

REMOTE CRIMINAL JUSTICE

*Jenia I. Turner**

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* Amy Abboud Ware Centennial Professor in Criminal Law, SMU Dedman School of Law. I thank Hillel Bavli, Jeff Bellin, Darryl Brown, Jeff Clark, Andrew Davies, Chase Hilton, Thea Johnson, Michael Mowla, Anna Offit, Allison Redlich, Meghan Ryan, Beth Thornburg, John Turner, and Ron Wright, and participants in the SMU Deason Criminal Justice Reform Workshop and the Stanford Law School Policy Practicum on COVID-19 and the Effect of Video Technology on Indigent Defense Services for helpful comments; Brooke Vaydik, Evan Rios, and Tom Kimbrough for outstanding research assistance; Cory Squires at the State Bar of Texas for help with the research of attorney demographic data; and Shalima Zalsha of the SMU Statistical Consulting Center for invaluable assistance with the statistical analysis. I am also grateful to the defense attorneys, prosecutors, and judges who took the time to participate in the survey and share their experiences with online proceedings during the pandemic.

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 nontrial 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 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

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 Coronavirus and the Courts*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Jan. 18, 2021) (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. *Responses to the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> (last updated Dec. 23, 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.

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>

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

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

--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 130–38 and accompanying text.

11. See *infra* notes 139–43 and accompanying text.

12. See *infra* notes 146–53 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/judiciary_provisions_cares_act_0.pdf (authorizing the use of remote proceedings in criminal cases and signed into law on Mar. 27, 2020).

16. See *infra* Part II.A.

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 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

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 260–88 and accompanying text.

19. See *infra* notes 351–53 and accompanying text.

20. See *infra* notes 289–92 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.

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.

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, 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

26. See *infra* Part IV.

27. See *infra* notes 388–91 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.*

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/>

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 at 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 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

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 Types of Criminal Proceedings That Utilize Video Conferencing (illustration), in *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. 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”).

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 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

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 Types of Criminal Proceedings That Utilize Video Conferencing (illustration), *supra* note 32, with Criminal Proceedings Governed by Statutory Authority (illustration), in *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. CRIM. 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.

40. *Id.* at 107–08.

41. *Id.* at 106–07.

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

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).

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.

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 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 defense counsel to provide effective representation. Effective representation depends on the ability of the defendant and her counsel to confer confidentially before and

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.

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, however, courts must remain attentive to the issue.⁵⁸ To protect 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

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. R. 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., *Privacy of Attorney–Client Communications in Correctional Facilities (illustration), in 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 14% of court administrators surveyed responded that their jurisdiction had no provision for ensuring privacy 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 155–56 and accompanying text.

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 testimony.⁶⁶ Even when a state interest is compelling enough to permit

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).

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, 94 (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).

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

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 Brief by Amicus Curiae Richard D. Friedman in Support of Defendant-Appellant, at 6–7, *Jemison*, 2020 WL 3421925 (Jan. 3, 2020) (No. 157812) [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).

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).

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 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

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 nontrial proceedings as well. See Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 985 (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).

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.

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 to 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.

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

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. Jouvenal*, *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).

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/>.

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 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

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).

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.

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 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

96. Brandon Marc Draper, *And Justice for None: How Covid-19 Is Crippling the Criminal Jury Right*, 62 B.C.L. REV. E-SUPP. 1–1, 1–8 (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 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>.

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 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

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.

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

112. *Id.* at 5, 10–11.

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 the remote setting makes it 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 that included labor, equipment, maintenance, repair, and fuel to transport 723,000 inmate trips to local courts.”¹¹⁹ Video arraignments were also found to save additional resources by improving security and thus reducing

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>; NAT'L CTR. FOR STATE CTS., *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%).

117. MCKAY, *supra* note 31, at 154–55; Nigel Fielding et al., *Video Enabled Justice Evaluation*, SUSSEX POLICE AND CRIME COMM'R & UNIV. 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).

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

workers' compensation claims filed by county employees.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 upfront 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

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. Courts' Realized Savings Through Video Conferencing (illustration), in *Video Conferencing Survey*, NAT'L CTR. FOR STATE CTS. (2010), https://www.ncsc.org/_data/assets/image/0019/16732/q48-png.png.

126. Court or State Benefits and Costs Realized (illustration), in *Video Conferencing Survey*, NAT'L CTR. FOR STATE CTS. (2010), https://www.ncsc.org/_data/assets/pdf_file/0021/17094/q51a.pdf.

127. Impediments or Issues in Video Conferencing Implementation (illustration), in *Video Conferencing Survey*, NAT'L CTR. FOR STATE CTS. (2010), https://www.ncsc.org/_data/assets/image/0026/16694/q7-png.png (finding that 76% 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 at 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

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. Privacy of Attorney–Client Communications in Video Conference Courtroom (illustration), in *Video Conferencing Survey*, NAT'L CTR. FOR STATE CTS. (2010), https://www.ncsc.org/_data/assets/image/0028/16678/q28-png.png, 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 104, 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); 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, 56 (2017) (“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 EDUC. FOUND., *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”).

of the jail may negatively affect their perceptions and behavior during the proceeding.¹⁴¹

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

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

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,

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

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.

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*, 68 *BUFF. L. REV.* 1275, 1286–92 (2020).

151. *Id.* at 1292–1306 (discussing studies); see also *infra* notes 164–68 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. REFORM* 695, 713–14 (2002).

154. See Draper, *supra* note 96.

155. See *id.*

156. See *id.*; Bandes & Feigenson, *supra* note 150, at 1301.

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

did not perceive the video consultations more negatively than in-person 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. COGNITIVE 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., *supra* note 164; Holly K. Olcutt et al., *Detecting Deception in Children’s Testimony: Factfinders’ Ability to*

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 in immigration proceedings—found that the use of video had no significant

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 (first citing and discussing James E. Driskell & Paul H. Radtke, *The Effect of Gesture on Speech Production and Comprehension*, 45 HUM. FACTORS 445 (2003); then 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. & LEGAL STUD. 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 RSCH. & PUB. POL’Y SER., no. 68, 2005, at 62 (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>.

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 164–68 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. Impediments or Issues in Video Conferencing Implementation (illustration), *supra* note 127.

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 NAT’L CTR. FOR STATE CTS., *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 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.*

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 permitted the use of remote proceedings for grand and petit jury

185. See, e.g., California Emergency Rules, <https://jcc.legistar.com/View.ashx?M=F&ID=8234474&GUID=79611543-6A40-465C-8B8B-D324F5CAE349>; First Emergency Order Regarding the COVID-19 State of Disaster, *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*, LAW.COM: 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.

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

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*, LAW.COM: 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., *Clarrington v. State*, No. 3D20-1461, 2020 WL 7050095, at *10 (Fla. Dist. Ct. App. Dec. 2, 2020).

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

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 proceeding,²⁰¹ and whether, even if the restriction on the right to be present is necessary, it 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

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.

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).

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 [c]ourt.”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 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

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).

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

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 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

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.

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

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

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, <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; Supreme Court of New Jersey, *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/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic?utm_campaign=usc-news&utm_medium=email&utm_source=gov-delivery. 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/>

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

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.

I. 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. ATTY'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 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.

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 who 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 State 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

233. See *supra* notes 229–31 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: *Texas County Designations*, TEX. STATE OFF. OF RURAL HEALTH: TEX. DEP’T OF AGRIC. (Apr. 2012), <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, Tbl. 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 Jan. 18, 2021) (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

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.

respondents said that they had participated in such proceedings *before* the 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 Texas 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. TEX. JUD. BRANCH, *supra* note 222.

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 Jan. 18, 2021).

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

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 defendant	Defense	34.0 ^{J,P}	38.0	28.0 ^J	$x^2(4)$ = 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	
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

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

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.”).

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.

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 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:

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

It helps our victims and witnesses attend 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

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.”).

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.”).

more time.²⁸² The parties also have to submit exhibits ahead of the hearing, 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

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 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.

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

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.

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.”).

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 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.

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

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 252–55 and accompanying text.

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	$x^2(2)$ = 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}	$x^2(4)$ = 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}	$x^2(4)$ = 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	47.2	26.4	26.4	

	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	
	Defense	30.3 ^{J,P}	35.7	34.0 ^{J,P}	

The online setting makes it difficult for disabled defendants to participate in proceedings	Judges	64.8 ^D	26.2	9.0 ^D	$\chi^2(4)$ = 73.43, N = 488, $p < .0001$
	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

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.”).

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, 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

299. See *infra* Part IV.B.

300. See *supra* Table 3.

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.

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 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

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.”).

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.

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 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

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.

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 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).

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.”).

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.”).

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:

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

321. Prosecutor Respondent #16.

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.

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 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 only slightly shorter

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.

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.

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 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 into the factual basis at the hearing so as to ensure that the defendant understands and agrees with the stipulations and that the guilty plea is truly voluntary and knowing. 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.

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 Dezember 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).

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}	$\chi^2(4)$ $= 213.72, N$ $= 427,$ $p < .0001$
	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.

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

A. Survey Findings

Respondents displayed broad consensus that some form of online criminal justice will continue to be used in the future. More than 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	$\chi^2(2) = 20.46, N = 508$ $p < .0001$

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/video conference proceedings used more	Defense	57.9	51.2	$\chi^2(1) = 0.28, N = 159,$ $p = .5957$
	Judges	47.6	66.3	$\chi^2(1) = 3.24, N = 122,$ $p = .0718$
	Prosecutors	37.5 ^S	72.9 ^F	$\chi^2(1) = 8.74, N = 193,$ $p = .0048$

frequently in criminal cases after the pandemic is over?				
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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 video proceedings being used more frequently, 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

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.

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.

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

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.

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[-]county 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

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 rate in some jurisdictions.³⁴⁶

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

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. NAT’L CTR. FOR STATE CTS., *supra* note 113.

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 101–02, 262–63 and accompanying text.

349. Prosecutor Respondent #32.

350. Bleiberg, *supra* note 291.

not others.³⁵¹ A number of respondents identified initial appearances, bond hearings, status hearings, and certain other uncontested pretrial hearings as 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

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.”).

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

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

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

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 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.

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 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

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.”).

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, 264–68 and accompanying text.

369. *See supra* notes 113, 128, 158–60, 345–47 and accompanying text.

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 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 concerningly, 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

370. See *supra* notes 289–91 and accompanying text.

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

372. See *supra* notes 286–88 and accompanying text.

373. See *supra* notes 280–88 and accompanying text.

374. See *supra* notes 354–64 and accompanying text.

375. See *supra* notes 360–62 and accompanying text.

376. See *supra* Table 4.

377. See *supra* notes 327–29 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

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 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

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>.

381. See *supra* notes 121–27 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.

(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 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

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 *Status Conference*, BLANCHARD LAW, <https://blanchard.law/criminal-defense-process/status-conference/> (last visited Jan. 18, 2021).

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

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.

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 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

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.

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 139–41 and accompanying text.

397. *See supra* notes 149–53, 300–04 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 Jan. 18, 2021).

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).

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 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

402. Bandes & Feigenson, *supra* note 150, at 1308 (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 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/HCDC_news.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 Jan. 18, 2021).

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 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.