *prior* to the intervention. After the policy change, these offenses showed increasing bond amounts of roughly 0.14% to 0.57% over time. All changes in rate before and after intervention for the above felonies were statistically significant. To confirm that the CCTP was the cause of the increase in bond level, we examined average change in bond amount for the combined homicide and serious sexual assault cases. These are offenses that continued to have live hearings and therefore could serve as a control group. If the CCTP caused the observed rise in bond amounts for treated felonies (those subjected to the CCTP), we should see no greater than expected significant change for the non-treated felonies (those not subject to the CCTP). Indeed, results show that immediately after the CCTP went into effect, the average bond amount for the non-treated felonies rose an insignificant 13% (see Figure 8 and Table 1), while the average for treated felonies rose a significant 51%.¹¹⁵

¹¹⁵ See *supra* Figure 1 and accompanying text.

After the CCTP went into effect, bond amounts for the treated cases generally held steady with results showing a close to zero decrease of -0.02% per month, while the non-treated felonies steadily decreased at a monthly rate of .42%.

Figure 8



E. SUMMARY OF FINDINGS ON THE IMPACT OF THE CCTP

The results of the analysis show that average bond amounts rose substantially following the implementation of the CCTP. The change cannot be attributed to general trends or seasonal variations as none were observed. As both the graphs (Figures 1-7) and the statistical models clearly reveal, the substantial increase in average bond level immediately followed the implementation of the CCTP on June 1, 1999. The average bond amount for the offenses that shifted to televised hearings increased by an average of 51% across all of the CCTP cases. In separate analyses, increases of between 54% and 90% occurred for six major felonies subjected to the CCTP. In contrast, the average bond levels for the combined serious sexual assault and homicide cases, which continued to have live hearings, changed an insignificant 13% (Figure 8) and when analyzed alone, the homicide cases showed almost no change at all in average bond level following the implementation of the CCTP. These results demonstrate that the change in bail procedures not only led to a large

and abrupt increase in the average bond amount for felony cases handled by televised bail hearings after June 1, 1999, but also produced a steady rise in bond levels over time.

V. THE FUTURE OF VIDEOCONFERENCED HEARINGS: LESSONS LEARNED
AND REMAINING QUESTIONS

The results from the Cook County Bail Study show that the defendants were significantly disadvantaged by the videoconferenced bail proceedings held between 1999 and 2009. This finding provides the evidence whose absence defeated the bail applicant in *LaRose v. Superintendent* when the court rejected the applicant's due process argument.¹¹⁶ There, the court found no evidence that the use of video "would adversely bias a judge's opinion of a defendant."¹¹⁷ The court specifically relied upon the fact that "[n]o evidence was offered to suggest that judges set bail at a higher amount for defendants who were arraigned by the video procedures than by in-person procedures."¹¹⁸ The substantial increases in bail levels that immediately followed the implementation of videoconferenced bail hearings in Cook County, and which occurred only for the offenses that shifted to videoconferenced hearings, provide precisely the evidence that was missing in *LaRose* and should raise questions about the harmful effects of videoconferenced hearings on defendants.

Looking to the future, important questions remain. First, a variety of influences may account for the disadvantage experienced by the defendants subjected to the videoconferenced bail hearings implemented in Cook County in 1999. The picture quality and sound available today are far superior to the technology that existed when the equipment was installed in Cook County. It may be that the quality of the available video display was too degraded or the size of the video monitor was too small to enable the judge to adequately view the defendant. In addition, in order to watch the judge in the courtroom on the monitor, the defendant in Cook County had to look at the monitor rather than at the camera that was capturing his own image and projecting it into the courtroom. He thus could appear on the courtroom monitor as if he was avoiding direct eye contact. Modern technology with a camera embedded in the viewing monitor would be able to eliminate this problem. The inability of the defendant to see the judge clearly may also have discouraged the defendant from speaking up when it would have helped him to say something. We cannot tell from the currently available research whether the defendant's willingness and ability to

¹¹⁶ 702 A.2d 326, 329 (N.H. 1997).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

communicate would be unimpaired if better technology were used. Although modern business may be rapidly embracing the ability to hold meetings and conduct collaborative work with videoconferencing equipment, the typical defendant who appears in court for a bail hearing may find such equipment both unfamiliar and alienating.

The particular videoconferencing technology used in Cook County was not the only potential explanation for the negative outcomes the program produced. Nor is it clear that modern technology could eliminate what may be inherent flaws in a procedure that has the defendant in a remote location. The remote location of the defendant meant that attorneys had little or no opportunity to gather information from the client before the hearing. Information that could have made the defendant a more plausible candidate for pretrial release was typically limited to that gleaned by a representative from the public defender's office who asked the defendant a few questions in the holding cell before the hearing began and provided the answers to the public defender in the courtroom. In an important experiment, Douglas Colbert, Ray Paternoster, and Shawn Bushway provided legal representation in the courtroom for defendants who participated in their bail review hearings only through a two-way video and audio system.¹¹⁹ They showed that those defendants randomly selected to receive legal representation were more likely to obtain bail reductions and to be released on their own recognizance.¹²⁰ The attorneys had an opportunity to gather significant information on the defendants before these hearings, so it is unclear whether it was the additional information that the attorneys were able to provide to the court or the mere participation of an advocate for the defendant that produced the reductions, but the study highlights the potential importance of the role that attorneys can play in bail hearings.

Many of these procedural defects could be reduced or eliminated. Others would be more difficult to overcome. The location of the defense attorney in the courtroom and not next to her client may prevent crucial consultation. To remedy that loss, it would be necessary to provide the defendant with a way to communicate privately with his attorney. The remote defendant would have to be able to signal the attorney in the courtroom that he needs to have a private conversation. A defendant might, for example, be given a device that he could activate to cause a paired receiver to vibrate in his attorney's pocket to signal a desire to communicate privately. Unlike the brief whisper that can occur when the defendant and his attorney are standing side-by-side, this private conversation would

¹¹⁹ Colbert et al., *supra* note 76.

¹²⁰ *Id.* at 1720.

require a private communication channel to preserve confidentiality and could only occur through a somewhat awkward disruption in what is typically a brief hearing.

Finally, there may be some aspects of live presence that affect the believability of an individual. Indeed, studies comparing credibility judgments and other ratings of live versus televised child witnesses have found that the method of viewing affected witness ratings. For example, mock jurors rated child witnesses who testified in person as more accurate, intelligent, attractive, and honest than children who testified on closed circuit television.¹²¹ Similarly, studies in educational settings suggest that some nonverbal behaviors by teachers, such as facial expression, tone of voice, and eye gaze, influence how students evaluate the teacher.¹²² In immigration hearings, in which the courts place great importance on the testimony of the asylum applicant, there has been a movement to hold asylum hearings by videoconference, a move sanctioned by Congress in 2006 when it shortened the removal period for detained aliens.¹²³ A recent study of decisions in asylum hearings during 2004 and 2005 compared the rate of asylum grants for individuals who had in-person and video conference hearings before the Congressional mandate went into effect.¹²⁴ The vast majority of hearings were in-person and it is not clear how cases were selected for videoconferenced hearings, but individuals who had in-person hearings were nearly twice as likely to be granted asylum as those who had a hearing held by video-conference.¹²⁵

If there is something about the presence of a live individual that cannot be replicated, even with modern technology, then videoconferenced bail hearings cannot avoid a sacrifice of information that may threaten the quality of bail decisions, and a dehumanization that encourages a harsher response than would occur if the judge were faced with a live individual.¹²⁶

¹²¹ Holly K. Orcutt et al., *Detecting Deception in Children's Testimony: Factfinders' Ability to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 *LAW & HUM. BEHAV.* 339 (2001); see also Gail S. Goodman et. al., *Face-to-Face Confrontation: Effects of Closed Circuit Technology on Children's Eyewitness Testimony*, 22 *LAW & HUM. BEHAV.* 165 (1998).

¹²² Spencer D. Kelly & Leslie H. Goldsmith, *Gesture and Right Hemisphere Involvement in Evaluating Lecture Material*, 4 *GESTURE* 25, 26 (2004).

¹²³ Note, *Developments in the Law—Access to Courts*, 122 *HARV. L. REV.* 1151, 1181 (2009).

¹²⁴ Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 *GEO. IMMIGR. L.J.* 259, 271 (2008).

¹²⁵ *Id.* at 280.

¹²⁶ Even changes in camera focus can dramatically affect lay and professional judgments about the voluntariness of a confession. See, e.g., G. Daniel Lassiter et. al., *Evidence of the Camera Perspective Bias in Authentic Videotaped Interrogations: Implications for Emerging*

Nor can any hearing that entails judgments about a defendant or other witness. At this point, we simply cannot tell which of the differences between live and videoconferenced hearings, or which combination of these differences, was responsible for the large jump in bond levels that followed the implementation of videoconferenced bail hearings in Cook County. The results do tell us that Cook County Chief Judge Timothy Evans was wise to reinstate live hearings in light of the costs that the videoconference procedure, as implemented, imposed on defendants subjected to it.

The attractions of technology invite courts to implement these apparently cost-saving measures, particularly when the demand for court resources is high. Ironically, an overeager welcome of technology can impose costs of its own. By boosting bond levels and decreasing the ability of defendants to obtain release pending trial, videoconferenced bail hearings may actually impose additional financial costs on the justice system by leading to more pretrial incarceration of defendants who would otherwise be released.

Inefficient courts that waste judge and attorney time are always appropriate targets for reform, and modern technology offers some unambiguously attractive ways to improve efficiency.¹²⁷ For example, document cameras can enable attorneys to organize and present exhibits electronically.¹²⁸ Video monitors, digital projectors, and projection screens are in wide use, at least in federal courts, making it possible to easily use images to supplement more traditional verbal presentations.¹²⁹ The push to allow remote witnesses to testify is both plausible and compelling in situations in which the witness is unavailable. A live videoconferenced procedure that permits real time testimony and cross-examination can provide a closer analog to live testimony than the use of a deposition transcript or even a video evidence deposition that lacks real time cross-examination.¹³⁰ An expert witness, experienced with technology, may have

Reform in the Criminal Justice System, 14 LEGAL & CRIMINOLOGICAL PSYCH. 157 (2009). The shift from a live to a video image is likely to produce effects that are at least as substantial.

¹²⁷ For compendia of current and potential uses of courtroom technology, see FEDERAL JUDICIAL CENTER, EFFECTIVE USE OF COURTROOM TECHNOLOGY: A JUDGE'S GUIDE TO PRETRIAL AND TRIAL (2001); NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT (2009).

¹²⁸ See Frederic I. Lederer, *Introduction: What Have We Wrought?*, 12 WM. & MARY BILL RTS. J. 637, 641 (2004) (providing a fictional example of how technology can expedite a pretrial hearing).

¹²⁹ Elizabeth C. Wiggins, *What We Know and What We Need to Know About the Effects of Courtroom Technology*, 12 WM. & MARY BILL RTS. J. 731, 733 (2004).

¹³⁰ Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 WM. & MARY BILL RTS. J. 769, 773 (2004).

no difficulty participating remotely in a hearing. Yet when the government prepares to bring criminal charges against a defendant, the justice system must confront serious questions about the impact of technology on the defendant's rights.¹³¹ The challenge is to avoid too swift an attraction to technology as a solution to perceived inefficiencies. Even outside the context of a trial or other proceeding that implicates the Confrontation Clause, the defendant can suffer a significant loss if the procedure involves more than a pro forma appearance. A bail hearing is in that category. It can result in a decision that deprives the accused of his liberty despite the presumption of innocence, and may interfere with his ability to effectively prepare a defense.¹³²

When the legal system is pressured by heavy caseloads and limited resources, quick fixes promised by new technology threaten to damage rather than promote justice. That is what appears to have happened in Cook County. Technology offers great promise, but procedural justice is the currency of a fair and legitimate court system. The needed approach is to conduct pilot programs that include an evaluation of the operation and impact of proposed reforms, rather than simply to impose dramatic system-wide changes, as Cook County did with the videoconferencing bail "reform." As Judge Joseph Goodwin wisely observed in describing the use of video proceedings in federal criminal trials, the justice system must "carefully segregate those inefficiencies that are mere products of time and place—which we would be foolish to retain—from those that are deliberately built into our system to spare a free people the convenience of the guillotine."¹³³ The warning signs from the Cook County experience counsel caution.

¹³¹ For a list of potential threats to defendants' rights, see *supra* text accompanying notes 58-61.

¹³² Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121, 122 (2009).

¹³³ Ashdown & Menzel, *supra* note 53, at 68 (quoting Letter from Judge Joseph R. Goodwin, District Court Judge for the Southern District of West Virginia, to Judge Robin J. Cauthron, Chair, Defender Services Committee (Sept. 6, 2001)).

CONFERENCE OF CHIEF JUSTICES

CONFERENCE OF STATE COURT ADMINISTRATORS

Resolution 2

In Support of the Guiding Principles for Post-Pandemic Court Technology

WHEREAS, the COVID-19 pandemic forced courts to determine how to maintain access to justice while keeping court users, the public, and court employees safe; and

WHEREAS, courts improvised in-the-moment solutions built upon existing continuity plans, and have shown remarkable creativity, resourcefulness, and willingness to embrace new technologies; and

WHEREAS, in the wake of the COVID-19 pandemic, it has become even more apparent that, through the adoption of a variety of technologies, state courts can modify court processes and employ remote services to conduct essential functions and provide greater flexibility, accessibility and efficiency for court users and court staff alike during an emergency and when normal operations resume; and

WHEREAS, state courts now have a unique opportunity to leverage creative thinking and openness to innovation by using technology to create long-term and much-needed change for the courts; and

WHEREAS, in the midst of this transformation, state courts must ensure that all parties to a dispute—regardless of race, ethnicity, gender, English proficiency, disability, socio-economic status or whether they are self-represented—have the opportunity to meaningfully participate in court processes and be heard by a neutral third party who will render a speedy and fair decision; and

WHEREAS, state court leaders should implement technological changes based upon a set of principles to guide those decisions;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators urge courts to ensure that the principles of due process, procedural fairness, transparency, and equal access are satisfied when adopting new technologies; and

BE IT FURTHER RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators urge state courts to implement technology that is designed to meet the needs of all users—including the public, judges, court staff, attorneys, self-represented litigants, community partners, and researchers—and reduce barriers to access; and

BE IT FURTHER RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators urge state courts to make informed technology decisions based on the needs of and feedback from a range of diverse court users; and

BE IT FURTHER RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators urge state courts to drive innovation, by defining what business problem the court is trying to solve before settling on a specific technology; reviewing and adjusting business processes to reduce redundancy and eliminate unnecessary steps from the perspective of court users; and to use agility and flexibility when piloting innovations; and

BE IT FURTHER RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators urge state courts to take a data-driven, open and transparent approach to implementing and maintaining technologies, including by collecting data to monitor and evaluate new processes and technologies to determine success and address any challenges, while also maintaining appropriate data management protocols; and

BE IT FURTHER RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators urge courts to adopt remote-first or remote-friendly approaches when moving court processes forward, both for court personnel and for court users; and

BE IT FURTHER RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators urge the National Center for State Courts and other national organizations to promulgate guidance, share resources, and provide assistance to jurisdictions working toward these goals.

Guiding Principles for Post-Pandemic Court Technology

A pandemic resource from CCJ/COSCA

July 16, 2020 | Version 1



Each year more than 83 million cases are filed in the nation's courts. Prior to the COVID-19 pandemic, in almost all cases, tens of millions of court users had no choice about whether to visit a courthouse to resolve their case; they were required to appear in person. The pandemic forced state courts to figure out how to maintain access to justice while keeping court users, the public, and court employees safe. Courts improvised in-the-moment solutions built upon existing continuity plans and have shown remarkable creativity, resourcefulness, and willingness to embrace new technologies. Over the last 120 days, courts have shared ideas, innovations, and problem solving across jurisdictions and should be commended for their commitment to keeping the legal system running.

This national emergency led state courts to embrace online platforms like never before. To varying degrees before the pandemic, courts had been using online processes like electronic filing, online case management, video- and teleconference hearings, online payment platforms, text message notifications, and Online Dispute Resolution (ODR). These technologies acted as gateways to modernization that this pandemic has accelerated. As a direct result of the pandemic, courts have improved their business processes and increased access for court users by deploying remote services to conduct essential functions and provide greater flexibility for court users and staff alike. While some of these solutions have been tested and proven for years, the disruptive pandemic expedited the courts' use of them and resistance to change.

With all of the advancements, courts should not just rest on the accomplishments of the past quarter but should view this moment as an extraordinary opportunity to deliver better justice. Courts have often felt insulated from the pressures of the private marketplace that has forced many businesses to adapt to new technology, but court users are demanding advancements and choosing to take their disputes elsewhere. To better serve court users, we must modify decades-old court procedures put in place before laptops, email, text messages, or even the Internet – many times even the mechanical typewriter. Courts now have a unique opportunity to leverage creative thinking, seize on an emergency-created receptivity to change, and adopt technology to create long-term and much-needed improvements.

The COVID-19 pandemic is not the disruption courts wanted, but it is the disruption that courts needed: to re-imagine and embrace new ways of operating; and to transform courts into a more accessible, transparent, efficient, and user-friendly branch of government. Institutional inertia should not end this transformation once the pandemic passes. The process of developing new business processes and technologies to better meet the

needs of court users and staff should continue, and courts must be willing to adjust as necessary in response to user input and experience. This moment in history marks a unique opportunity to create long-term and much-needed change for state courts.

Technology is not a panacea. It does not and should not replace the fundamentally human character of justice. However, it provides a unique opportunity for courts to ensure that all parties to a dispute—regardless of race, ethnicity, gender, English proficiency, disability, socio-economic status or whether they are self-represented—have the opportunity to meaningfully participate in court processes and be heard by a neutral third-party who will render a speedy and fair decision.

The technological improvements made recently provide benefits beyond this pandemic, as these same solutions allow state courts to prepare disaster plans to maintain court operations during other challenges, such as power outages, natural disasters, or cybersecurity attacks. As court processes become increasingly intertwined with technology, disaster plans must create redundancies to address situations that may specifically impact mission-critical technologies.

In consideration of all of this, the Post-Pandemic Planning Technology Working Group of the Conference of Chief Justices/Conference of State Court Administrators recommends that state courts consider the following six key principles as they embrace technology:

1. Ensure principles of due process, procedural fairness, transparency, and equal access are satisfied when adopting new technologies.

Although adopting new technologies may allow courts to become more efficient, it is imperative that the principles fundamental to the court are preserved when processes go online. Courts should:

- Ensure parties receive proper notice of a case. This includes adapting statutes and court rules to allow for electronic service and other tech-friendly options.
- Include plain language procedural and substantive legal information for all parties at various stages of their cases, so that users can access easy-to-understand and relevant information in real time.
 - This is true within both traditional in-person court processes and in online court processes.
 - Within online systems specifically, court users need access to plain language legal information directly from the court website or court-annexed online dispute resolution (ODR) platform easily and without having to toggle between multiple websites or additional sources of information.
- Design systems that connect litigants to available legal help and, if applicable, develop solutions where attorneys can participate fully with their clients during remote hearings or ODR.

- Live chat for the public, chatbots, telephone hotlines, and other interactive features allow court users to ask questions to self-help court staff and outside attorneys and to locate available legal referrals on court websites, within ODR platforms, and within remote hearing platforms.
- Courts should design systems that allow for multiple users to access case files and legal information; and for online negotiations that specifically accommodate the use of breakout rooms.
- In ODR, facilitate court or staff review of proposed agreements and orders prior to hearings or enforcement.
 - Once reviewed and confirmed by a judicial officer, orders should be fully enforceable.
 - Parties should maintain the same rights to appeal whether a judge resolves the case via ODR or in a traditional court process. For ODR specifically, cases that do not resolve through online systems should proceed through an in-person court process in a timely manner.

2. Focus on the user experience.

Courts should implement technology that is designed to meet the needs of all users and reduce barriers to access. Court users should include not only judges, clerk and court staff, but also attorneys, self-represented litigants, community partners, researchers, and the public. In particular, courts should:

- Ensure that online services are mobile responsive, compatible with the most used browsers, and easy for users to provide the necessary information to advance their cases. In the era of paper, this meant giving court users easy access to a plethora of court forms. Today, as remote services become more available, this means finding easy ways to collect data from users in a way that facilitates the transfer of that data across the court system.
- Look to the impact the innovation would have on underserved communities and ensure their perspectives and needs are effectively addressed in design and functionality. Implement technologies only after carefully considering the benefits, costs and burdens on court users and ways to bridge the digital divide.
- Ensure accessibility.
 - Comply with the Americans with Disabilities Act, applicable state laws and regulations and commonly accepted accessibility guidelines related to accommodations for persons with disabilities. This requires ensuring the compatibility of online platforms with screen-reading software, confirming that web pages can be easily magnified, and using video technology that integrates closed captioning.
 - Reduce barriers for individuals with limited English proficiency by designing systems that allow for online translation and remote live

interpretation. Offer online tools in whatever languages are commonly spoken in the populations being served. Consider creating videos and spoken language assistance to address the needs of people with low literacy, American Sign Language as well as limited English proficiency.

- Make non-protected court case records and documents publicly available online and, where appropriate, enforce confidentiality requirements for information, pleadings, proceedings, negotiations, and communications in online settings.
- Provide alternatives such as telephone or SMS texting services, to ensure information is available to the broadest range of communities, including those without internet access.
- Avoid requiring users to pay additional costs to use technology or remote services and streamline the process for obtaining civil fee waivers.
- Accommodate the payment of fees and fines via electronic, telephone, or community pay point (such as gas stations, grocery, or convenience stores) eliminating the requirement for individuals to come to courthouses to make payments. Be mindful of unbanked court users; and consider payment options from credit card and/or electronic wallet options (like Venmo, Apple Pay, PayPal) as well as cash through community pay points.

3. Prioritize court-user driven technology.

The speedy release and adoption of court technology—with room for modification and iteration—has been especially important during this pandemic, where emergency court closures have forced courts to make rapid technology decisions relating to teleworking software, hardware, and remote hearing platforms. Going forward, courts should make intentional technology decisions, based on the needs of and feedback from a range of diverse court users. While the experiences of other courts can provide valuable insights, it is essential that courts analyze court user and their own business needs in making technology choices that will respond to local problems and maximize return on investment.

The court user experience should drive innovation and the transitioning of traditionally in-person processes online where appropriate. Courts should focus on implementing technology improvements that better serve both court users and staff; and as such, are open to working with public/private entities to achieve desired innovation. Technology vendors should be included collaboratively to ensure a common understanding of the business problems being addressed and user needs.

In addition, courts should collaborate with one another to define needs to achieve efficiencies with vendors. Requiring technology customization for institutional local court cultures is likely to increase the cost of products and processes. Courts should consider collaborating on a local or regional basis to standardize requirements and leverage negotiations with vendors. The tendency to regard each court as a unique business problem permits vendors to charge bespoke prices for what may be across-the-board very similar solutions.

Courts often look to off-the-shelf products developed by private companies. While many can be quickly customized and implemented, some platforms can require costly modifications to align with existing court rules and procedures. Courts in this instance need to make informed choices between standardization, which facilitates the use of off-the-shelf solutions, or customization, which provides tailored products but compromises the hoped-for savings in choosing an off-the-shelf product. Gaps between court needs and vendor offerings have often created challenges. Some may not fully integrate with the court's other systems, resulting in user frustration and duplication of staff effort. In some instances, products have been implemented that are not designed for court users, resulting in low levels of adoption and use. Wherever practicable, state courts should explore platforms that allow for increased flexibility when implementing off-the-shelf software, should explore choices in operational processes, and should simplify the training process. This avoids simply replicating decades-old paper processes with a digital substitution, or "paving the cow path."

To avoid these pitfalls, courts should:

- Clearly define what user challenges and business problem(s) the court is trying to solve before settling on a specific technology.
 - During this analysis, the court should review and adjust business processes to reduce redundancy and eliminate unnecessary steps.
 - Map current processes and determine which elements can be eliminated or combined and/or consider how existing processes can be re-imagined to better meet user needs.
 - Review established court technologies to assess whether they can be re-purposed (to avoid "re-inventing the wheel") and/or whether a new technology will be necessary to solve the business problem at hand.
- During the design phase, test the anticipated new process with real users, with an emphasis on external stakeholders.¹
 - This review can also highlight when and where court users can and should receive legal information within new technologies.
 - Review existing court administrative orders, procedures, rules, and cultural habits to identify those that should be modified or eliminated to conform with more modern, technologically innovative processes.

¹ See, e.g., Hagan, Margaret. "Participatory Design for Innovation in Access to Justice." *Daedalus* 148, no. 1 (2019): 120–27. https://doi.org/10.1162/DAED_a_00544; Aldunate, Guillermo, Margaret Hagan, Jorge Gabriel Jimenez, Janet Martinez, and Jane Wong. "Doing User Research in the Courts on the Future of Access to Justice." *Legal Design and Innovation*. Stanford, CA, July 2018. <https://medium.com/legal-design-and-innovation/doing-user-research-in-the-courts-on-the-future-of-access-to-justice-cb7a75dc3a4b>; Maier, Andrew, and Sarah Eckert. "Introduction to Remote Moderated Usability Testing, Part 2: How." 18F, US General Services Administration agency, November 20, 2018. <https://18f.gsa.gov/2018/11/20/introduction-to-remote-moderated-usability-testing-part-2-how/>; 18F. "18F Methods: A Collection of Tools to Bring Human-Centered Design into Your Project." US General Services Administration, 2020. <https://methods.18f.gov/>; O'Neil, Daniel X, and Smart Chicago Collaborative. *Civic User Testing Group as a New Model for UX Testing, Digital Skills Development, and Community Engagement in Civic Tech*. Chicago: The CUT Group, 2019, <https://irp-cdn.multiscreensite.com/9614ecbe/files/uploaded/TheCUTGroupBook.pdf>; and Hagan, Margaret. "Community Testing 4 Innovations for Traffic Court Justice." *Legal Design and Innovation*, 2017. <https://medium.com/legal-design-and-innovation/community-testing-4-innovations-for-traffic-court-justice-df439cb7bcd9>.

- Issue competitive requests for information or proposals (RFIs/RFPs) that invite and empower vendors to propose solutions that are responsive to court users' needs, rather than promoting specific products. Leverage the creativity and expertise of vendors, without letting vendors determine court technology priorities.
- Explore low-code development and application platforms that allow for a more flexible approach to implementing off-the-shelf software.

4. Embrace flexibility and willingness to adapt.

Cost-effective technology design is achieved by doing three important things:

- Identifying the technology solution only after clearly articulating the business problem that the technology will address, informed by user input and experience;
- Solving the business problem by proposing user-experience based solutions; and
- Testing for success at each step.

This approach, pioneered in Silicon Valley, is an on-going process that shapes technology solutions through multiple versions of a product until the goal is achieved; and even then, technologies can continue to be improved to better meet the changing law and user needs. Agility maximizes return on scarce court technology dollars by spotting and avoiding expensive mistakes early in development. This process also identifies opportunities to streamline and simplify court operations through available technology choices as the design progresses.

Put another way, courts should adopt an agile approach to piloting innovation and technology. This means a willingness to test and adapt, anticipating that changes will be required after the initial launch. It means being willing to try things and fail. It also means being willing to jettison technologies or court processes that do not deliver intended benefits and/or cause unanticipated harms. By identifying small failures in assumptions quickly, expensive mistakes can be avoided, corrections will be easier to make, and overall success is more likely.

- Start with a minimum viable product, pilot test, learn from user experience, and identify needed features. This will allow courts to learn how the technology works in practice, which will inform how to improve future versions and releases; and will likely result in more cost-effective innovation.
- Neither the minimum viable product nor the updates that follow should affect fundamental due process.
- Every version of a technology product under development is examined and reexamined to avoid “scope creep” and assure the product remains oriented to the project goal, including considerations of due process, procedural fairness, transparency, and equal access.
- Be open to public/private partnerships, including with civil legal aid offices, law

school technology innovation labs, charities, community organizations, non-profits, start-up technology ventures, private vendors, and large law firms to accomplish what is required.

5. Adopt remote-first (or at least remote-friendly) planning, where practicable, to move court processes forward.

Courts should implement technology that is deliberately designed to allow court staff, judicial officers, and external court users to advance court processes remotely where appropriate, while respecting the fundamental court processes that will always be best served by live participation. Courts should ensure that the needs of external court users are paramount in all decisions.

In particular, courts should:

- Build supportive infrastructure around remote work practice for court staff, judicial officers, probation and pre-trial officers, self-help staff, court-annexed mediators, and interpreters. This will require courts to promulgate the necessary employee and human resources remote policies, as well as to set the expectation for good home internet connections and quiet working space for court staff to allow for court business to continue remotely.
- Move as many court processes as possible online. This will not only facilitate the resolution of legal issues during the pandemic, but will also reduce the inconvenience and burden of in-person processes including taking time off work, getting childcare, and/or commuting far distances to courthouses once the risk of COVID-19 has passed.
- Allow for remote attendance at hearings (by either telephone or video) and ensure that court staff and court users are provided with the training, plain language instructions, and resources necessary to participate effectively.
- Identify options for those without meaningful and/or limited access to the Internet or equipment required to participate in court processes remotely. To bridge the digital divide, courts should allow participation via telephone or court- or community-based kiosks.

6. Take an open, data-driven, and transparent approach to implementing and maintaining court processes and supporting technologies.

As courts seek to improve their effectiveness through online services, they should collect data to monitor and evaluate new processes and technologies to determine success and address any challenges, while also maintaining appropriate data management protocols. Specifically, courts should:

- User-test technology with the public during development. Ensure the system meets user needs, including accessibility, ease of use, and language.

- Establish baseline metrics from existing processes/systems.
- Collect data at frequent intervals. Monitor the effectiveness of online services as compared to baseline metrics. Ensure collected data helps court leaders accurately assess the technology's impact on the identified business problem and make any necessary adjustments.
- Protect personal identifying information (PII) in the use and reporting of court data.
 - When working with vendors, courts should consider who owns the case, configuration, and usage data; the parameters and timeframes for the transfer or destruction of this data; and restricting vendor and third-party usage of data.
 - Use the RFI/RFP bidding process to specify requirements relating to data collection, legal information and limited English proficiency/disability accessibility.
 - Work to provide transparency while balancing the privacy and safety needs of litigants, witnesses and jurors.
- Evaluate all technology innovations to aid with continuous improvement and, when resources permit, consider working with third-party evaluators to conduct external review.
- Share developed technologies (for free or limited cost, if practicable) and lessons learned from court technology projects with other courts.
- Prepare for costs associated with continuous improvement. Develop and follow through with sustainability and maintenance plans for all technology innovations. Budget anticipated future costs to modify technology due to changes in the law or user needs over time.

Technology has played a critical role in the courts' response to the pandemic. As courts begin to resume some in-person proceedings and to consider a post-pandemic world, courts must not leave the technological advances behind but instead use these guiding principles to build upon the success of the past months to better serve court users and provide greater equal access to justice for all.

JUDICIAL DIVISION AMENDMENT TO REVISED 117

ADOPTED

RESOLUTION

1 RESOLVED, That the American Bar Association applauds the work of federal,
2 state, local, territorial and tribal courts and the members of federal, state, local
3 territorial and tribal bars for their thoughtful and innovative approaches to
4 administer the justice system and protect the interests of litigants during the
5 COVID-19 pandemic;

6
7 ~~FURTHER RESOLVED, That the American Bar Association urges that mandatory~~
8 ~~use of virtual or remote court procedures established as a result of the COVID-19~~
9 ~~pandemic be limited to essential proceedings, defined as preliminary proceedings~~
10 ~~that have the potential to result in the detention or release of an individual from~~
11 ~~custody and other critical civil proceedings such as temporary orders of protection,~~
12 ~~interim child custody or child welfare orders or other temporary injunctions or~~
13 ~~orders concerning the safety or placement of an individual, as well as hearings on~~
14 ~~petitions necessary to protect constitutional rights;~~

15
16 FURTHER RESOLVED, That the American Bar Association supports a considered
17 and measured approach in adopting and utilizing virtual or remote court
18 proceedings established as a result of the COVID-19 pandemic, prioritizing use of
19 such procedures for essential proceedings and those cases in which litigants
20 consent to the use of virtual or remote processes.

21
22 FURTHER RESOLVED, That the American Bar Association urges regular review
23 of any decision to detain an individual pending a final proceeding made during a
24 period of mandatory use of virtual or remote court proceedings;

25
26 FURTHER RESOLVED, That the American Bar Association urges that any
27 authorization of mandatory use of virtual and remote court proceedings during the
28 COVID-19 pandemic ~~include a self-executing expiration provision to take effect~~
29 ~~within a designated period of time that is continue for as short a time as possible~~
30 and in no event longer than the duration of the declaration of emergency issued in
31 the jurisdiction;

32
33 FURTHER RESOLVED, That the American Bar Association urges that use of
34 virtual or remote court proceedings ~~beyond essential proceedings~~ be permitted
35 when litigants have ~~provided informed~~ consented to the use of such procedures,
36 including being offered ~~either a safe, as determined by independent medical~~
37 ~~experts, in-person proceeding or~~ a delay until ~~such~~ a safe, in-person proceeding
38 can be held;

39

JUDICIAL DIVISION AMENDMENT TO REVISED 117

40 FURTHER RESOLVED, That the American Bar Association urges that no person
41 consenting to the use of virtual or remote court proceedings be required to sign a
42 blanket waiver of rights or waive the right to have the procedure or outcome of the
43 proceeding be subject to appellate or post-conviction review;
44

45 FURTHER RESOLVED, That the American Bar Association urges the formation
46 of committees to conduct evidence-based reviews of the use of virtual or remote
47 court proceedings and make recommendations for procedures, revisions of
48 procedures and best practices to ensure that they are guaranteeing all applicable
49 constitutional rights and ensure that attorneys can comply with their professional
50 ethical obligations. Such committees should include representatives of all
51 constituencies involved in or affected by the type of court or proceeding under
52 consideration;
53

54 FURTHER RESOLVED, That the American Bar Association urges that all virtual
55 or remote court proceedings be tailored to the needs of participants and take into
56 account the type of case and proceeding to be conducted, the participants
57 involved, and whether participants are likely to be represented by counsel, by:

- 58 (1) Considering the ability of all participants to access and fully participate
59 in the proceedings, including:
- 60 a. Ensuring that participation options for virtual or remote court
61 proceedings are free for participants and observers;
 - 62 b. Providing options concerning participation and permitting
63 participants to select the means of participation best suited to
64 them without prejudice;
 - 65 c. Allowing participants to alter their chosen means of participation
66 for each proceeding;
 - 67 d. Providing necessary support for those who, for financial,
68 technological, language access, disability, or other reasons, may
69 not be able to fully participate without assistance;
 - 70 e. Ensuring that methods of participation reduce, to the fullest extent
71 possible, any prejudice that might result from the circumstances
72 of participation;
 - 73 f. Providing contingencies for possible technological or access
74 problems during the proceeding;
 - 75 g. Guaranteeing that participants are not pressured or obligated to
76 waive constitutional rights;
- 77 (2) Providing training on applicable procedures, including training on
78 possible areas of technological bias;
- 79 (3) Providing additional funding to assist courts, legal aid and public defense
80 providers, prosecutors, and social service providers to expand and
81 improve access to virtual and remote court proceedings, particularly for
82 those who may require financial, technological, language access, or
83 other specialized assistance;

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- 84 (4) Protecting full attorney-client relationships, including providing access
85 for private consultation both before and during court proceedings and
86 guaranteeing the confidentiality of such communications; and
87 (5) Enabling and encouraging access to other litigation assistance
88 programs and self-help programs previously available;
89

90 FURTHER RESOLVED, That the American Bar Association urges that advance
91 notice be provided to the public of all virtual or remote proceedings and that full
92 and meaningful public access to such proceedings be guaranteed, while also
93 protecting the privacy of those proceedings legally exempted from public access;
94 and
95

96 FURTHER RESOLVED, That the American Bar Association urges that virtual and
97 remote court procedures be studied for purposes of developing best practices and
98 determining possible biases, and that, if such studies suggest prejudicial effects or
99 disparate impacts on particular litigants or case outcomes, steps should be taken
100 to halt, alter, or revise virtual or remote court procedures.

**JUDICIAL DIVISION
AMENDMENT TO
REVISED 117**

REMOTE HEARING TOOLKIT





This Toolkit is published in partnership by the Justice and Corrections Service of the Office of United Nations Office of Rule of Law and Security Institutions in the Department of Peace Operations (JCS/ OROLSI/DPO) and the United Nations Institute for Training and Research (UNITAR).

The guidance proposed in this publication should not be regarded as a definitive guide on United Nations norms and standards relating to the use of remote court hearing technology. The presentation of the material in this publication does not imply the expression of any legal advice or opinion on the part of OROLSI-JCS or UNITAR concerning design, implementation, or any other aspect of remote hearings.

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Background

The COVID-19 outbreak that began in late 2019 evolved rapidly and globally. The pandemic, and subsequent policy and security measures taken in response, impacted the administration of justice in every legal system around the globe. One of the greatest impacts is that lockdown measures and social distancing rendered in-person hearings challenging or impossible. The disruption to conducting hearings and other judicial proceedings has the potential to significantly undermine access to justice, due process, and civil and human rights.

In response, the Justice and Corrections Service of the Office of Rule of Law and Security Institutions (OROLSI/JCS), in partnership with the United Nations Institute for Training and Research (UNITAR), created this Toolkit on Remote Hearing Decision-Making.

The Toolkit will help determine whether and how to use audio, videoconferencing, and other technologies to conduct remote hearings when in-person hearings are not feasible.

Given the wide variation in settings where hearings are conducted, it is not possible to provide uniform or prescriptive advice about using remote hearings. It is a decision for the courts to make, governed by local needs, conditions, and capacities. Instead, this Toolkit provides a decision-making framework and resources so that stakeholders can arrive at appropriate solutions for their particular contexts.

The Toolkit may be used by all varieties of legal stakeholders – ministry officials, judges, prosecutors, lawyers, court officials, and others – responsible for the administration of justice in challenging environments.

It should be considered not only as an immediate response to COVID-19 but also for longer-term planning. The establishment of remote alternatives to court hearings and other legal proceedings may help improve access to justice in contexts where insecurity, limited transport, logistical and other obstacles will continue to severely hamper the delivery of justice services.



Defining remote hearings

As a result of the COVID-19 outbreak, courts around the world are rapidly introducing remote hearings in various forms, including audio hearings (largely by telephone), video hearings (by videoconference platform), and paper hearings (decisions delivered on the basis of paper submissions).¹ There are many synonymous terms for remote hearings, including but not limited to: virtual hearings, tele-hearings, electronic or e-hearings, teleconference hearings, etc. For the purposes of this Toolkit, we use the term remote hearings to refer to any hearing or other judicial proceeding, which is not conducted entirely in person.

Remote hearings are not a new invention. Many jurisdictions, such as international arbitration centers, have used remote hearings – or a hybrid of in-person and remote elements – to increase access and efficiency since long before COVID-19. But the global geographic scope and unprecedented impact of COVID-19 means that remote hearings now have the potential to be a strategic, if not necessary, option in nearly all jurisdictions.

Before adopting the use of remote hearings, however, courts and other judicial and arbitral bodies must carefully consider and plan. The use of remote hearings has many legal, technical, organizational, and rights-related implications that present both opportunities and challenges. This Toolkit will assist stakeholders to conduct a thorough decision-making and planning process.



Contextual considerations

This Toolkit specifically focuses on whether and how to use remote hearings in lower-resourced contexts, such as United Nations Missions and other fragile non-mission settings. Circumstances in such settings create additional considerations above and beyond those previewed above that all legal stakeholders must consider.

Lack of funding, legal constraints, limited access or exposure to technology, limited or no access to electricity, and low levels of literacy will inevitably create barriers to implementing remote hearings in a way that ensures quality and due process.

The Toolkit will assist stakeholders to assess whether and how such challenges can be overcome or mitigated. Examples include incremental implementation, support from field missions, Country Teams and international actors, and innovative approaches based on local practices. The final section of the Toolkit includes examples of available support, as well as links to relevant resources.





POSSIBLY



NO

YES

YES

NO

PERMITTED UNDER SPECIFIC CIRCUMSTANCES

BRANCH 1 LEGAL PERMISSIBILITY

The threshold question when considering implementing remote hearings in place of in-person hearings is whether governing law permits their use. This involves assessing general permissibility based on statutes and rules and, where prohibitions or barriers exist, determining whether the relevant laws can be amended or suspended. It also requires considering permissibility in the context of decisions made on behalf of the legal sector, e.g. if the government is rolling out a national initiative, individual courts should follow those directives as opposed to implementing ad hoc solutions.

The questions below pertain to legal permissibility.

They provide guidance when permissibility of conducting remote hearings is uncertain or subject to any legal barriers.

General and case-specific legal permissibility

Click on the answer that applies.



1. Is using phone and/or video technology to conduct remote hearings and legal proceedings permissible under current national legislation?

- In Civil Law jurisdictions, look first to the national Constitution and law(s) of procedure. ²
- In Common Law jurisdictions, look to the national Constitution and relevant procedural and case law. ³
- In Islamic Law, look to the primary sources of law as well as the specific schools of jurisprudence relevant to the context. ⁴
- Consider also whether, in the context of COVID-19, conducting remote hearings has been made permissible as a temporary public health / state of emergency measure.



Y/N



✓ 1.1 If permissible,
are there any restrictions or conditions on whether and how phone and/or video technology may be used to conduct remote hearings?

- Consider in particular:
- Due process, including whether it is possible to require parties to participate in remote hearings, or merely offer them as an option;⁵
 - Civil, criminal, commercial, and administrative procedure laws;
 - Criminal sentencing rules, including the application of the death penalty;⁶
 - Cyberlaw and security (which will be revisited in the Technological & Security section);
 - Rules about confidentiality and attorney-client privilege.

? 1.2 If permissibility is uncertain or vague,
is permissibility unclear because of specific language or terms in the relevant law(s), or because the law doesn't appear to directly address the issue?

- Clearly articulate what is uncertain or unclear before proceeding;
- From what legal body or institution might you seek clarity and guidance?
- Are there examples of comparable use of phone or video technology by other administrative bodies for the purpose of conducting government affairs that may be informative and, if so, can you discover whether they assessed legal permissibility?
- Are there countries with sufficiently similar legal systems, frameworks, and practices whose response to COVID-19 and using remote hearings may be informative?



Y/N 1.3 If permissible with restrictions or conditions,
can and should relevant restrictive statutes be amended by legislation, regulation, or decree?⁷

- Are there any foreseeable risks to lifting restrictions on using technology for remote hearings? If uncertain, you may consider consulting with stakeholders to identify and address any concerns with using remote hearings;
- Whose participation would be required for such an amendment? Would additional participation, e.g. in the form of an expert or advisory opinion, be helpful?⁸
- What is the likelihood of success?

✗ 1.4 If impermissible,
can amendments be made to existing legislation or can new legislation be promulgated to allow for remote hearings?⁹

- Consider and weigh a variety of factors when deciding the form and substance of legislation, including but not limited to:¹⁰
- Emergency legislation¹¹ versus durable law, i.e. the need for an expedient response to COVID-related disruptions to the administration of justice versus the opportunity to create durable legislation¹² allowing for remote hearings;
 - The possibility of issuing a decree or decision under an existing emergency or procedural law;
 - Legislation that grants broad power to conduct remote hearings versus detailed and restricted powers;¹³
 - Whether and how countries comparable in terms of legal system, framework, and administration have legislated the use of technology to conduct remote hearings.



1.5 For what types of cases or proceedings are remote hearings legally permissible?

 Refer to research and analysis undertaken in [Question 1](#). Consider cataloging cases by type and remote hearing permissibility like [this example](#).

1.6 Of the legally eligible cases and proceedings, which are appropriate for remote hearings?

 Consider also which cases should receive priority, particularly with respect to parties' rights, preferences, and public interest.¹⁴

Implementation-related permissibility

1.7. Will remote hearings be implemented at the national level, by local jurisdiction, or by individual judge/court? ¹⁵

 **Court officials should consider:**

- A national approach will provide greater uniformity across the country and may create more options for support resources, e.g. via foreign-funded legal development initiatives; however, a national approach may not be feasible due to insufficient stakeholder buy-in, structural barriers, lack of funding, or inability to implement at scale.
- A local solution will provide greater uniformity for court users in that local jurisdiction; however, it may be infeasible or challenging for the similar resource and coordination challenges that exist at the national level.
- A court official may choose to use remote hearings for an individual court. An individual solution allows intrepid court officials to continue administering justice to minimize backlog; however, it may be infeasible or challenging due to lack of technological capacity and/or access, and insufficient human resources for successful design and implementation.



If national level approach,

1.8 Will it involve the creation of a dedicated body within the justice administration entrusted with strategic planning and implementation of videoconferencing? ¹⁶

If yes, ensure that those tasked with the responsibility are involved in the assessment and decision-making process.

If no, is it clear who within the system will have the authority to act on any devised plans?

1.9 Will the aim be to bring every judge or court online at once or on a rolling basis?

 Consider issues of feasibility, capacity, gathering feedback and observations to improve the process.

1.10 If operating in a subnational court system, has research been undertaken to determine whether steps have been taken to implement remote hearings at a higher judicial level?

 **If yes**, and plans are underway, consider consulting the above judicial level for resources and guidance as to legality and best practices.

 **If yes**, but plans are not yet underway, consider adopting uniform approaches for greater coherence and to create the possibility of collaboration.

 **If no**, determine how to discover what, if any, efforts are being undertaken at other judicial levels.



BRANCH 2 TECHNICAL & SECURITY ASPECTS

In remote hearings, judicial services are provided by courts to the public through technological means. This implies taking into account available technological resources, human resources and capacity, and cybersecurity, among other elements. The decision-making process entails strategic planning, as well as detailed tactical planning that is closely tailored to national and local circumstances.

The questions below will help determine whether the requisite technological, human and security capacity exists and, if not, whether and how to acquire it.

Technological platform

2. Is phone or videoconferencing being used by other national government or administrative services?

- 🔍 **If yes**, conduct consultations to learn from their experience.
- 🔍 **If no**, proceed to the next question.

2.1 What technology is being considered to use?

- 🔍 Several technology options can be used to facilitate virtual hearings. The simplest to implement are audio hearings; however, using only audio technology limits what can be accomplished. Videoconferencing provides more robust features enabling most types of hearings.¹⁷



Where considering telephone only:

2.2 Can the court guarantee that all parties will be able to access a phone call?

- How will the court establish whether participants have access and do not have disabilities that prevent them from participating, e.g. hearing impairment?
- If participants are low-income and credit is required for phone calls, is the court able to provide alternative access or vouchers?

- Particularly for national or regional efforts, coordinating with telecom providers may be desirable and/or necessary.
- If no**, consider whether an internet-based audio platform is a preferable option ([see questions about access](#)).

If participants are in low-coverage areas,

- Consider whether an [internet-based audio platform](#) is a preferable option.
- If participants are hearing impaired, consider using video technology.

2.3 Is the court prepared and equipped to host a multi-line conference call?

- Does the Court have personnel skilled in audio and internet technology who can provide trainings to judges and legal practitioners?
 - If not**, does the court have a budget to hire such assistance, OR
 - Are there other ways to increase technical capacity, e.g. providing online trainings, bringing in a short-term consultant, etc.?



2.4 If internet-based audio¹⁸ or videoconferencing:¹⁹

- Is internet available in the given jurisdiction so that parties, counsel and/or witnesses are able to access internet-based hearings?

- If yes**, how will it be confirmed that participants have internet access prior to the hearing?

- Consider having participants [test their internet connectivity and speed](#).²⁰
- Consider creating a pre-hearing test protocol that all participants follow prior to the hearing to verify that they will be able to use the technology.

- If yes**, but it is only available at cost, how will the court guarantee access of all participants?

- Consider whether telecom companies can be consulted about providing vouchers and free access for court proceedings.

- If yes**, but service is unreliable or weak, can telecom companies be consulted about increasing internet capabilities?

- If yes**, consider the stakeholders who must be involved on the telecommunication and legal sides to move forward with such a project.
- If no**, revert to questions about using phone audio.



If **yes**, how will the court establish that participants do not have disabilities that prevent them from participating, e.g. sight impairment?

If **no**, is there a strategy to boost Internet capacity to bring connectivity to areas without?

2.5 Does the nature of the case or hearing require specialized videoconferencing technology?

Consider that some hearings are more complex and may involve elements that require specialized platforms that can accommodate witness examinations, extensive use of exhibits, and/or simultaneous translation services.

- Will it be necessary to share slide presentations (e.g., PowerPoint) with participants?
- Does the platform allow for private communications between individual participants?
- Does the platform allow for breakout “rooms” during breaks?
- Is the platform better suited for simultaneous or consecutive interpretation?

If the answer to any of these questions is **yes**, a paid videoconference service created specifically for judicial proceedings may need to be considered. [See an example.](#)



2.6 Does the technology enable public access where required or desired?

Consider that many jurisdictions legally require that hearings be available to the public. There are helpful examples of how various courts have satisfied this requirement using tools and live feeds for remote hearings.

- How is the public going to be made aware of their ability to access remote hearings?
- Can advocacy and legal services organizations be mobilized to conduct public outreach?

2.7 Is it feasible to use multiple methods simultaneously should one method fail?

Be prepared for internet connections to fail and consider using backup phone audio.

- Are there protocols to follow if the entire platform cuts out, or if a participant's connection is lost and they cannot log back into the hearing room?

If **yes**, how will the information be disseminated to hearing participants?

If **no**, who will prepare such protocols before launching remote hearings?



Hardware and software requirements

2.8 Will each participant be able to connect to the hearing from a personal device or from a technology-equipped conference room?

- If yes** and participants are accessing from a personal device, is the virtual hearing platform compatible with the device's operating system?
 - Will screens be able to clearly display documents and other information, such as exhibits or transcripts, for all who would be entitled to view such documents in a live hearing?
- If yes** and participants will be able to convene and access the hearing in a conference room,
 - Does each room have a sufficient number of speakers and microphones to accommodate all participants?
 - Are any local safety measures in effect, such as social distancing or shelter-in-place, and, if so, is there any risk they will be violated by participants convening to access the remote hearing?
- If no**, stop and consider whether it is feasible to host remote hearings in such a way to satisfy obligations to provide access to justice.



2.9 Does the selected technology require participants to have proprietary software?

- If yes**, first consider that this will likely limit the ability of some participants to attend, which may implicate their rights and/or general procedural fairness. To ensure success, court leaders should prioritize solutions that can be operated with the simplest and broadest array of equipment that is most readily available to all potential participants.²¹
- If yes** and specialized software or hardware is required for participants to participate, determine who is responsible for providing it and bearing the cost.
- If no**, proceed.

Recording and archiving hearings

2.10 Is recording remote hearings in video or audio files to maintain as part of the judicial record being considered?²²

- Does legislation allow for recording court proceedings? If so, under what conditions?²³
- Will reviewing courts be authorized, able, and willing to accept the electronic recording as the official record?
- Does the selected remote hearing platform have the capacity to generate a recording?
 - If yes**, can the files generated be safely stored and maintained?
 - If no**, is there a method for simultaneously recording the proceeding on a separate platform?
 - If no**, will the hearings be transcribed to create a written record?



2.11 Do you have an established electronic court filing system?

- If yes**, how will recordings of remote hearings be archived within the existing system?
 - 🔍 Assess whether the storage system is sufficiently large and secure. Audio and video files often require more space than is available on local storage, but Cloud storage is less secure;
 - 🔍 If storage is through a third-party, carefully review the terms of any contract or licensing agreement to see who owns the recordings or court-generated data to ensure that data is not misused;
 - 🔍 Consider the additional staff and/or training and support required to competently archive recordings of remote hearings.

- If no**, can the system be established? ²⁴
 - 🔍 **If yes**, consider what steps will be required to put a system in place, the support needed, and how digital files of remote hearings will be maintained in the interim.
 - 🔍 **If no**, confirm that written transcripts of all remote hearings can be generated and stored.



Cyber and data security

- 🔍 Confirm that the planned technological platform will adhere to the laws and rules governing cyber- and data-security, confidentiality, and attorney-client privilege.²⁵

- 2.12 Can connections to the remote hearing platform be secured? Consider all security threats, including hackers, participants creating unauthorized video or audio recordings, etc.**
 - 🔍 **If yes**, proceed;
 - 🔍 **If no**, conduct research about cybersecurity measures, e.g. protected access or encryption, to determine whether there are options for ensuring security; If no options can be determined, stop and consider whether it is feasible to host remote hearings in such a way that you satisfy your legal obligations.

- 2.13 How will document and data security be ensured during and after hearings?**
 - How will referenced documents be viewed by the court and the other parties (e.g., by sharing a screen or by reference to the electronic materials in the possession of parties and the court)?
 - How will any private or sensitive information be referred to and protected during and after the hearing?

- 🔍 **2.14 Consider what, if any, additional security standards or protocols should be established given risks particular to the given jurisdiction?** ²⁶



In remote hearings, judicial services are provided by courts to the public through technological means. Providing this service effectively requires organizational and logistical planning and execution. This decision-making process emphasizes strategic planning but be aware that it will need to be followed by detailed tactical planning that is closely tailored to the circumstances.

The questions below will help determine whether there is the requisite organizational and logistical capacity in place and, if not, whether and how to acquire it.

Immediate organizational considerations

3. Taking into consideration the previous answers regarding legal permissibility and technology and security, does the court or jurisdiction in question have the organizational and logistical capacity to conduct remote hearings? Consider, at minimum, the following factors. ²⁷

- Internet, e.g. sufficient internet bandwidth to support as many remote hearings as may be conducted at a single time;
- Electricity, e.g. sufficient and reliable electricity to support all technology required for remote hearings;
- Hardware, e.g. computers and (if necessary) webcams, microphones and other technology-enhancing hardware;
- Software, e.g. access to online court conferencing applications;
- Physical space, e.g. appropriate space for court personnel to conduct remote hearings if at the courthouse; personal protective equipment for anyone required to be in-person at the courthouse;
- Dedicated personnel for IT support, to provide trainings on remote hearing technology and/or procedure, etc. ²⁸

BRANCH 3 **ORGANIZATIONAL & LOGISTICAL CAPACITIES**



? If capacity is unknown

- 🔍 Complete a thorough logistical needs assessment for remote hearing including existing and required technical items, maintenance, services and other equipment that are available or needed.
- 🔍 If it has been determined that other administrative bodies are already using phone or video technology to conduct operations, do research and/or consultations to learn how they are meeting logistical and organizational needs.

? If capacity is known but incomplete

- From what institutions or donors can support be obtained?
- Is capacity unclear because courts are skeptical that personnel will be able to effectively learn and use the technology necessary to conduct remote hearings?

If yes,

- Can trainings be offered to increase court employees' technological capacity?
- Is it possible to begin with a pilot project and/or offer remote hearings in limited scope, using the lessons learned to build confidence and capacity?

⊗ If no capacities

- If there are generally no capacities, can the logistical needs be developed internally or provided by a third party?**

If yes, identify what is needed, who needs to be consulted, and what steps must be taken to meet the need.

If no, can courts adopt other solutions like the following which have been undertaken by other jurisdictions:

- 🔍 Amend laws or freeze enforceability of certain laws to mitigate challenges created by COVID-19, e.g. ²⁹

- Halting eviction proceedings for non-payment of rental fees; ³⁰
- Extending litigation deadlines and/or waiving statutes of limitations in certain cases;
- Providing amnesty or alternative options for imprisonment in case governments cannot provide timely court services;
- Encouraging parties to consider alternative dispute resolution methods and other out-of-court settlements;
- In administrative cases, freezing collections and/or ordering administrative agencies to continue providing services;
- Emergency allocation of existing resources from another government agency.



3.1 Taking into consideration the previous answers regarding legal permissibility and technology and security, what services can and should the court provide to enable participants to participate in remote hearings? This is particularly important in cases involving unrepresented parties. ³¹

Consider technical support

- Information or training about the hearing format and technology;
- Guidance on what to do if technology issues happen during the hearing;

Consider procedural support

- Information or training about the format of, procedure for, and timetable for the exchange of any documents before and during the hearing;
- Information or training about the procedures for witnesses or other necessary parties at the hearing, including how documents will be shown during examinations;

Consider communication or public relations support ³²

- Outreach to inform the public about the use of remote hearings; ³³
- Means for the public to access remote hearings, e.g. streaming to a dedicated live feed or channel;
- Outreach about access to archived remote hearing recordings;
- Any necessary language interpretation or translation;
- Any necessary court reporting services;
- Any support necessary to accommodate disabilities, cultural differences, and / or illiteracy.



3.2 Has logistical planning been done to ensure that the court and other conference participants have advance copies of evidence, hearing documents, and/or presentations?

- If yes**, proceed.
- If no**, assess the document- and evidence-related needs to conduct in-person hearings and consider what will be required to enable remote hearings. ³⁴

Legal sector harmonization

3.3 If remote courts are being implemented at the national level, what efforts are being made to ensure consistency and quality?

- Who is responsible for oversight of nation wide efforts?
- Is there a database or list tracking the courts, types of cases, and remote hearing modalities being used?
- Is the introduction of technology for remote hearings part of a larger project aimed at increasing the use of technology in the justice sector?
- Who has responsibility for harmonizing the COVID-19 response with larger efforts to increase the use of technology in the courts?
- Is there a large-scale program in development or already being implemented to provide legal practitioners with training and information on remote hearings?



BRANCH 4 PROCEDURAL SAFEGUARDS & ACCESS TO JUSTICE

This section focuses on considerations of access to justice and due process when deciding whether and how to implement remote hearings. Courts must strike a balance between responding swiftly to the constraints imposed by COVID-19 while also thoughtfully adopting a holistic and inclusive strategy for ensuring the continued functioning of the justice system and equal access to fair, timely, and effective justice services.

The questions below will help determine whether the plan considered based on the previous three sections adequately protects access to justice and the due process of law.

Access to justice in individual cases

4. Have appropriate hearing procedural accommodations been identified to ensure that courts are not infringing on access to justice? At a minimum, consider the following:

- Lack of access to internet or mobile reception;
- Lack of access to technological devices like smartphones or computers;
- Ability to access
- Ability to review evidence and key documents;
- Illiteracy;
- Disabilities, particularly hearing or visual; ³⁵
- Gender;
- Language barriers;
- Access to an appropriate physical space to virtually attend a hearing (e.g in the case of homelessness).



If yes, proceed.

If no, review available resources³⁶ and consider which accommodations are appropriate in the given context.

If the court encourages the use of online alternative dispute resolution methods to process cases more quickly, are the ADR processes guaranteed to protect the domestic and international legal rights of participants?³⁷

If yes, proceed.

If no, consider developing a list of court-approved online ADR providers that abide by national and international law.

4.1 Will a monitoring and assessment system be created to determine whether and how the use of remote hearings in response to COVID-19 impacts access to justice overall, e.g. the effect on case backlogs and user feedback?³⁸

Specific to Criminal Defendants

4.2 What mechanisms exist or can be established to ensure effective access to lawyers, particularly for those in detention, in a way that protects the right to legal advice and representation?

Ensure, in particular, that:

- Defendants have access to effective modes of communication with their lawyers before, during, and after proceedings that ensure attorney-client privilege.
- Defendants have the same, if not greater, frequency of contact with lawyers while in detention that they have when represented in-person.
- Defendants are provided access to the technology necessary to participate in proceedings where they would otherwise make an in-person appearance.



4.3 How will it be ensured that trying a criminal defendant's case by remote hearing will not contravene the presumption of innocence or otherwise prejudice the defendant's right to a fair trial?

Do remote hearings allow the defendant to exercise her/his Constitutional and procedural rights? These may include the right to confront witnesses and to be represented by counsel.

Will criminal defendants be able to participate in the proceedings in a way that allows for the same level of engagement and dignity that they would have in an in-person hearing?

Can it be ensured that criminal defendants will have timely access to all statements, evidence, and court hearing notices before, during, and following proceedings?

In cases where criminal defendants are illiterate or not fluent in the language of the court, how will interpretation for proceedings and translation of documents be provided?

Specific to Witnesses and Victims

4.4 How will witnesses be heard, and what measures can be taken to ensure witness protection?

Where will witnesses testify? Is there a designated area at the courthouse or other location or will witnesses testify from home?

What procedures or mechanisms can be put in place to ensure that the victims/witnesses giving evidence remotely are not subject to undue interference, intimidation or pressure?

What procedures or mechanisms can be put in place to ensure that child victims/witnesses appearing in a court hearing remotely are not subject to improper or undue, interference, intimidation or pressure from their parents, guardians, custodians, caretakers or other responsible person?⁴⁰



- Is there sufficient visual or other information to assess the risk of improper influence?³⁹
- Is there technology available to provide the judge a more complete picture of the remote room and its occupants?

4.5 Can alternative ways to assess and demonstrate the credibility of witnesses and evidence in a video- or teleconference hearing be adopted?

Consider methods such as:

- Provision of declarations (prepared and provided to the court ahead of time);
- Expanded inquiry into a witness’s background to explore credibility issues,
- Expanded inquiry into preliminary matters to demonstrate context for a witness’s or attorney’s position;
- Selection of videoconference (not merely a teleconference) as a default method of witness-involved hearings so that the court can visually assess credibility and confirm the witness is not being improperly influenced.

- What means can be used to administer the oath in absence of a witness “appearing” in-person?

4.6 Can it be ensured that witnesses and parties, including victims, are afforded the same rights and protections that they would have in an in-person hearing?

Consider how to ensure that statements, evidence, court hearing notices are:

- Available to witnesses and victims before, during, and after the hearing;
- Adequately explained for parties to understand their significance; and
- That the needs of illiterate parties and those who do not speak the official language of the court are considered.



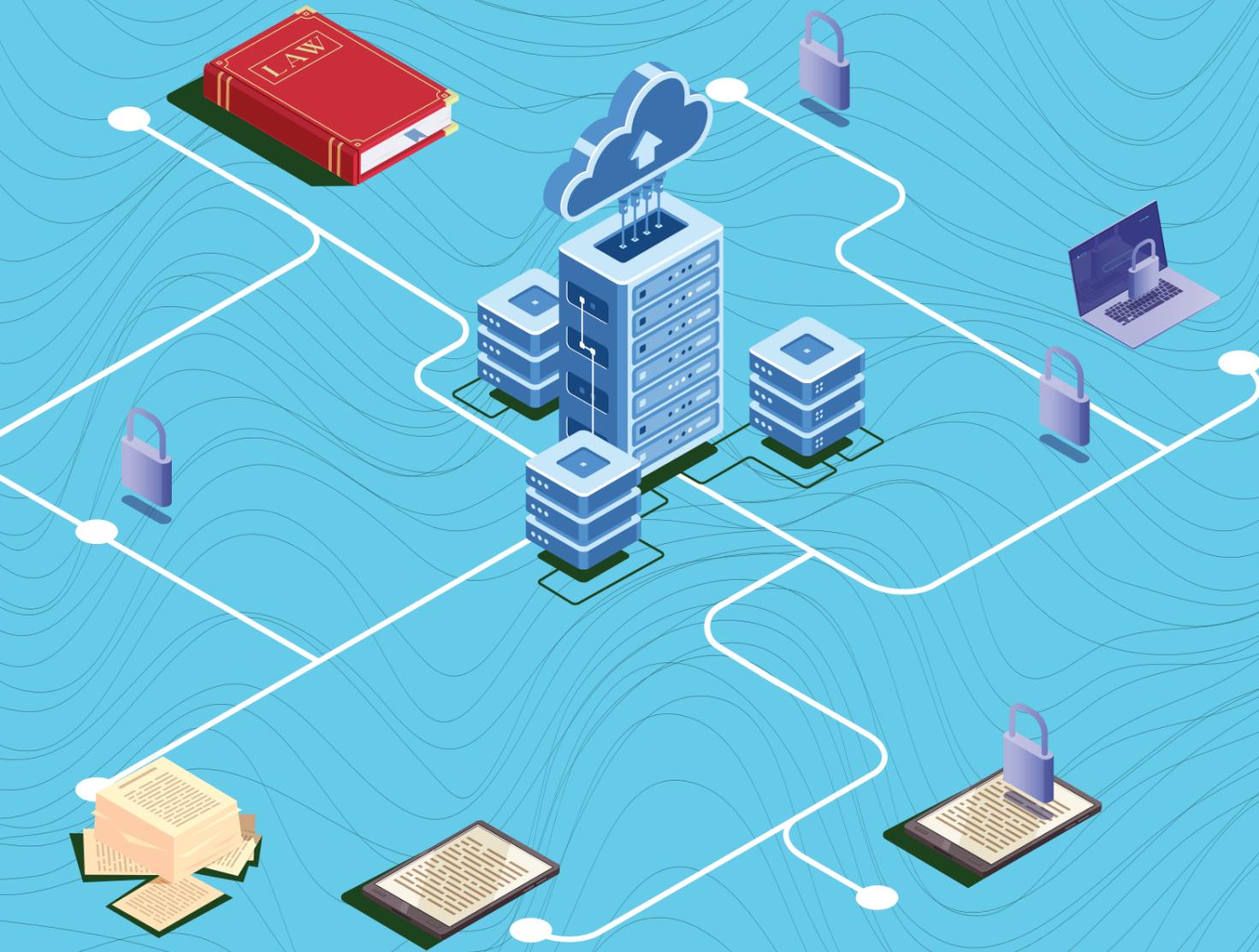
4.7 What measures exist or will be established to ensure that remote hearings are accessible, gender-sensitive, and child-friendly in cases involving women and child victims/witnesses?

Examples of measures relating to the design of a remote hearing system include ⁴¹:

- Prioritizing remote hearings cases involving requests for restraining and protection orders.
- Outreach to vulnerable populations, directly or through legal aid providers, community-based paralegals, or relevant civil society organizations, to raise awareness of remote hearings and facilitate engagement.
- Enabling parties to request to postpone the hearing for a reasonable period of time, if appropriate.
- Ensuring that child-specific procedures and safeguards are in place and applied. These may include, but are not limited to, introducing regular breaks into remote hearings accommodate children’s shorter attention span.

Examples of measures relating to conducting remote hearings include:

- Educational training or materials for parties who have little or no previous contact with relevant technologies;
- Appropriate support from qualified professionals for parties required to give accounts of traumatic experiences via technological means;
- Training for judges, prosecutors, and court staff on trauma, gender-based violence, and associated challenges.



ANALYSIS AND ASSESSMENT LINKS AND OTHER IMPORTANT REFERENCES

Completing an Analysis and Assessment

This Toolkit will have enabled you to analyze the four critical aspects of remote hearings: legal, technological & security, organizational & logistical, and procedural safeguards and access to justice. Your analysis should now help you reach a decision about whether and how to proceed with implementing remote hearings.

The assessment will and should look different depending on the context. It will be shaped by the outcomes of the four-part analysis, the contextual considerations, and the events and circumstances in which the decision is being made. As such, it is neither possible nor desirable to prescribe how stakeholders should aggregate the information to reach a conclusion. Instead, below are the important questions to answer, taking the outcomes of your detailed analysis into account:

Will your jurisdiction or court implement remote hearings? If so, under what conditions? Who will be responsible for design, planning, and implementation? What stakeholders must be engaged?

As noted in the beginning, remote hearings should be considered not only as an immediate response to COVID-19 but also for longer-term planning. The establishment of remote hearings may help improve access to justice in contexts where insecurity, limited transport, logistical and other obstacles will continue to severely hamper the delivery of justice services.



Support from the United Nations

In peacekeeping contexts, supporting national authorities to establish remote alternatives to court hearings and judicial proceedings accords with the call by the Secretary-General to explore innovative approaches that are fit for the future. Remote court hearings can complement other initiatives widely supported by missions to enhance access to justice, including, mobile courts.

For assistance related to the planning, analysis, design or implementation of remote court hearings and judicial proceedings in a peacekeeping or special political mission setting, please contact the **Mission's Chief of the Justice Section**.

In other settings, please contact the **Justice and Corrections Service of the Office of Rule of Law and Security Institutions within the Department of Peace Operations** at dpko-jcs@un.org.

The Justice and Corrections Service can help to identify expertise and channel requests to suitable United Nations System partners for assistance to set up remote court hearings.

For further information on the work of the Department of Peace Operations in the area of justice, please follow the links:

 **ORLSI Toolkit**

 **The "Justice" section of the United Nations Peacekeeping website**

To learn more about the United Nations' approach to ensuring access to justice in the context of COVID-19, see:

 **Remote Court Hearings and Judicial Processes in Response to COVID-19 in**

Mission and other Fragile Settings, Justice and Corrections Service ORLSI/DPO

 **Guidance Note: Ensuring Access to Justice in the context of COVID-19**, United Nations Office on Drugs and Crime (UNODC) and United Nations Development Program (UNDP)



1. See "Our Purpose," at <http://www.remotecourts.org>

2. See e.g. Germany, Code of Civil Procedure (Zivilprozessordnung, ZPO), Sec 128a, which allows the use of videoconferencing technology without the explicit consent of the parties, subject to certain conditions.

3. See e.g. Canada, courts have a constitutional responsibility to provide access to justice, and that responsibility includes ensuring that cases are heard in the best format available given the circumstances. Superior Courts are established by section 96 of the Constitution Act, 1867 and possess inherent jurisdiction, which was further characterized in *Endean v British Columbia*. That inherent jurisdiction includes both inherent subject matter jurisdiction as well as inherent jurisdiction to control their own processes. The Ontario Superior Court's most recent Notice signals a willingness on the Court's part to embrace its jurisdiction and conduct hearings remotely.

4. The primary sources of Islamic law should be consulted as well as the relevant specific school of thought, e.g. Hanafi Fiqh. For further guidance on conducting research on Sharia law, see <https://library.law.yale.edu/guides/foreign/islamic-law-research-guide>. See e.g. Afghanistan, 'Mandatory Presence of Accused and Options for Remote Trials in Afghanistan'.

5. See e.g. United Kingdom, the Coronavirus Act 2020, s. 55, schedule 25, which provides that a court "may" direct public access or recording of proceedings, which undermines the principle of open justice.

6. As a matter of policy, the United Nations opposes the application of the death penalty in all circumstances and advocates for its abolition worldwide and continues working on concrete measures to assist States' efforts to bring this practice to an end. Consequently, the United Nations will not provide support to the establishment of courts and tribunals where the death penalty is a sentencing option or where it is imposed and carried out. The United Nations will also not provide support to criminal proceedings in which there is real risk that capital punishment will be carried out.

7. See e.g. Uganda, Administrative and Contingency Measures to Prevent and Mitigate the Spread of the Corona Virus (COVID-19) by the Judiciary, allowing court hearings via video link. Available at: https://ulii.org/system/files/Chief%20Justice%20Circular%20on%20COVID-19_recognized.pdf (last accessed 10 July 2020);

See e.g. South Africa, Directives Issued by Chief Justice Mogoeng Mogoeng in Terms of Section 8(3)(b) of the Superior Courts Act 10 of 2013 for the Management of Courts During the Lockdown Period, which allows hearings through videoconferencing or electronic means. Available at: <http://www.saflii.org/za/other/ZARC/2020/32.pdf> (last accessed 15 July 2020).

8. For guidance on how to answer these and relevant questions about statutory amendments, see <https://rm.coe.int/european-commission-for-efficiency-of-justice-cepej-checklist-for-promo/16807475cf> (last accessed 20 August 2020).

9. See e.g. Malawi, the Public Health Act, Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020, Government Notice 5 of 2020, s. 18 (Judicial Proceedings), allowing a judicial officer the use of electronic means of hearing, conducting and disposing of a matter as a primary means, including the service of documents, actual hearing of the parties, receiving evidence and making determinations. Available at: <https://africanlii.org/akn/mw/act/gn/2020/5> (last accessed: 13 July 2020)

10. For a thorough discussion of the factors to consider, see <https://rm.coe.int/european-commission-for-efficiency-of-justice-cepej-checklist-for-promo/16807475cf> (last accessed 20 August 2020).

11. See e.g. Austria, 1. COVID-19 Justizbegleitgesetz, §3(1), which allows the use of video-technology in civil court hearings, provided that the involved parties in the proceedings agree and have access to the appropriate equipment. The Act also provides for the hearings of witnesses, experts, interpreters and other affected parties. The law will be in force for a limited period until 31 December 2020. (See also: <https://www.upskillinglawyers.com/remote-courts-in-austria/>)

12. See e.g. Bangladesh, where the ordinance titled "Usage of Information and Communication Technology in Court 2020" allowed courts to reopen virtually. Available at: <https://tbsnews.net/thoughts/law-e-judiciary-might-change-bangladesh-courts-forever-84148> (last accessed 20 August 2020)



13. See e.g. Norway, which passed a legislation limiting the right to appear in person before a court while increasing the types of proceedings in which a court can require participants to appear via video link. Available at: <https://perma.cc/RRK2-N8VS> (last accessed 10 June 2020).

14. See page 14 of https://www.unodc.org/documents/Advocacy-Section/Ensuring_Access_to_Justice_in_the_Context_of_COVID-191.pdf (last accessed 20 August 2020) and pages 1-2 of https://www.ncsc.org/_data/assets/pdf_file/0018/40365/RR-Technology-ATJ-Remote-Hearings-Guide.pdf (last accessed 20 August 2020) for guidance on how to select and prioritize the types of cases appropriate for remote hearings.

They may or may not be relevant to your legal context.

15. For a discussion of the strategic considerations when deciding which courts and types of cases are appropriate for remote hearings, see <https://www.ncjfcj.org/wp-content/uploads/2020/04/COSA-NSCSC-and-NACM-JTC-Response-Bulletin-Strategic-Issues-to-Consider-When-Starting-Virtual-Hearings-.pdf> (last accessed 20 August 2020).

16. JTC Quick Response Bulletin: Strategic Issues to Consider when Considering Starting Virtual Hearings, Version 1.0. (7 April 2020). Available at: <https://www.ncjfcj.org/wp-content/uploads/2020/04/COSA-NSCSC-and-NACM-JTC-Response-Bulletin-Strategic-Issues-to-Consider-When-Starting-Virtual-Hearings-.pdf> (last accessed 20 August 2020).

17. See e.g. Morocco: 362 remote hearings held from 29 June to 3 July 2020. Available at: <http://www.mapnews.ma/en/actualites/social/remote-trials-362-remote-hearings-june-29-july-3-cspj> (last accessed 10 July 2020)

18. For internet audio, jurisdictions have embraced applications like WhatsApp and GoogleVoice in the wake of COVID-19 and additional applications are regularly developed. In selecting a particular application, you should consider factors like stakeholders' pre-existing familiarity and use, privacy, necessary features.

19. For internet videoconferencing, jurisdictions have embraced the use of videoconferencing programs like Skype and Zoom in the wake of COVID-19. Many of these platforms support screen sharing so that participants may show slides and exhibits. These services also offer multiple connection methods so that participants can connect and participate across multiple devices. In selecting a particular application, you should consider factors like stakeholders' pre-existing familiarity and use, privacy, necessary features. We will also want to find the most appropriate spot to link resources, like this suggested checklist for preparing for remote videoconference hearings: [Checklist: Preparing Your System for a Remote Hearing](#)

20. There are websites like <https://www.speedtest.net/> that can be used to test internet speeds.

21. JTC Quick Response Bulletin: Strategic Issues to Consider when Considering Starting Virtual Hearings, Version 1.0. (7 April 2020). Available at: <https://www.ncjfcj.org/wp-content/uploads/2020/04/COSA-NSCSC-and-NACM-JTC-Response-Bulletin-Strategic-Issues-to-Consider-When-Starting-Virtual-Hearings-.pdf> (last accessed 20 August 2020).

22. See e.g. <https://www.idpcyber.com/defending-against-covid-19-cyber-scams/> (Last accessed 5 June 2020)

23. See e.g. Coronavirus Act, Schedule 25, s. 85A. Available at: <http://www.legislation.gov.uk/ukpga/2020/7/schedule/25/enacted> (Last accessed 28 May 2020)

24. See e.g. <https://www.courtserve.net> (Last accessed: 4 June 2020)

25. <https://www.idpcyber.com/defending-against-covid-19-cyber-scams/> (last accessed 5 June 2020).

26. See e.g. South Africa, Practice Direction – Supreme Court of Appeal Video or Audio Hearings During COVID-19 Pandemic, introduces directives regulating the manner in which hearings are conducted in the Supreme Court of Appeal. Available at: <https://www.supremecourtofappeal.org.za/index.php/2-uncategorised/46-practice-directions> (last accessed 15 July 2020).



27. The following checklist provides a sense of what to consider in terms of organizational and logistical needs and may or may not be relevant to your context: https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/BestPracticesRemoteHearings/Overview_of_the_Best_Practices_for_Remote_Hearings_May_12_2020_FINAL_may13.pdf (last accessed 20 August 2020).

28. The following guide is an example of what could be modified to your context and used to train judges on conducting inclusive remote hearings: <https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf> (last accessed 20 August 2020).

29. See e.g. <https://www.ada-microfinance.org/en/covid-19-crisis/fiche-covid-19-crisis/2020/05/bceo-guide-report-echeances-imf-umoa> (last accessed 07 July 2020). See also examples from Ethiopia <https://www.africalegalnetwork.com/covidhub/faqs/litigation> (last accessed 07 July 2020) and Equatorial Guinea <https://www.herbertsmithfreehills.com/latest-thinking/covid-19-initial-responses-of-certain-african-countries-africa> (last accessed 07 July 2020).

30. See e.g. Zimbabwe <https://africanlii.org/sites/default/files/regulations/6330/media/6330.pdf> (Last accessed 07 July 2020).

31. For ideas on how to support self-represented litigants, see <https://gato-docs.its.txstate.edu/jcr:27c725a8-4dbc-44f0-a58a-96a8b121e3d0/Best%20Practices%20for%20Courts%20in%20Zoom%20hearings%20involving%20Self%20Represented%20Litigants.pdf> (last accessed 20 August 2020).

32. For guidance about what to consider and how to make remote hearing publicly available, see pages 14-15 of this document: https://www.ncsc.org/_data/assets/pdf_file/0018/40365/RR-Technology-ATJ-Remote-Hearings-Guide.pdf (last accessed 20 August 2020).

33. See e.g. Kenya: Court Standard Operating Procedures During COVID-19 Pandemic, provides guidance on filing of pleadings. Available at: <https://www.judiciary.go.ke/wp-content/uploads/2020/04/COURT-PROCESSES-DURING-THE-UPSCALING-OF-COURT-SERVICE-AT-MILIMANI-LAW-COURTS.pdf> (last accessed 08 July 2020).

34. See the following guideline which may or may not be applicable to your jurisdiction: https://www.ncsc.org/_data/assets/pdf_file/0014/41171/2020-06-24-Managing-Evidence-for-Virtual-Hearings.pdf (last accessed 20 August 2020).

35. See, e.g. <https://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf> (last accessed 20 August 2020).

36. See e.g. https://www.unodc.org/pdf/criminal_justice/WA2J_Consolidated.pdf (last accessed 20 August 2020).

37. See: http://www.courtexcellence.com/_data/assets/pdf_file/0027/5787/checklistforpromoting.pdf and https://www.euromed-justice.eu/en/system/files/20090706164940_Coe.Checklistforpromotingthequalityofjustice.pdf (last accessed 20 August 2020).

38. The following resources has suggestions for protecting access to justice in individual cases: https://www.unodc.org/documents/Advocacy-Section/Ensuring_Access_to_Justice_in_the_Context_of_COVID-191.pdf (last accessed 17 September 2020).

39. See <https://www.thelawyersdaily.ca/articles/19410/scc-poised-for-first-virtual-appeal-hearing-zoom-observers-to-see-novel-contract-criminal-cases?category=news> (Last accessed 6 June 2020)

40. Handbook for Professionals and Policymakers on Justice in Matters Involving Child Victims and Witnesses of Crime (2009), United Nations Office on Drugs and Crime. Available at: https://www.unodc.org/pdf/criminal_justice/Handbook_for_Professionals_and_Policymakers_on_Justice_in_Matters_Involving_Child_Victims_and_Witnesses_of_Crime.pdf (last accessed 17 October 2020).

41. For examples of measures to protect children's welfare in remote hearings, see: Capacity-Building Center for Courts, Conducting Effective Remote Hearings in Child Welfare Cases at https://www.acf.hhs.gov/sites/default/files/cb/covid19_conducting_effective_hearings.pdf (last accessed 18 Sept 2020).

REMOTE HEARING TOOLKIT

Justice and Corrections Service

Office of Rule of Law and Security Institutions

United Nations Department of Peace Operations

dpo-jcs@un.org

Division for Peace

United Nations Institute for Training and Research

ptp@unitar.org





SRL One Page Remote Hearings Sample Instructions

#COVIDandtheCourts

Transcend Adaptation of Michigan Legal Help Resource



Because of COVID-19 many courtrooms are closed, and most court hearings are now *remote*. That means some or all of the people participate by video or by phone. Read below to know how to prepare a remote hearing.

How do I know if I have a remote hearing?



The court will notify you if your hearing is remote. They may contact you by U.S. mail, email, or phone. They will also notify the other parties in your case.

What if I don't have Internet or a phone?

Contact the court as soon as possible. They may:

- Postpone the hearing until everyone can participate safely, or
- Help you find a way to participate, such as free hot spots, or access to a free phone or Internet.

What if I cannot join at the scheduled hearing time?

You must have a good reason why you cannot be present at the scheduled time. And you must tell the court *before* the hearing. Go to your court's website. It will explain how to contact the court.

Will the court tell me how to join the remote hearing?

Yes. The court will send you instructions on how to join your remote hearing by video or by phone.

Courts may use different apps and processes. Visit your court's website or call your court to find out how your court does remote hearings.

How to Get Ready for Your Remote Hearing



Make sure you have good Internet connection.



Download Zoom (or other app your court uses). Practice with the app so you feel comfortable.



Charge your computer or mobile device. If you are calling in by phone, make sure you have enough minutes.



Use earbuds or headphones, if you can. This frees up your hands, and improves sound quality.



Email the court any evidence, like documents or photos.



Tell the court if you have witnesses. The court will tell them how to join the hearing.

Get Your Space Ready!



- Find a quiet place where no one will interrupt you.
- Have all your papers ready, including a list of what you want to say to the judge.
- Know what time your hearing starts and how to log on or what number to call.



Look Good!

- Set the camera at your eye level. If using your phone, prop it up so you can look at it without holding it.
- Look at the camera, not the screen, when you speak.
- Dress neatly. Wear soft solid colors.
- Sit in a well-lit room, not too dark, not too bright. No bright lights behind you.



Sound Good!

- Pause before speaking in case there is any audio/video lag.
- Mute yourself when not speaking to improve sound quality.
- Say your name each time you speak.
- Talk slowly and do not interrupt.

What should I expect during the hearing?

1. When you first join, the judge will take you from a "waiting room" to the "hearing room." Only the people in your case will be in your hearing room.
2. The judge will make sure you can hear and talk, and go over all the rules.
3. You will see a picture or name of each person in your hearing on your screen. The first one you see is the person who is speaking.
4. Your hearing is live and will be recorded. Everyone there can hear what you say. It may even be open to the public.
5. The judge decides most cases at the end of the hearing.

Important! You may be connecting from home, but it is still a court hearing. Pay attention and follow all rules.

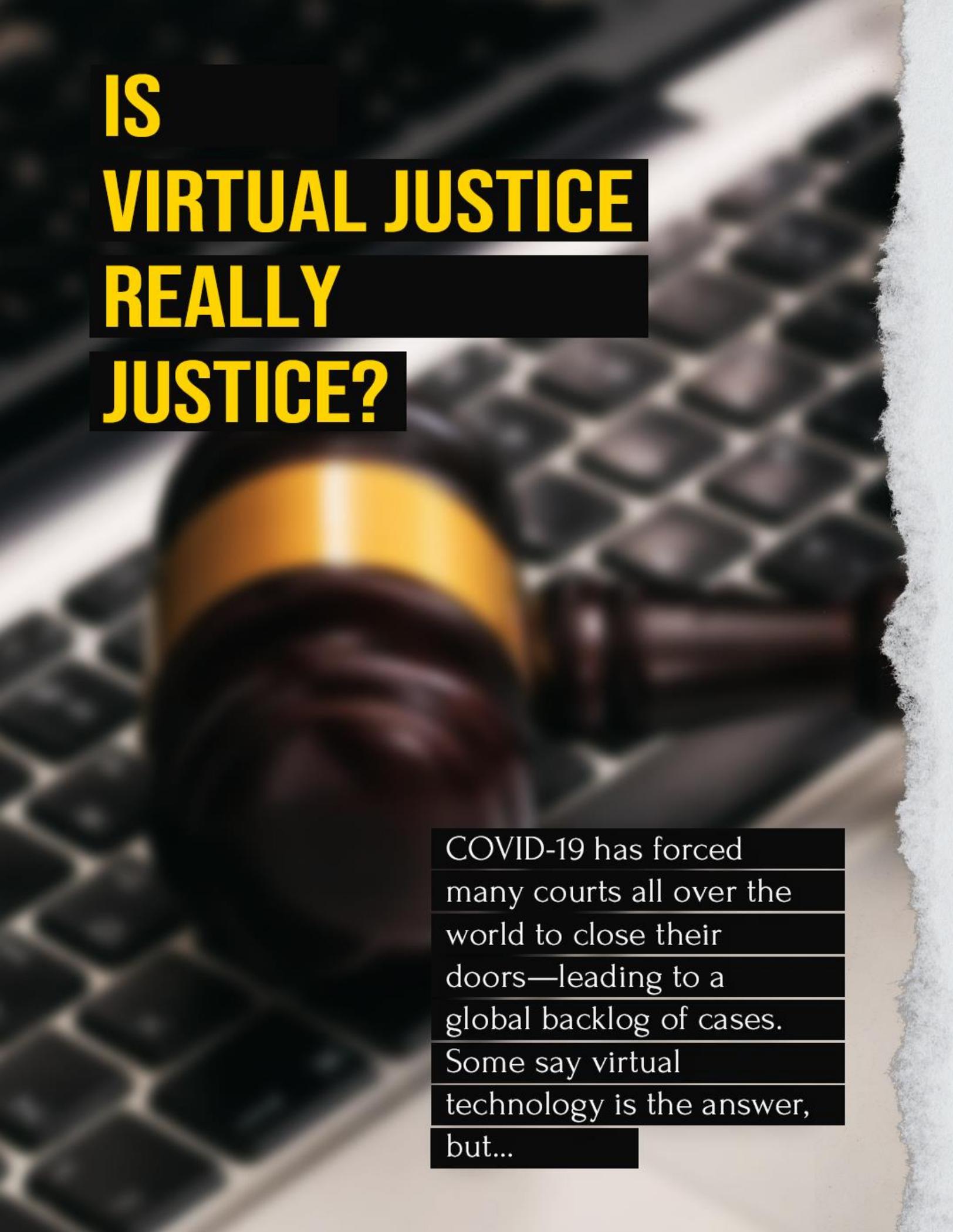
Need legal help?

[insert local resource here]

Things to remember in video court:

Please note that each individual case may require a different course of action. This checklist is intended to provide a general guide but it is not prescriptive.

- Do I have a **reliable internet connection**?
- Am I **visible**?
- Can I be **heard**?
- Is my client **present**?
 - If my client is in jail, and the jail does not have internet access, and it is necessary that they be at the hearing, have I **objected to my client's absence**?
 - If my client is not present because he/she **does not have access to the internet**, have I objected?
- If my client is appearing **only by telephone**, have I noted the potential bias that may affect the hearing?
- If my client is not with me, but they are present virtually does he/she have a **reliable internet connection**?
 - If no, have I documented that fact to the court so that they may understand delays in transmission?
- Is my client's face **fully visible**?
- Can my client be **heard**?
- Can my client **hear the proceedings**?
 - Have I taken steps to ensure my client can **understand** the proceedings, especially if unable to hear or read?
 - If my client needs an **interpreter**, am I sure that my client has been given access to one?
- Is my client's image portrayed in a way that **does not prejudice him/her**?
 - If not, have I noted for the record the **problems with my client's image**?
- Have I coached my client on how to **speak up and engage** on videoconference where appropriate?
 - Have I coached my client on **how to get my attention** so that I can stop the hearing and have a breakout room/private session to answer his/her questions?
- Have I established a **secure, private form of communication** with my client?
 - If possible, is that communication **contemporaneous with the hearing**?
 - If not, have I **established that the judge will stop the hearing** so I can meet with my client confidentially?
- Given the issues with mediated communication over video conference, does my client have access to **visual aids** that assist in understanding the hearing?
- Have I asked if I can record the hearing or if a **copy of the online proceeding** will be kept?
- Have I checked to ensure that any livestream has been **deleted from the Internet** after the hearing is over?



IS VIRTUAL JUSTICE REALLY JUSTICE?

COVID-19 has forced many courts all over the world to close their doors—leading to a global backlog of cases. Some say virtual technology is the answer, but...



What Should Virtual Justice Look Like in the Legal Space? Remote Courts

COVID-19 has created an enormous crisis for criminal justice systems. At least initially, the threat of contagion forced many courts to close their doors and postpone non-urgent hearings. Many jurisdictions have begun using video conferencing for at least some essential court proceedings¹, while others are working mainly in-person with physical distancing protocols² or are still suspending hearings without contingencies. The initial court closures have led to an incredible backlog of cases in many places³. World-wide there is urgent concern: denying justice and risking lives are both unacceptable.

Technology has been touted as a solution, allowing the courts to function remotely, in part or entirely. Technologies that allow the courts to function remotely run the gamut from electronic signatures and digital document management systems, to the more concerning telepresence technology (also known as video conferencing). Because of the great concern about the potential harm, we focus mainly on the later.

Many of guidelines being produced and shared⁴ are intended to apply to hearings that have already been deemed legally and logistically appropriate for a remote hearing. So in this document we focus on examining:

- What are the concerns about remote hearings?
- When should they be considered?
- What can be done to mitigate harm and allow justice to move forward at this urgent time?

This document is part of a series on technology and justice produced by *Incarceration Nations Network (INN)* and its global justice partners. We aim to provide a resource for practitioners and advocates worldwide on the use of remote court technology during the global pandemic. Of course, every jurisdiction is different and there is not a single “right” approach. However, based on the best research and experience of INN partners, we aim to provide a resource to help global advocates and practitioners come together and find innovative solutions so that justice can prevail, despite obstacles.

GENERAL CONSIDERATIONS

1. **Seize the opportunity for reform.** With disruption comes opportunity for reform. As the courts are forced to adapt to new circumstances, there are opportunities for wider reform of outdated requirements, policies, and practices. For example, determining which hearings to hold remotely also presents an opportunity for considering how and why in-person appearances are required, scheduled, and excused. While considering if bail hearings should be held remotely, there may be new opportunity to incorporate bail or pretrial reforms. It's imperative that we don't simply graft a new digital layer onto the existing procedures and systems. **We must create new rules and policies alongside the new digital tools.**
2. **Don't overestimate the transformative capacity of technology.** Technology is only a tool adapted by the systems and the people that use it. To believe technology can dramatically alter abilities to fulfill the justice system's mandate is to overestimate the abilities of technology and to underestimate the stable, stubborn nature of justice systems. Where the basic pillars of fair trials (i.e. access to defense attorneys) are not already upheld, technology—specifically use of remote trials—can even further exacerbate existing problems, instead of improving them.
3. **Don't underestimate the digital divide.** There is both a divide in access and in skills. Not all litigants, lawyers, prosecutors, and witnesses have the same technological capabilities – especially if they are connecting from the safety of their home (rather than a police station, an office or court building for example). Not every geographical area has bandwidth and internet speed required for quality videoconferencing. There are digital deserts where whole areas are not served by a single internet provider. As we explain further in this document, poor audio or visual quality can end up prejudicing the disadvantaged party.
4. **Don't underestimate cost and implementation challenges.** Virtual justice reforms in the courts need to be comprehensive, and therefore can be expensive and complex to implement. Holding remote hearings requires not only the audio-visual hardware, software/platforms, and connectivity, but also requires accompanying secure systems for sharing documents and evidence, among other considerations. It's important for each jurisdiction to identify the needs and sources of funding to have infrastructure to support remote hearings.

REMOTE COURTS

Why are remote hearings happening?

Justice cannot stop. Postponing justice until risks of infection are lower, or risking exposure to infection for all involved parties, are both bad options. Even during the pandemic, courts need to continue to carry out essential functions, including processing of criminal cases,

and safeguarding the rights and welfare of defendants, especially those who are detained. Especially given the potential for second waves and of COVID-19 and other potential future pandemics, it's worth considering the potential of remote courts to keep cases moving while respecting travel restrictions and health and safety concerns.

What are the concerns about remote hearings?

- 1. They can interfere with the rights of the accused.** A persons' physical absence from the courtroom seriously undermines their ability to participate in proceedings effectively and the exercise of the rights of the defense. Defense attorneys, researchers and human rights advocates have already outlined concerns about remote justice and its impact on the rights of the accused.⁵ The rights in consideration include:
 - *Access to a lawyer and effective legal representation* – The lack of face-to-face contact makes it harder to build the attorney-client relationship and for the attorney to assess the mental and emotional state of their client. Limitations during COVID-19 on visitation in prisons and jails, together with use of remote hearings can make it difficult to communicate effectively and confidentially before and during proceedings.
 - *Effective participation* - Attorneys and their detained clients can be prevented from participating effectively and be discouraged by logistical and technical difficulties. Physical separation from other participants such as judges, prosecutors, and their attorney, as well as a limited view of the court room, can result in a defendant's decreased understanding the proceedings and of their rights, and in the inability of the lawyer to confer with their client or "approach the bench."
 - *Presumption of innocence* - If defendants do not leave their places of detention to attend their hearings, they may appear in court as "prisoners"—particularly if they are wearing prison clothes, or screens with a background showing them in prison. Appearing on screen can lessen the speaker's ability to connect emotionally with listeners and reduce their perceived credibility.
- 2. They can lead to unjust outcomes.** While more research is needed, there is some evidence that participants in remote hearings can fare significantly worse compared to participants in in-person ones in terms of *pleading guilty*, *bail amounts* and *sentences*.⁶ The dehumanization of defendants who are denied the opportunity to present in person is a real concern, and may have an especially negative impact on people who already face discrimination due to race, class, caste, ability, gender, native language or other quality.
- 3. Virtual interaction effects perception and decision-making.** When interacting virtually we have a reduced amount and "richness" of information available compared to in-person (i.e. physical attributes, facial expressions, tone, gaze, posture). A growing body of literature from the social sciences finds this can influence perceptions and

decision making. Virtual interaction can result in lack of engagement and participation of all involved⁷. It can make defendants feel isolated, like outsiders, especially defendants of overrepresented groups, and make the process more difficult to understand.⁸ It can also influence judgements about credibility, character, and likeability of the accused.⁹ Biases can be affected and more pronounced¹⁰ and virtual interaction could potentially lead to more extreme or risky decision-making than in face-to-face interactions.¹¹ **Many of these effects are not obvious to participants, so explicit mitigation strategies are called for.**

- 4. There are concerns about intimidation, privacy, and security.** In remote proceedings it can be impossible to know whether individuals (defendants or witnesses) are experiencing dangerous pressure, or even torture, beyond the frame of their webcam that impacts their ability to speak truthfully and free of coercion.

There are also concerns about surreptitious recording and dissemination of proceedings (which can violate both witness and party rights), as well as insufficient public access to trials. Finally, there are concerns about remote identity verification, potential for fraud and concerns about transmission of sensitive files.¹² Emerging technologies such as *blockchain* can be used to authenticate evidence, documents and signatures, however there are still concerns about privacy and vulnerability to hackers.¹³ Other emerging technologies such as *deepfakes*, can allow users to manipulate images and audio in real-time and could present additional problems.¹⁴

When should remote hearings be used?

- 1. Consider for non-criminal cases.** Videoconferencing may be less damaging and more useful for certain types of civil and family law proceedings that might not require a physical presence in courthouses. For example, it might be worth considering telepresence technology for some *commercial, matrimonial* or *trusts and estates* cases, *protection/restraining orders*, as well as in cases of *mediation* or *arbitration* (See [Guidelines for virtual arbitration](#) and [Online tools and guidance for mediation and arbitration](#)).
- 2. Consider for some procedural criminal hearings.** It's worth drawing a distinction between hearings which impact substantive rights (first appearance/bail/release, pleas, sentencing, trials) and those which are purely procedural (scheduling, evidence, compliance with judicial orders). The former should rarely be conducted remotely, while the latter have less impact on rights and can potentially free courts to more safely and efficiently conduct in-person business. For some procedural matters which are handled almost entirely by lawyers (i.e. scheduling, serving motions, settling discovery disputes) courts should even consider waiving the requirement for defendants to appear, so that the attorney can represent them (in-person or remotely) if the client is not able to be present.
- 3. Avoid use in substantive criminal hearings.** Because of the incredibly high stakes in criminal trials, courts need to seriously consider the potential interference of use of videoconferencing on justice outcomes. Even in extreme and unusual circumstances under

the pandemic, there should be a strong push for court proceedings that effect substantive rights to be conducted in person, using social distancing measures where necessary. It is especially crucial that the accused be physically present during trial.

4. **Apply clear criteria to determine if a case should proceed remotely.**

While we strongly advocate against videoconferencing in substantive criminal hearings, it is also clear that criminal justice systems need to continue to function during this global health crisis. Courts may need to temporarily resort to remote hearings to deal with some urgent cases. An emergency, temporary remote trial regime would be justified only with **consent of the accused in each case, and only while necessary to prevent irreparable harm to the accused.**

When determining whether or not a hearing should take place remotely, additional factors to be considered should include those outlined by [Fair Trials](#):

- The length of delays and their impact on the rights of defendants.
- The nature of the hearing (complexity, need to call witnesses, if accused is at risk of deprivation of liberty).
- The availability and quality of equipment and systems.
- The existence of impairments or other factors that could negatively affect the defendant's ability to participate effectively.

5. **First appearances/ bail/ remand hearings should be in-person where possible and must not be delayed.**

First appearances before the court are particularly difficult to generalize about because they differ greatly between jurisdictions. On the one hand, the first appearance after arrest also serves as a check on arbitrary arrest and on custodial violence by police during interrogation/arrest – which can be difficult to determine via remote hearing. For this reason, these hearings should be in person and cannot be postponed.

Bail or remand hearings, however, are an opportunity for the accused to be released from custody during this particularly dangerous time. In some cases, defense attorneys have considered that a remote hearing is better than no hearing at all.

Overall, it's important to consider that experience with remote bail hearings prior to the pandemic has shown many real reasons for concern. In addition to potentially increasing the likelihood of pleading guilty¹⁵, remote bail hearings have been documented as leading to significantly higher bails than live hearings.¹⁶ Moreover, they may also actually take longer and be less efficient¹⁷.

The video below discusses the advantages to in-person, council present, first appearance. *Click on the image to hear Lindsay Blouin -Deputy Chief District Defender, East Baton Rouge Office of the Public Defender- speak about an 8-week pilot project in Louisiana (United States). The pilot provided an alternative to the previous no-council-present, remote, initial appearance of defendants via CCTV. During the 8-week pilot they began having council*

and client present and moving the initial hearing to occur within a three-day period after arrest. There was massive improvement in appearance rates (95%), along with lower bond amounts and 64,000 detention days saved.



If remote bail hearings are used as an emergency measure during this urgent time, they should follow the criteria above regarding irreparable harm, with the consent of the accused. They should, **at minimum, ensure that the accused have had the opportunity to talk confidentially to a lawyer prior to the hearing and that both participate in the hearing (even if remotely)**. One way to guarantee legal representation in first appearances and bail hearings could be to appoint legal aid lawyers to be present in videoconferencing centers in jails, for those that might not have legal representation. The suggestions in the following section below should also be applied.



Click on the image above to hear from Jonathan Osei Owusu, Executive Director of the POS Foundation in Ghana on the **urgent need for remand cases to move forward and their initiative to conduct remand hearings remotely**. The POS Foundation's Justice for All Programme (JFAP) began setting up Mobile In-prison Special Courts to adjudicate remand/Pre-trial prisoner cases throughout the country of Ghana.

What can be done to mitigate some of the harm and allow justice to function during this urgent time?

Click on the image below to listen to Defense Attorney Michael Hueston talk about considerations for remote hearings and his experience during COVID-19 in Brooklyn, New York (USA).



Click on the image below to see considerations for prosecutors on remote courts from Jaclyn Quiles-Nohar, a former prosecutor and senior program associate with the Vera Institute's Reshaping Prosecution program.



1. **Maximize capacity for in-person hearings in criminal cases.** Many jurisdictions have been implementing less tech-driven, but equally creative ways to help courts to continue with in-person hearings safely.

- **Change the physical environment in the courtroom** – In order to maintain social distancing some courts have begun using non-court buildings for additional court rooms, redesigning courtrooms, building jury boxes with additional space and inserting plexiglass dividers to keep jurors safer. Shields are being put in front of witness stands and at lecterns where lawyers argue.
- **Prioritize courtrooms for criminal hearings** – For example, the UK has created new “Nightingale courts”¹⁸ operating under extended hours and weekends, which will hear civil, family and tribunals work as well as non-custodial crime cases. This will free up room in existing courts to hear more criminal cases, including jury trials, with social distancing. Although it’s important to consider this may also have negative impacts for staff, legal professionals, victims, defendants, and witnesses who may have child-care or travel difficulties after hours.
- **Improve court scheduling practices** - Court appearances should also be scheduled in narrow time windows, to reduce the number of people waiting in the courtroom, allowing those who need to be there to socially distance. For court appearances that must happen in person, defendants should also be allowed to reschedule based on unexpected childcare, work, and safety needs, which will all be exacerbated by the pandemic.

Click on the image below to see a video from Deputy Director, Ogechi Ogu PRAWA in Nigeria about their work to ensure physical hearings can continue in the courts using social distance protocols.



2. **Develop protocols and practices to safeguard the rights of the accused during remote proceedings.** Where there are strong justifications that mandate the use of remote justice procedures, remote hearings should only take place if there are adequate safeguards in place that address various threats to the right to a fair trial. Detailed protocols¹⁹ should be developed to ensure the following rights of the accused²⁰:

- ***Access to legal representation and confidentiality***

Prisons and detention centers should have proper accommodations to ensure that detainees are able to have effective, frequent, and free access to telephones. To compensate for the limitations on in-person visits, prisons and detention centers should also lessen restrictions on frequency and length of phone calls and aim to make video-conferencing facilities available for defendants. Confidentiality in defendant-lawyer communications must be respected, so defendants should have access to secure spaces for confidential discussions and private phone calls that cannot be intercepted or recorded. This includes both prior to and during hearings.

- ***Effective participation***

Video-link equipment should attempt to mimic courtroom participation. The accused should be given a full view of the courtroom, the ability to contact their lawyer confidentially during proceedings, and, when applicable, access to facilities that enable them to inspect and submit evidence during the proceedings. In addition to full view, audio testing is essential, as there could be noise, low volume, or other problems. Ensuring proper quality of audio-visuals is a must. The accused must also have control of the equipment – or at minimum it should be in control of non-prison personnel – to ensure that there is no compulsion in participating and for there to be free and open communication with the judge if required.

The accused must be given a sufficient opportunity to understand the equipment and the courtroom procedure prior to hearing. If remote participation is from a prison or jail, this orientation should be given either by the prison officer, the legal aid authorities or the paralegal volunteers; and the court, before initiating the proceedings, should ask the accused whether he understands the process or not.

Further, any person participating in the proceedings off-camera should be identified for the record. Cameras should be setup in a manner that allows a 360-degree view of remote points in jails or prisons so that judges and magistrates can see all individuals in the room and check for any injuries or harms to the accused.

- ***Access to information***

The accused and defense lawyers must have access to case files, free of charge, that allows defendants to exercise their rights.

- ***Presumption of innocence***

To avoid preconceived notions, dress requirements should be the same as for face-to-face hearings. Other environmental factors are regulated, such as the

location of the cameras, the need for a neutral background and good lighting in the room.

- ***Special considerations for vulnerable defendants and other defendants with special needs.*** Defendants participating in remote proceedings should undergo an individualized needs assessment to identify any impairments that affect their ability to participate effectively, decide if a remote hearing is appropriate at all, and make individualized procedural adjustments to facilitate effective participation. This should include provision for interpreters when the defendant is not conversant in the language of the court.



Listen to Madhurima Dhanuka, Programme Head of the Prison Reforms Programme at Commonwealth Human Rights Initiative (CHRI), discuss how they have been working in India during the COVID-19 pandemic to safeguard rights of the accused in remote hearings.

3. Assess needs and invest in the right technology

- ***Asses what is needed***– A first step to adopting remote hearings should be an assessment of the existing access to technology in a jurisdiction. Such an assessment should include the available infrastructure and assess access for all parties to videoconferencing equipment and connection (judge, prosecutors, defense attorneys and the accused). It should also determine needs for making documents, files, and evidence accessible remotely. A **preliminary list of equipment** can be found in

[endnote 21](#) of this document.²¹ The assessment should identify gaps, needs and sources of funding to ensure access and use by all parties.

- **Compare advantages of different videoconferencing platforms** – Some courts have been using videoconferencing platforms already widely accessible and easy to use (i.e. Zoom, Skype, GoTo Meeting, MS Teams and WebEx). There are also some litigation-specific platforms such as Courtcall. In the later there are options for “Privacy” mode where calls during a hearing can be directed exclusively to a particular party. A Courtcall operator connects litigants and judges and handles adding or dropping parties, which can reduce error and support parties with less familiarity with the technology.
- **Invest in high quality technology and preparation** - Good quality connection and equipment (large screen and good audio) may offset some of the potentially harmful effects by providing more “richness” of information and by creating fewer delays that can impede the flow of proceedings and negatively affect participation. Potential technical problems should be anticipated, and steps taken to address them before they occur. Useful resources include the Handbook on [Best Practices for Using Video Teleconferencing in Adjudicatory Hearings](#) and other ACUS materials²² which cover many technical aspects of how to ensure the best use of the technology,

Video webinars covering some technical aspects of remote hearings include²³:

- [Early Adopters of Online Technology](#) (conversation with practitioners already familiar with the technology and using it widely)
- [Tools You Need for Working Virtually in the New Age](#) (focus for private practitioners on how to transition to a paperless office)
- **Take special precautions to address security, public access, and privacy concerns** – Courts should address privacy issues on the front end by agreement with participants and the technology provider before engaging in remote proceedings to mitigate any risk. Courts should go beyond conventional terms of service, to ensure that every person whose privacy is impacted by virtual courts understands the risks, has the option to opt out and can provide truly informed consent. This means clearly communicating what technologies they use and how individuals’ personal information will be impacted, empowering participants to hold operators of virtual court to account for errors.

An additional point of concern is that many VC hearings are not open courts. It’s important to ensure that proceedings conducted through VC are open to the public to join in, if they so choose – except in cases where a “closed” trial is required.

To guard against potential hacking, an independent government watchdog should conduct routine and impartial security audits.²⁴ Tele-hearings should have very clear rules for the identification of people, either by digital signature, biometrics, email

addresses validated by special systems, or simply by showing the identity document to the camera.

- [Online Courts: One Month-In](#) (This webinar covers lessons learned, with a special focus on **security issues**)
- **Consider non-telepresence technologies** - Information Communication Technologies (ICTs) support various operational areas in the justice domain to compliment videoconferencing: from filing to disposition, to case registration, to managerial control and the exchange of procedural documents. Non-telepresence technologies include: *Case Management Systems (CMS)*²⁵, *Criminal justice interoperability platforms*²⁶, *E-filing and electronic exchange of procedural documents*²⁷. If well implemented, these management and e-document tools can potentially streamline and standardize procedures, documents, and data, as well as establish new digital channels to exchange procedural documents. [Digital Technologies for Better Justice: A Toolkit for Action](#) provides a methodology and toolkit to navigate the design and assessment of e-justice projects to guide decisions on e-justice investments.

4. **Develop strategies to mitigate harmful effects of virtual interaction.**

Where virtual proceedings will be held, all parties need to be aware of the science on how virtual interaction affects perception and cognition²⁸. Adequate steps need to be taken to minimize harm; these include:

- **Training and Awareness Raising** - Trainings should be held for the different court actors to make them aware of how remote hearings can impede the rights of the accused and how technology affects perception and cognition. It would also be helpful for the courts to consider implementing “mock courtrooms,” so that court actors/staff can test the new technologies to better develop procedural standards. Also consider having some guidebooks and visual representation in VC room/area in prisons and jails to inform the accused of how the system works. Awareness programs with pretrial detainees should also be considered to enable them to understand their rights during such proceedings.
- **Defense strategy and preparation** - Defense attorneys need to take the above-mentioned factors into consideration when preparing their clients and defense strategies. For example, they should coach clients ahead of time on maintaining eye contact, on proper use of the technology, expectations for demeanor during the proceeding and provide visual aids to clients about the procedures. They should also encourage clients to speak up and ensure communication plans are in place that allow rapid individual response to the client and other participants. Use of separate and secure telephone lines or break-out Zoom rooms are two options. This must always ensure confidentiality and no occasion for misuse of video recordings or telephonic recording should be left.

A helpful preparation checklist for defendants and defense attorneys can be found [here](#).

See a [video introduction on Online Court for Defense Attorneys](#)²⁹

5. **Reduce individuals in pretrial custody.** Best practice during the pandemic would be direct release of pretrial detainees in mass in leu of a case-by-case approach. **Courts should simply release all detainees for non-violent or low-level crimes.** To ensure no one is held in custody because they cannot pay, individuals should be **released on their own recognizance** – when the accused signs an agreement that he will appear in court in the future and is not required to pay any money. Many jurisdictions have already increased this type of release in the early months of the pandemic.³⁰ This can be accompanied by community/supervised release programs which have proven effective in ensuring higher rates of appearance in court after release.

- The [Bail Project](#) offers a successful model for this called [Community Release with Support](#). See how they have been working during the COVID-19 pandemic.



Other measures can help to reduce the in-flow of urgent criminal custody cases, and thus the need for some hearings to happen remotely. These steps are currently being used in many places³¹ during COVID-19. They include:

- Working with law enforcement to reduce custodial arrest, especially for minor crimes/petty offenses.
- Suspending/reducing criminal filings for specific charges (e.g., non-violent or low-level cases)
- Suspending issuing/executing of warrants for failure to pay fines & fees
- Suspending issuing/executing of warrants for failure to appear
- Suspending revocations for technical violations
- Increasing case dismissals

- Increasing pre-arraignment/pre-first appearance releases
- Increasing release on personal recognizance for non-violent and low-level cases
- Increasing releases from jail for persons awaiting trial (pretrial period)
- Diverting cases from the criminal justice system through increased use of mediation and restorative justice approaches.

6. Fund, support, and design robust research. Now is the time to collect data necessary for making informed policy decisions post-crisis. The perceived time and cost savings need to be accurately calculated and weighed against the potential impact on fairness and justice outcomes.

We need data collected and research conducted by non-governmental organizations, academics, lawyers, international organizations, and governments. Ministries of Justice should be amassing and analyzing vast amounts of data now and carefully preparing impact evaluations using the most rigorous methodologies.

The following information needs to be collected now in each jurisdiction to permit quality analysis of the impact of remote proceedings:

- Data on number, types and categories of cases heard, length of proceedings
- Impact on justice outcomes, including rates of pre-trial detention, bail amounts, conviction, sentences, and guilty pleas. Including demographic information to understand if certain groups are disproportionately affected.
- Data on amount of adjournments related specifically to hearings being conducted remotely
- Experience of defendants, including vulnerable defendants with visual or auditory impairments, cognitive differences, and mental health challenges.
- Experience of lawyers, judges (jurors), prosecutors and other trial participants such as victims and witnesses

¹ For example in the [UK](#), [Chile](#), and some parts of the [US States](#), video conferencing was already in use for limited types of proceedings before the pandemic (most often for civil cases and bail/remand hearings), enabling them to move quickly to expand use during the pandemic. In other cases, the move to adopt remote technology is new, but is underway ([Germany](#), [Spain](#) and [Kenya](#) for example). In some countries such as [Costa Rica](#) and [Ecuador](#) the option of remote participation in hearings existed prior to COVID-19, but was only offered in isolated cases for people in prison custody. As a result of the pandemic, completely virtual hearings have been authorized, where all parties, their lawyers and in some cases even the judges, can connect by video from their offices or their homes. In [India](#), the law only permits remand hearings (i.e. all subsequent hearings after first appearance to filing of charge-sheet) to be conducted by videoconference. However, in some cases, High Courts have granted permission for conduct of trial through VC. The cases where VC has been used are few and mostly include high-risk offenders, terror cases or where the accused is being tried for multiple cases in multiple states.

² Some countries, often where the use of remote technology is new or still not a viable option, have continued with face-to-face hearings under social distancing precautions. In [Uruguay](#), for example, courts are open while they are initiating a small pilot for limited virtual hearings only in Montevideo. To mitigate

health risks, new measures are being issued such as assigning more spaced shifts, adopting procedures to reduce the flow of people to offices such as summoning witnesses to trials for shorter times and convening hearings sequentially instead of simultaneously.

³ See a few examples: <https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html>; <https://www.seattletimes.com/nation-world/pandemic-may-finally-push-germanys-courts-into-21st-century/>; <https://www.nytimes.com/2020/05/25/world/europe/spain-courts-coronavirus.html>

⁴ See for example those featured on the new website <https://remotecourts.org/>

⁵ See for example: Fair Trials, “[Safeguarding The Right To A Fair Trial During The Coronavirus Pandemic: Remote Criminal Justice Proceedings](#)” (2020); Penelope Gibbs, “[Defendants on video – conveyor belt justice or a revolution in access?](#)” Transform Justice (2017); Camille Gourdet, et al., “[Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology](#),” RAND Corporation (2020); Rowden, E., Wallace, A., Tait, D., Hanson, M., & Jones, D. (2013). [Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings](#); A, Wallace, “[Virtual Justice in the Bush: The Use of Court Technology in Remote and Regional Australia](#)”(2008).

⁶ Shari Seidman Diamond, Locke E. Bowman, Manyee Wong, and Matthew Patton, “[Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions.](#)” *Journal of Criminal Law and Criminology* Vol. 100, No. 3 (Summer 2010): 869-902. AND Frank M. Walsh & Edward M. Walsh, [Effective Processing or Assembly Line Justice? The Use of Teleconference in Asylum Removal Hearings](#), 22 *GEO. IMMIGR.L.J.* 259, 267–69 (2008).

⁷ See overview related specifically to courts in Gourdet, et al. 2020 (citation above) and Lynne Wainfan and Paul K. Davis, “Challenges in Virtual Collaboration: Videoconferencing, Audioconferencing, and Computer-Mediated Communications,” RAND Corporation (2004).

⁸ See Ronnie Thaxton, “Injustice Telecast: The Illegal Use of Closed-Circuit Television Arraignments and Bail Bond Hearings in Federal Court”, 79 *IOWA L. REV.* 175, 197- 98 (1993) [“Criminal defendants, especially minorities, often feel they are ‘outsiders’ rather than participants in the adjudication of justice. Given the reality that most racial minorities may already distrust and feel intimidated by the criminal justice system, CCTVs provide another bar to their full understanding of the proceedings and reinforce their distrust of the system. CCTVs only further magnify this distrust and alienation.”].

⁹ In one study, mock jurors rated child witnesses who testified in person as more accurate, intelligent and honest than children who testified on closed circuit television (Landström, Sara, and Pär Anders Granhag, “[In-Court Versus Out-of-Court Testimonies: Children’s Experiences and Adults’ Assessments.](#)” *Applied Cognitive Psychology*, Vol. 24, No. 7, 2010, pp. 941–955). See other studies similar studies: Landström, Sara, [CCTV, Live and Videotapes: How Presentation Mode Affects the Evaluation of Witnesses](#), Gothenburg, Sweden: University of Gothenburg, Department of Psychology, 2008. Studies from other fields outside criminal justice have also shown that when interacting virtually, participants may perceive the other as less likeable or even less intelligent than in face-to-face interaction (Fullwood, C., “[The effect of mediation on impression formation: A comparison of face-to-face and video-mediated conditions.](#)” *Applied Ergonomics* 38 (2007): 267-273).

¹⁰ For example, the “Fundamental attribution error” is exaggerated. This is where we attribute action or behaviors to the person’s character instead of situational or external factors, while more likely to attribute our own actions to situational or environmental factors. Several researchers have found that mediated communication (through video conferencing) can exacerbate this error. See Wainfan and Davis, 2004 and Cramton and Wilson’s 2002 series of three experiments (Abel’s 1990 account of dispositional attribution during videoconferencing; Olson and Olson, 2000; Armstrong and Cole, 2002; Herbsleb and Grinter, 1999).

¹¹ See for example Lee, et al. Nathaniel Fruchter, and Laura Dabbish, “Making Decisions From a Distance: The Impact of Technological Mediation on Riskiness and Dehumanization,” presented at the 18th ACM

conference on Computer-Supported Cooperative Work and Social Computing, Vancouver, BC, Canada, February 2015. ACM publications.

¹² See a thorough review of security concerns in Alberto Fox Chan and Melissa Giddings (2020). [Virtual Justice: Online Courts During COVID-19](#). STOP – Surveillance Technology Oversight Project.

¹³ Ibid. p. 7.

¹⁴ Ibid. p. 8.

¹⁵ Terry, Mathew, Dr Steve Johnson and Peter Thompson. "[Virtual Court pilot Outcome evaluation](#)" United Kingdom Ministry of Justice (2010).

¹⁶ Diamond, et al., "[Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions.](#)" Journal of Criminal Law and Criminology Vol. 100, No. 3 (Summer 2010): 869-902. [Using data gathered from the Cook County Clerk's Office (USA) regarding cases eight and one half years prior to the video bails and eight and one half years after, the study of 645,117 cases revealed "average bond amount for the offenses that shifted to televised hearings increased by an average of 51% across all of the CCTV cases."]

¹⁷ See Terry, Mathew, Dr Steve Johnson and Peter Thompson. "[Virtual Court pilot Outcome evaluation](#)" United Kingdom Ministry of Justice (2010).

¹⁸ See <https://www.gov.uk/government/news/10-nightingale-courts-unveiled>

¹⁹ See examples for protocols in [Gateways to Justice report: Design and Operational Guidelines for Remote Participation in Court Proceedings](#) (Australia).

²⁰ The points are summarized based on: "[Safeguarding the right to a fair trial during the coronavirus pandemic: remote criminal justice proceedings](#)" by Fair Trials.

²¹ See a preliminary list of minimal equipment necessary based on a working document developed by the Commonwealth Human Rights Initiative:

1. **A computer with high speed internet connectivity**
2. **Video camera of appropriate audio-video relay quality:** 360 degree cameras should be installed at both points. This is especially important if the remote point is a prison or police station, so that the court can inspect any part of the room.
3. **E-signature technology or printing and scanning facility:** For obtaining signature of the accused or the witness wherever required in a VC session, an e-signature system or printing and scanning facility should be available at both the points. The plea can be typed and read to the accused, then signed or thumb impression can be taken. It can then be logged in a cloud system and/or scanned & sent to the court, where it will be printed and marked as a scanned copy.
4. **A separate chamber for lawyer-client interaction**
5. **Quality slip generation system:** At both the remote point and the court point, the computer system should generate a live slip of various quality measures of the VC session, so that the disputes and concerns over the quality can be addressed.
6. **Displaying of documents:** Document visualizer should be at both the remote point and court point.
7. **Headphones for optimum audio and microphone quality**
8. **Power Back-up system for VC setup**
9. **CCTV camera at the entry gate of the VC room:** There should be a CCTV camera at the single entry point to the VC room at the remote point and a register should be maintained detailing the particulars and reasons of each and every person entering the VC room.

²² See resources from Administrative Conference of the United States (ACUS): [Best Practices for Using Video Teleconferencing for Hearings](#); Jeremy S. Graboyes, [Legal Considerations for Remote Hearings in Agency Adjudications](#) (June 16, 2020); [Adjudication During the COVID-19 Pandemic: Questions for Agencies to Consider](#) (April 14, 2020); Martin E. Gruen & Christine R. Williams, Center for Legal & Court Technology, [Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings](#) (Dec. 2015); National Association of Administrative Law Judges, [Platforms Used by Administrative Courts to Conduct Remote Hearings](#)

²³ The Texas Criminal Defense Lawyers Association and the Texas Indigent Defense Commission recently completed a series of six webinars related to Online/Virtual Courts.

²⁴ The points are summarized based on: Fox Chan and Melissa Giddings (2020). [Virtual Justice: Online Courts During COVID-19](#). STOP – Surveillance Technology Oversight Project.

²⁵ *Case Management Systems (CMSs)* are applications adopted by courts and public prosecutors to support the administrative tasks of judicial offices, such as case and procedural document registration and monitoring of case scheduling. More advanced systems also offer procedural guidance, deadline monitoring, and the use of case-related data for managerial purposes.

²⁶ *Criminal justice interoperability platforms* allow electronic exchange between the various bodies that are engaged in the criminal justice chain, particularly prosecutors and courts, but also police, prisons, and different law enforcement agencies.

²⁷ *E-filing and electronic exchange of procedural documents* support the exchange of the data and the documents in the course of judicial proceedings. The most common include e-filing (i.e., the lodging of procedural documents), e-delivery of deeds, e-summoning, e-payment of court fees, e-signatures and stamping of documents and all other solutions that entail the establishment of electronic channels of communications between courts, lawyers, and citizens.

²⁸ For an overview see Gourdet, et al., “Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology,” RAND Corporation (2020).

²⁹ Part of the series of six webinars developed by the Texas Criminal Defense Lawyers Association and the Texas Indigent Defense Commission (Texas, United States).

³⁰ In the United States, under COVID-19 (between April and June 2020) 68% of states reported increased release on personal recognizance in nonviolent cases and 81% reported increased releases from jail for persons awaiting trial. [US National Association of Pretrial Services and Agencies COVID Response Survey](#), June 2020.

³¹ The listed measures have been adopted at high levels in a substantial number of US jurisdictions according to a recent study conducted in 40 states between April and June of 2020. [US National Association of Pretrial Services and Agencies COVID Response Survey](#), June 2020.

Our work continues, no matter what.

The threat of coronavirus is particularly acute for people trapped in the justice system. To support our coverage of the crisis, please become a member today.

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LIFE INSIDE

“How Do I Defend People Now?”

Public defenders rely on in-person, confidential meetings with clients. They say COVID-19 makes their jobs nearly impossible.

By **CHRISSEY MADJAR**, **KENNETH HARDIN**, **ERIC QUANDT** and **NATHAN WADE**

75 Percent of My Job is In-Person, But I Can Barely See My Clients

By **Chrissy Madjar**, public defender
Kentucky Department of Public Advocacy

D.* had his first court appearance via Skype, his plea was taken via Skype and all communication with his lawyer took place via Skype. He did not have a private room; he just had a computer that

he could only hope was confidential.

* The Marshall Project is using only the first letter of clients' first names to protect their privacy. Wade and Quandt both have clients identified as "T."

Even in counties that are embracing technology amid the COVID-19 crisis, it is a poor substitute for in-person representation. A public defender's job is 75 percent interactive. Normally, we are constantly in courtrooms. We are at jails and prisons several times a week meeting with our clients, and we spend multiple hours with the same person. We are negotiating with prosecutors and interacting with family members, witnesses, the court clerk, bailiffs and law enforcement agents, just to name a few.

There is no virtual substitute for many of these duties. As a result, we now can accomplish only the bare minimum, namely emergency hearings and arraignments (those first court appearances). What isn't happening in many counties are competency hearings at which we would argue that a client is not being properly evaluated by mental-health professionals. Hearings for mitigation specialists that might show that a client has faced trauma are on hold because we cannot obtain records from closed schools and social-service agencies. Drug and veterans courts are closed too. And we can't have trials, because it would be impossible to convene a jury or to subpoena witnesses to appear with current social distancing rules.

All the while, the bar for "justice" constantly gets lowered. J., another client, took a plea because the prosecutor agreed to release her from jail, where the virus may spread, if she admitted guilt.

Others, like K. are foregoing the review of evidence in their cases to speed up the process and get out of jail. J., another client, is behind on child support. He was making payments but lost his job due to layoffs caused by the coronavirus. So now he has to serve 6 months in jail. And if the virus enters his cell, he'll be facing a possible sentence of death.

Is any of this justice?

Isolation and The Cruel Irony of Having More Time

By Kenneth Hardin, staff attorney

Harris County, Texas, Public Defender's Office

My entire life has changed overnight.

Gone are the three or four court appearances per day. I now go to the office just one to two times a week, to print and scan items for “virtual” court, and to rotate with other attorneys assigned to cover bail hearings.

On the days I have been in court, I no longer elbow my way between attorneys to get on the elevator. It is alarming how quiet it is in the courthouse—it reminds me of 9 p.m. on a Friday night waiting for a jury to come back with a verdict.

Then, however, I at least had my client with me. Now it is just me and the echoes of a few other client-less lawyers.

Meanwhile, I constantly vacillate between feeling like an “essential employee” and feeling like just a human being worrying about whether I am exposed to coronavirus every time I step into the courthouse.

In some ways, oddly enough, the pandemic has made me more effective as a lawyer. The endless meetings and hearings that used to take up my days have been canceled. I now have more time to look at files and evidence individually and thoroughly.

The darker moments are when I have to hear the awkward pauses between the sobs and screaming of family members as I try to explain to them on the phone why their loved one is still in jail.

How do I attend court on their behalf through a Zoom account? How can plea agreements be made without people feeling coerced into pleading guilty, just to get out of jail to be safe from the virus? How do my investigator and I go out into the field to gather evidence when businesses are closed and witnesses are more hesitant than usual to meet with me?

How do I defend people now?

Why Did It Take COVID-19 to Convince the State That My Client is a Human Being?

**By Eric Quandt, deputy public defender
San Francisco Public Defender's Office**

For three years, I have tried to get the criminal justice system to see T.* as a human being who deserves help, not incarceration. It's only because COVID-19 arrived that the system has begun to listen.

T. is 64. He has not been convicted of a crime. He has been in jail all this time—pre-trial. Just waiting.

In one of his two pending cases, he was accused of attempting to break into a garage; in the other, of entering a garage and stealing a printer.

When T. was 5, he lost his mother, father and siblings in a car accident. He entered the California foster care system, where he endured years of abuse. As an 18-year-old, he found himself in Qumyum, Vietnam. He left the war with an opioid addiction and PTSD. T. also suffers from seizures and chronic obstructive pulmonary disease and has been hospitalized multiple times while in jail. And he's been severely attacked twice.

I've made multiple attempts to convince the powers-that-be to offer him treatment instead of prison, but had no luck. Then COVID-19 arrived. The court and district attorney suddenly removed the barriers to taking T. out of custody. He is out now and living at a residential program for veterans.

Why? Because T. was more deserving of help and treatment than he already was? Or because the sheriff doesn't want a COVID-19 death on his watch? Why couldn't anyone have recognized T's situation a year ago, two years ago, two-and-a-half years ago? Why was he separated from his granddaughter for three precious years? Why does it take a global pandemic to recognize the humanity of our incarcerated brothers and sisters?

My Client Has Seizures and Heart Problems. COVID-19 Is Pushing Him Over the Edge.

**By Nathan Wade, assistant public defender
Office of the Public Defender, Pima County, Arizona**

I recently got a voicemail from a man I represent named T. who is in custody right now at the county jail. His voice was trembling because he was convinced the coronavirus had overtaken the jail and that he was going to die if I didn't get him out ASAP.

T. is an elderly homeless person, and the charges he faces are nonviolent. But he was thrown in jail anyway, on a bond that he could not afford, in part because he has a prior criminal record.

I knew that if I could sit down with T., I could ease some of his worry. Unfortunately, the jail is considered a high public-health risk for in-person visitation. It's also not equipped with enough cameras and bandwidth for all attorneys to meet with all of their incarcerated clients. I was told it would be at least 24 hours before I could talk to him even on video.

There's just nothing I can do but hope I happen to be at my desk when T.'s next frightened phone call comes in.

This is my new life as a public defender: Try not to let those I serve know that I am just as scared for them as they are.

The Pima County Attorney's office has said it is working with the public defender, courts and sheriff to release detainees charged with nonviolent offenses and to remove bail as a condition for release for certain detainees. It acknowledges that they may disagree with the public defender on which detainees count as nonviolent. ■■■



Question of the Month

Judges are split on whether virtual hearings have reduced the number of no-shows

June 18, 2020

By Anna-Leigh Firth

Our June Question of the Month asked NJC alumni if they were seeing fewer no-shows in virtual hearings compared with conventional in-person hearings.

The vote came out roughly even: 47 percent of the 363 judges who responded said they had seen an improvement during the coronavirus-driven move to virtual hearings; 53 percent indicated that no-shows had stayed about the same or had even gotten worse.

Commented one judge, anonymously: "I have conducted hearings both in person and by phone for roughly 20 years. My in-person hearings show nearly all the time; the telephone hearings show about half the time."

On the other hand, Maricopa County (AZ) Judge Gerald Williams reported: "In residential eviction actions, we have gone from a 90 percent no-show rate for tenants to an 80 percent rate of appearances because they can appear by telephone."



Oklahoma Judge Mike Hogan, whose jurisdiction covers Pittsburg and McIntosh counties, reported that fewer people were showing up for remote hearings than they had for in-person hearings, and that trend was contributing to a case backlog. One reason for the absenteeism, he speculated, was that it had become easy for people to use “technical difficulties” as an excuse for not showing up.

Other reasons mentioned for no-shows included:

- Defendants being unaware of their virtual hearing date
- Lack of access to electronic devices
- Limited court access and assistance for self-represented litigants
- Genuine technical difficulties

... except in some places, it has improved

Among the 47 percent of judges who said they were seeing improved attendance at hearings, many cited ease of access.

Virtual hearings remove traditional obstacles like lack of transportation (locally or from out of state), risk of losing employment if taking time off for court, and lack of childcare, wrote Blount County (TN) Juvenile Court Judge Kenlyn Foster.

Other factors mentioned:

- Defendants in prison can't fail to appear in court
- One judge mentioned having better success reaching hearing participants by accessing contact information in the DMV's database
- No fear of being arrested on the spot
- Self-represented litigants are more comfortable appearing by phone
- More people show up when the court sends a hearing reminder with virtual instructions to the attorney, bail bond company and the defendant

A few judges wrote that it was hard to tell whether absenteeism had improved because fewer citations were being issued and fewer court hearings were being held. Additionally, many courts have defaulted to cancellation of all hearings unless litigants specifically request that a hearing take place.

** Each month the College emails an informal, non-scientific one-question survey to its more than 12,000 judicial alumni in the United States and abroad. The results, summarized in the*



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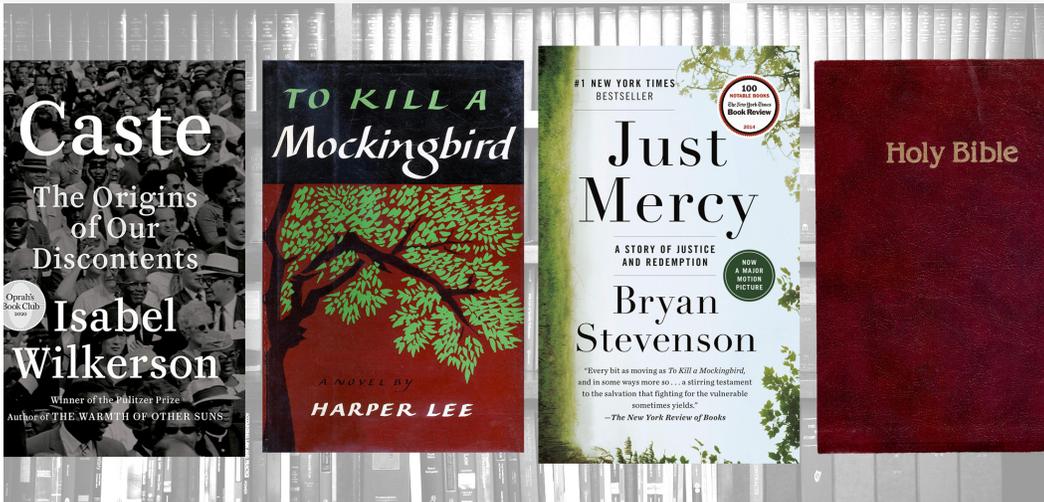
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LUCY LANG IDEAS 07.01.2020 09:00 AM

Virtual Criminal Justice May Make the System More Equitable

Courtrooms can't afford to go back to their inefficient, inaccessible "normal." The innovative practices that arose from this pandemic need to be implemented now.



While the pandemic didn't create unjust criminal justice conditions, it did better expose them. PHOTOGRAPH: GETTY IMAGES

THE COVID-19 CRISIS closed local, state, and federal courtrooms, put trials on hold, and delayed justice. Now courts are evaluating how to resume operations in a world where social distancing and limited contact are the new norm. The reopening process is not just vital for our constitutional rights, but necessary to begin to address stark racial disparities that have become all the more apparent through the pandemic and recent reckoning on police violence and systemic inequities. Before courts return to "business as usual," it's important to remember that the system in place before the

pandemic was in many ways inequitable, inefficient, and in serious need of a 21st century upgrade. Failure of technological imagination is no longer an excuse.

WIRED OPINION

ABOUT

Lucy Lang (@LucyLangNYC) is the Director of the Institute for Innovation in Prosecution at John Jay College of Criminal Justice and a former Assistant District Attorney in Manhattan, where she investigated and prosecuted domestic violence and homicides. Lucy writes and speaks widely on prosecution and criminal legal reform, and teaches those issues in New York State prisons.

While the pandemic didn't create unjust criminal justice conditions, it did better expose them. Unhygienic and crowded jail and prison conditions, for example, subjected communities of color—already disproportionately incarcerated—to disproportionately high rates of Covid. Now, justice system leaders have an opportunity to address this by embracing technology that will make investigations and prosecutions more efficient and accessible. Some have already started this process. During the pandemic, courts have conducted all manner of remote proceedings in which interested parties, including press and the public, are afforded legally protected and appropriate access. Legal processes like filing motions were increasingly done electronically, saving huge time and expense for lawyers' fees. Detectives, prosecutors, and crime survivors appeared virtually before judges to obtain search warrants and protection orders, allowing more rapid response and significant savings. At least 16 states used Zoom to conduct bail, evidentiary, and other pre-trial hearings. Federal legislation authorized district court judges to allow video or teleconference in some criminal proceedings, including guilty pleas and sentencing. Both Florida and Texas have conducted civil and criminal trials on Zoom. Other states and municipalities are exploring less tech-driven but equally creative means to ensure that constitutional rights are protected: In rural Montana, juries will be selected from a gymnasium to enable large numbers of people to social distance.

We should take inspiration from these innovations. If we refuse to embrace novel solutions, the alternatives are bleak: continuing to suspend court proceedings until risks of infection are lower, or risk exposing crime survivors, people facing criminal charges, and criminal justice professionals to infection. Denying justice or risking lives are both unacceptable, and, as is so often the case in criminal justice, would likely disproportionately harm Black and Brown communities.

Courthouses are public places where matters of great public interest are addressed, and technology can help shine a light on what happens in their hallowed walls. If hearings are streamed, the public and the media, who are often limited access to high-profile proceedings because of courtroom capacity, would no longer face that limitation. Similarly, crime survivors, who often attend proceedings simply to observe, might prefer to log in at a particular time to watch, rather than take a day off of work, secure childcare, and travel to courthouses, especially to courthouses that have to maintain social distance while still using municipal bathrooms.

Trials pose a different set of challenges. The season finale of CBS's *All Rise* dramatized this, depicting a bench trial—one in which the fact-finder is a judge, rather than a jury—in Covid-19 Los Angeles conducted entirely over Zoom, replete with the expected challenges of various members of the virtual "courtroom" neglecting to un-mute themselves before speaking. Reality is now imitating art as local jurisdictions are following suit. At stake are two competing Sixth Amendment Constitutional protections: the right to confront witnesses and the right to a speedy and public trial. The

Supreme Court has held that the right to confront witnesses does not require the confrontation to be in person, and for some crime survivors and witnesses the ability to offer testimony remotely might encourage cooperation by allaying the fears and practical burdens of appearing physically to testify. For people charged with crimes, virtual options could mean the difference between languishing in jail and exercising the right to their day in court.

Jury trials pose another set of challenges, but perhaps also promise. For jurors, on whom the burden of serving is—rightly—significant, some measure of remote options might enable people to serve who are not otherwise able to easily secure childcare or time off work. This might allow juries to better embody the principle of a “jury of our peers,” and represent a more accurate and inclusive picture of the American public. When weighed against the indefinite suspension of the right to a speedy and public trial, courts would be well-advised to consider the virtual options, imperfect though they may be.

Of course, as with any systemic change, hurdles abound: from the comical, like the now-infamous toilet flush during a Supreme Court oral hearing, to the serious, including lack of access to reliable internet, the inability to know whether at-risk witnesses and victims are experiencing dangerous pressure beyond the frame of their webcam that impacts their ability to testify truthfully, concerns about surreptitious recording and dissemination of proceedings, and a potentially decreased ability for judges to oversee jurors’ focus on the presentation of evidence. As is the case with in-person proceedings, a lawyer’s access to resources may result in more polished technical presentations than their under-resourced colleagues, and concerns ranging from sound to lighting have the potential to impact jurors’ ability to assess witnesses’ accounts.

Careful analysis and technological improvements may reveal, though, that some of these fears are surmountable. Witnesses might be permitted to testify from a hygienic, secure location in their own neighborhood—a precinct or community center, for instance—as compared to testifying from home, where they may be subject to unknown and unseen pressures. And it can hardly be said that simply being in a courthouse has ever offered adequate protection from the multitude of pressures on a witness. Concerns about safety and privacy can continue to be dealt with in the same individualized way that they are now—virtual courtrooms can be “closed” to attendees in the same way that physical ones have long been, when a particular witness faces an articulable risk. And an honest assessment of accepted practices reveals existing norms to include comparable risks and imperfections, which have long warranted close attention to case-by-case adjustments in all jury trials.

As we have already begun to adjust to a world of virtual meetings with colleagues, teachers, doctors, friends, and family, so must our legal system modernize in order to better serve. Many jurisdictions have long used technology to implement innovative solutions to intractable challenges, and courts and criminal legal agencies should take advantage of this unanticipated opportunity to explore technologies with the potential to increase efficiency, access, and equity. Prosecutors and courts should begin by surveying their communities to understand the limitations on access and participation under the old model, then leverage the solutions that have emerged during the pandemic to better suit the needs of crime survivors, witnesses, and people charged with crimes. Zoom witness interviews, remote court appearances, and electronic sharing of evidence may prove fruitful places to start.

Not taking action today would be more than a missed opportunity—it would be an injustice to the millions of Americans who could benefit from a justice system built for the modern era.

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Lawyer Breaks Down 17 More Courtroom Scenes From Film & TV

Lawyer Breaks Down 17 More Courtroom Scenes From Film & TV

Former prosecutor Lucy Lang is back to take a look at more courtroom scenes from television shows and movies and breaks down how accurate they are. Lucy Lang is an executive director at the Institute For Innovation In Prosecution at John Jay College of Criminal Justice. Learn more about Lucy Lang and the Institute for Innovation in Prosecution at <http://www.prosecution.org> and follow their work on Instagram and Twitter @LucyLangNYC and @iip_johnjay

TOPICS WIRED OPINION COVID-19 SUPREME COURT LAW

The Perils of ‘Zoom Justice’

By Sarah Esther Lageson | September 1, 2020



Photo by Wiseheart Lawyering via Flickr

As COVID caused massive shutdowns of traditional in-person institutions, courts were faced with a dilemma. Facing severe backlogs if the courthouse doors were closed, courts **quickly shifted** (<https://www.brookings.edu/techstream/the-legal-and-technical-danger-in-moving-criminal-courts-online/>) to Zoom-based proceedings.

Today, you can watch hundreds of **livestream court events** (<https://themarkup.org/coronavirus/2020/06/09/how-fair-is-zoom-justice>)—many on YouTube—ranging from felony arraignments to traffic ticket hearings to family court proceedings. For the defendant or witness, this is a welcome change. Going to court no longer requires a person to find childcare, take time off work, or risk exposure to COVID.

However, they must now contend with their name and image broadcast across the internet

Streaming court proceedings takes the same logic as the decision to release court documents on the Internet in the late 1990s and early 2000s. Rooted in virtues of transparency and accountability, the argument is that anything you might witness or access in person by visiting court should be similarly available on the Internet.

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These are laudable goals. However, the turn to digital access had the unintended consequence of creating digital punishment (<https://slate.com/technology/2020/06/criminal-justice-records-online-digital-punishment.html>): a phenomenon where the collection and release of digital criminal justice information creates permanent online stigmatization for millions of people arrested or processed through U.S. courts each year.

Due to a blend of permissive public records laws that allows the release of pre-conviction and in-process case information—as well as a private market built on re-sharing and selling this information across extortion sites and background check services—millions of people have a tarnished digital reputation simply because they were processed through the court system.

As I document in my recent book (<https://global.oup.com/academic/product/digital-punishment-9780190872007?cc=us&lang=en&>), the harms of digital punishment are far reaching.

My research has shown that people who must continually confront their addiction or mistakes posted online often begin to “opt out” of institutional and social contexts that might trigger a Google search. Rather than engage in their communities, schools, or churches, people avoid situations where new people might want to learn more about them—only to discover their name on a website that has reported a court docket or a mugshot.

There are material harms as people avoid employment, educational, and housing systems that rely on increasingly automated background checks (<https://www.nytimes.com/2020/05/28/business/renters-background-checks.html>) that may report incorrect, misleading or outdated information that is nearly

impossible for the applicant to remedy.

There are also social harms. Dampening social and institutional participation can also decrease democratic participation, especially if digital punishment leads people toward legal estrangement (https://law.vale.edu/sites/default/files/area/center/liman/document/b.2054.bell.2150_rbbnaxd9.pdf), lessens procedural justice (<https://cops.usdoj.gov/procdceduraljustice>) by assigning public guilt before due process, and increases mistrust in government through what people experience as state-sanctioned privacy violations (https://coc42d9a-a170-4571-949c-ea8bd55b102f.filesusr.com/ugd/3ac972_44316c35ea8a4bfeb08da89dee532193.pdf).

If a victim, witness, or defendant is terrified to testify or afraid to tell the truth because they know their face and voice will be broadcast on YouTube, justice will not be served.

Another overlooked problem with digital access to courts is that we don’t learn nearly as much about judicial decision-making as we do about the individual people whose lives are broadcast across the internet during their hearings.

Recently, I watched a child custody proceeding unfold over five hours in a Texas courtroom. Through his own live streamed testimony, I learned about the father’s alcoholism and suicide attempt and watched as his lawyer screen-shared dozens of emotional text messages between the two parents.

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The judge was mostly silent as the proceedings shifted to the mother, tired and in hospital scrubs, whose lawyer showed dozens of photos of the interior of her home, including of her children’s bedrooms.

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In New Jersey's Essex County, I watched an elderly man in prison garb and a face mask silently weep on video for ten minutes at his arraignment. His public defender made a case for his release based on his health and risk of death through COVID exposure. The judge rapidly read through his rights and conditions of a pretrial release. The man asked if she could call his employer to explain why he missed a week of work. The livestream ended.

Live court on YouTube has the potential to expand digital punishment in unexpected ways. We don't know yet if and how court live streams have been recorded and replicated for extralegal purposes.

We don't know who is watching.

Transparency is central to having an accountable judiciary. But the pace and disorganization of local courts means viewers get very little sense of how the criminal justice system really operates. Aggregate, complete data about the criminal legal system is still incredibly difficult for journalists and researchers to access. Photos of children's bedrooms in suburban Austin do not fulfill the intent of public access for watchdogging government officials.

The solution? Courts have a simple opportunity here to instill a bit of ~~practical obscurity~~ practical obscurity (<https://onlinelibrary.wiley.com/doi/10.1002/bult.2014.1720400206>), which has long been the shield for protecting individual privacy (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2822386) while encouraging open government. Courts can easily have users register for a password-protected Zoom proceeding.

In the digital context, this means a small, verification hurdle to encourage interested journalists, researchers and members of the public to access governmental data for accountability reasons. In some ways, password protected live streams better mirror the traditional forms of access that underlie transparency laws, where the requester has an active interest in a document, rather than a passive opportunity to make a copy.

And even as our lives have become more isolated and based in technology, we shouldn't forget that policy decisions are a human-powered process.

The expansion of digital punishment into unexpected, pandemic-responsive domains is not the inevitable outcome of digital life. Technological advances like Zoom and YouTube do not determine their own fate; people and organizations use technologies and share data for specific ends.

We can choose a better way to ensure the judiciary is serving the public while *also* protecting that same public.

Sarah Esther Lageson is an assistant professor at Rutgers University-Newark School of Criminal Justice, and a grant recipient of the National Institute of Justice Early Career Award. She welcomes comments from readers.

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Virtual Courtrooms Prove To Be Both Curse And Blessing

By **Steven Lerner** | January 8, 2021, 12:44 PM EST

For New York City criminal defense attorney Elena Fast, the inside of a courtroom before the pandemic was always a "very magical place."

"A criminal case court is where justice prevails and that's where cases get resolved in a fair way," Fast, of The [Blanch Law Firm](#), told Law360.

Fast even relished the daily rituals of dressing up, commuting and waiting in line to enter the courtroom.

But as in the rest of the country, most cases in the city's Criminal Court have been handled virtually since the end of March.

"Now with virtual court, it seems that everything is done from your house and you have children running around and you have other obligations," Fast said.

Fast acknowledged that the court process is now sometimes quicker, but it comes with a cost.

"I don't think, at least in the minds of some people, it's got the same importance because you don't have to schlep to go to court and you don't have to dedicate as much time as you used to," she said.

She said the shift to virtual courtrooms has been disrupted by the technology itself.

People don't have the proper video equipment and we have sound issues and computer issues. And sometimes if one of the parties is having issues, we can't do the case.



Elena Fast

Blanch Law Firm

"People don't have the proper video equipment, and we have sound issues and computer issues," she said. "And sometimes if one of the parties is having issues, we can't do the case."

In one case a prosecutor in Queens had internet outages and it took the district attorney's office 30 minutes to get a replacement prosecutor, Fast said.

"I've been on court appearances when a public defender gets on and says, 'Hey judge, my client only can join by phone because they don't have a webcam or they don't have reliable internet access,'" she said.

White collar practitioner Daniel F. Wachtell told Law360 that he had a civil case in state Supreme Court in the fall where one of the parties wasn't able to fully participate in a hearing because of tech problems and had to submit comments by email.

"People are trying very hard and are doing an excellent job of keeping cases moving along, but it's not always perfectly smooth," Wachtell said.

Criminal defense attorney James A. Schiff told Law360 that some defendants are less familiar with technology, as was the case with a client of his who couldn't access the video feature on [Microsoft Teams](#) during a hearing in October.

"[He] just couldn't do it," said Schiff. "I was on the phone with him representing that, and the judge stayed a bench warrant until the next time, when the client was able to do it successfully."

And in a case in Manhattan federal court New York in August, Schiff said the prosecutor had bad reception and the court reporter couldn't record comments.

"By the time the court reporter actually mentioned that there was an issue, we then had to go back several minutes and let the prosecutor do it again after he found an area where there was better reception," Schiff said. "And he was calling in because he was having video problems."

As the courts went virtual, Fast said, she saw a slowdown in cases and a resulting backlog. In Manhattan, Queens and the Bronx, she said the only cases held in today's virtual courts are ones that will reach resolution that day.

Lucian Chalfen, spokesman for the [New York State Unified Court System](#), told Law360 that technical glitches have been mostly limited.

"While early on there were some technological issues, more of a lack of familiarity with [Skype](#) or more recently Microsoft Teams, which we migrated to, now judges, attorneys and litigants have become used to virtual proceedings," Chalfen said.

And Danielle Hirsch, a principal court management consultant with the National Center for State Courts, told Law360 she doesn't think courts have slowed down, saying many court systems in states such as Florida, Arizona, Illinois and Texas may have actually had more hearings during the pandemic.

"We've heard, at least anecdotally, that there's been a huge spike in participation rates in court proceedings, which has been a really wonderful boost in public engagement with the courts," Hirsch said.

She said courts are becoming increasingly sophisticated in handling virtual hearings.

We hope over time to be able to, thorough evaluation and data collection, really quantify how some of these technical changes have led to good things across the country.



Danielle Hirsch

National Center for State Courts

"We hope over time to be able to, thorough evaluation and data collection, really quantify how some of these technical changes have led to good things across the country," Hirsch said.

A 2020 report from the Texas Judicial Council's Public Trust & Confidence Committee found that judges in the Lone Star State fully adapted to technology and held about 500,000 cases with 1.5 million participants between March and September.

Additionally, the report found that judges experienced more participation from litigants due to the ease of using the video platform Zoom.

Instead of technology, Hirsch said the real culprit could be budget cuts.

"Court systems in Oregon, California, Michigan and Ohio have reduced hours for certain kinds of court operations," Hirsch said. "Some have closed courthouses, and some have implemented other kinds of furloughs or cost-cutting measures."

Fast said there are fewer cases in Bronx Criminal Court. However, Chalfen confirmed that the number of cases in an all-purpose part in Bronx Criminal Court has decreased from 90 before the pandemic to about 25 today but said it was at the request of the district attorney and defenders.

"It has nothing to do with tech issues," Chalfen said. "It has to do with virtual calendars being

logistically harder to coordinate for everyone, but particularly the defense attorney and defendant."

To resolve any technology-driven delays, Fast said state courts in New York City should adopt an appointment system for cases, similar to those in federal courts or other state courts in different jurisdictions.

"I have a case up in Jefferson County, which is on the Canadian border, and the judge schedules everyone in 15-minute increments," Fast said. "I've had a phenomenal time doing the video court in Jefferson County because I know what time the case is, there's really no wait time, it's been very smooth and very seamless."

The New York state system does not make appointments and that each county can stagger its own appearance times, but Chalfen pointed out that Jefferson County has the population of a single New York City neighborhood.

In fact, state courts in cities across the country, such as in Miami-Dade County, have largely adapted well to virtual proceedings.

"They've developed a pretty innovative court scheduling technology to allow the bench to schedule hearings on their own, and they have embraced Zoom," Hirsch said.

A potential bright spot in the backlog of cases is that Fast said she is getting better plea deals and more dismissals from the district attorney's office.

"I think in terms of whatever we can resolve with the DA's office will be done at a very steep COVID discount in terms of what they've offered before COVID and what they're offering now," she said.

In a current felony case, the prosecutor knocked criminal charges down to just a violation, with the stipulation that her client get substance abuse treatment, she said.

"Before COVID, that was not even a conversation," Fast said.

Even with the backlog, Fast knows that virtual court is the best option for now.

"I'd rather have some court than no court in terms of moving cases along," she said.

--Editing by Brian Baresch.

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