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## Unmuted: Solutions to Safeguard Constitutional Rights in Virtual Courtrooms and How Technology Can Expand Access to Quality Counsel and Transparency in the Criminal Justice System

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## Articles

### UNMUTED: SOLUTIONS TO SAFEGUARD CONSTITUTIONAL RIGHTS IN VIRTUAL COURTROOMS AND HOW TECHNOLOGY CAN EXPAND ACCESS TO QUALITY COUNSEL AND TRANSPARENCY IN THE CRIMINAL JUSTICE SYSTEM

MATTHEW BENDER\*

#### ABSTRACT

A defendant's fundamental right to a public trial, and the press and community's separate right to watch court, has been threatened by the shift to virtual hearings. These independent constitutional rights can be in harmony in some cases and clash in others. They cannot be incompatible.

Public interest in criminal justice transparency is increasingly crystallized, but courts have often become more opaque, which jeopardizes First and Sixth Amendment rights. This Article addresses the conflict and confronts a key question: how can we be assured that remote and virtual hearings like Zoom arraignments or trials guarantee the same rights as traditional court hearings? Instead of rejecting virtual criminal hearings outright, I offer new proposals for how virtual courtrooms can safeguard constitutional rights. I question the prevailing belief that criminal defendants should always reject virtual trials. Virtual trials may lead to better outcomes for some defendants than traditional trials, especially during the

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\* Clinical Instructor and Professor, University of Arkansas School of Law. J.D., University of Michigan Law School. Many, many thanks to Associate Dean and Professor, Tiffany Murphy, for her reviews, comments, and guidance. I also want to thank Michigan Law Professor Eve Primus for helpfully challenging my arguments, which led to important refinement. Drug Court Public Defender Brooke Smith deserves appreciation for her encouragement and detailed explanation of the benefits of virtual court for her clients. I should mention journalist Andrew Epperson for explaining how local news stations cover criminal courts. I am also grateful to Jon Comstock, Deputy Public Defender Paul Teufel, and defense attorney Brian Altman for mooting ideas, along with recent law school graduates Nicholas Linn, Anna Van Der Like, and Alex Carroll for their help and edits. The many front line public defenders who provided feedback and suggestions also deserve acknowledgement.

(1)

ongoing pandemic. Beyond preserving rights in a virtual courtroom, the Article explores ways technology can improve the criminal justice system.

Through an analysis of existing indigent defense and First Amendment scholarship, I address the myth that traditional court decorum should trump open court and virtual hearings. Judicial legitimacy and transparency may benefit when criminal cases are accessible on virtual platforms or livestreamed. Transparency can help safeguard defendants' rights and improve indigent clients' representation and outcomes. Instead of disrupting the courtroom—whether a hearing is virtual or traditional—convenient public access helps a community learn more about the criminal justice system and evaluate cases, judges, and attorneys.

These proposals provide a framework for virtual litigation and show how technology can be leveraged for a more equitable criminal justice system. Livestreams and virtual or remote hearings can improve the right of representation for indigent defendants by increasing access to quality counsel, reducing costs, creating a more competitive legal market, and expanding a client's choice of attorneys.

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## INTRODUCTION

ON June 1, 2020, Avion Hunter was arrested during a Black Lives Matter police brutality protest.<sup>1</sup> At his arraignment on June 10, 2020, the courthouse denied his mother Tanisha Brown from entering to watch her son's arraignment and told her remote viewing was impossible.<sup>2</sup> Avion is only twenty-four and has no criminal history.<sup>3</sup> After ten days of detention, Ms. Brown had expected to see her son appear in court. She was there with friends and family members who wanted to show support, see Avion, and ensure his rights were protected.<sup>4</sup> At a typical arraignment, Ms. Brown would learn her son's charges and potentially testify about his ties to the community, his likelihood of appearance at future court dates, his ability to pay money bail, or her ability to act as a third-party custodian.<sup>5</sup>

Ms. Brown was denied access based on a local court order from March 23, 2020, which prevented "access to any and all courthouses . . . to those persons required to appear in person for a court hearing" and denied public and press access to all court proceedings.<sup>6</sup> On June 26, 2020, she became one of five named plaintiffs in a civil lawsuit brought by the ACLU of Southern California and the First Amendment Coalition requesting safe public access and a viable way to watch criminal court.<sup>7</sup>

The lawsuit resulted from a March 25, 2020, letter from the First Amendment Coalition, which many California civil liberties groups co-signed.<sup>8</sup> The lawsuit challenged what the First Amendment Coalition's executive director called, "widespread instances, to put it most bluntly, of court secrecy."<sup>9</sup> The letter requested the Supreme Court of California issue guidance to lower courts on the specifics of meaningful public access

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1. Complaint for Injunctive and Declaratory Relief at 7, 20, Am. Civil Liberties Union of So. Cal. v. Harber-Pickens, No. 1 20-cv-00889 (E.D. Cal. 2020).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 7, 20; *see also* CAL. CONST. art. I, §§ 12, 28; CAL. R. CRIM. P. 4.105; CAL. PENAL CODE § 1272.1 (Deering 2020) (enumerating the state's bail procedures and release factors, including ability to pay, risk of flight, criminal history, and ties to the community).

6. Superior Court of the State of California, in and for the County of Kern, Miscellaneous Order No. STO-20-005 (Mar. 23, 2020) (quoted and depicted in Complaint for Injunctive and Declaratory Relief, *supra* note 1, at 4–5).

7. Complaint for Injunctive and Declaratory Relief, *supra* note 1.

8. Letter from David Snyder, Exec. Dir., First Amendment Coal., to the Honorable Tani G. Cantil-Sakauye, Chief Justice, Cal. Supreme Court, Public Access to Court Proceedings and Records Amid COVID-19 Crisis (Mar. 25, 2020) (on file with First Amendment Coalition).

9. David Lieb, *Courts Straining to Balance Public Health With Public Access*, ASSOCIATED PRESS (June 28, 2020), <https://apnews.com/article/18547f90185b353c29fdb5dffc137f7> [permalink unavailable] (discussing courts that have denied public access including New York City, and courts that have allowed YouTube livestreams, such as ones in Chicago).

to hearings, criminal proceedings, and court records.<sup>10</sup> While the court-house denied Ms. Brown from watching her son's arraignment, lower courts in other parts of California were permitting public access to virtual hearings and livestreaming criminal proceedings, including first appearances and arraignments, on YouTube.<sup>11</sup>

On the same day Ms. Brown's lawsuit was filed in California, defense attorneys and prosecutors in Minneapolis argued a motion on whether the court should publically broadcast criminal hearings for the four police officers charged with murdering George Floyd.<sup>12</sup> Defense attorneys claimed that public broadcasting would ensure a fair trial, while prosecuting attorneys—and ultimately, the presiding judge—maintained that public broadcasting of the case would obstruct selecting an impartial jury.<sup>13</sup>

The COVID-19 pandemic has required courts to quickly shift to remote and virtual hearings. Many courts have denied public access as they host criminal court hearings as restricted virtual proceedings. The current renegotiation of criminal court rules and norms has created discomfort for courts and has created new concerns.<sup>14</sup> While the pandemic continues, protests have increased after the murder of George Floyd.<sup>15</sup> The renewed interest for transparency and change in the criminal justice system has created a paradox, as courts have too often become less transparent.

Criminal court hearings implicate the public's First Amendment rights to view court proceedings and a defendant's Sixth Amendment right to a public criminal hearing.<sup>16</sup> The press and public have pursued their right to watch criminal court hearings as described in this Article's

10. See Letter from Snyder, *supra* note 8; Complaint for Injunctive and Declaratory Relief, *supra* note 1, at 13–15; see also Shelly Banjo, *Digital Courtrooms Put Justice on YouTube, Zoom*, BLOOMBERG (Apr. 7, 2020, 6:45 AM), <https://www.bloomberg.com/news/newsletters/2020-04-07/digital-courtrooms-put-justice-on-youtube-zoom> [<https://perma.cc/3BBS-ZUBQ>] (discussing the variety of virtual software used by courts, the ease of access, and how virtual livestreams or public access eliminate the inconvenience of watching court).

11. See Complaint for Injunctive and Declaratory Relief, *supra* note 1, at 12–13 (citing occurrences of California state courts permitting virtual hearings within the brief).

12. Order Regarding Audiovisual Coverage, *State v. Chauvin*, No. 27-CR-20-12646 (Minn. Dist. Ct. 4th Jud. Dist. June 26, 2020).

13. Chao Xiong & Stephanie Montemayor, *Judge Denies Audiovisual Coverage of Hearings for Former Officers Charged in George Floyd Killing*, MINN. STAR TRIB. (June 26, 2020, 9:57 PM), <https://www.startribune.com/judge-denies-audiovisual-coverage-of-hearings-for-former-officers-charged-in-george-floyd-killing/571503602/> [<https://perma.cc/58G2-VUHN>].

14. See generally Colleen Shanahan et al., Essay, *COVID, Crisis, and Courts*, 99 TEX. L. REV. ONLINE 10 (2020) (discussing civil cases in state courts, the burden of the COVID-19 pandemic, and opportunities for courts and legislatures to become more transparent and flexible to address civil litigation problems).

15. See *infra* note 137 and accompanying text.

16. See *Presley v. Georgia*, 558 U.S. 209, 211–12 (2010) (“[T]he public trial right rest upon two different provisions of the Bill of Rights . . . .”); see also *Nixon v. Warner Commc'ns*, 435 U.S. 589, 608–11 (1978) (construing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and stating that the press's First Amendment right to

case studies. Among the goals of open courts are increasing the accountability and quality of attorneys, making the public more engaged, and providing an informed check on the judiciary and criminal justice systems.<sup>17</sup>

Defense attorneys have voiced discontent with virtual hearings and have noted, as one of the leading defense practice journals describes, COVID-19's "next victim" is defendants' rights.<sup>18</sup> The prevailing wisdom is that criminal defendants have a right to physically face witnesses, and in many ways, "virtual criminal trials cannot overcome key constitutional hurdles."<sup>19</sup> As the National Association of Criminal Defense Lawyers stated, "[r]emedial measures such as virtual or 'Zoom' trials offend the [C]onstitution."<sup>20</sup> Consequently, some criminal defense attorneys are avoiding virtual trials and insisting on *literal*, face-to-face testimony.<sup>21</sup>

While appellate courts have not ruled on the constitutionality of virtual trials,<sup>22</sup> the pandemic has forced many trial courts to use virtual, pre-trial hearings and to begin virtual jury trials.<sup>23</sup> COVID-19 safety

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attend a trial was satisfied by their ability to attend and report on the historical case due to the Sixth Amendment's guarantee of a public trial).

17. See Potter Stewart, Assos. Justice, U.S. Supreme Court, Address at Yale Law School (Nov. 2, 1974) (Justice Stewart stated, "[t]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches"), reprinted in Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

18. Dubin Research & Consulting, *COVID-19's Next Victim? The Rights of the Accused*, CHAMPION, NAT'L ASS'N CRIM. DEF. LAW., May 2020, at 24–49 ("By requiring reluctant and distracted jurors to perform their key functions during a pandemic, many states are unwittingly undermining the justice system by risking mistrials and faulty verdicts."); see also Melanie Wilson, *The Pandemic Juror*, 77 WASH. & LEE L. REV. ONLINE 65, 78–85 (2020) (noting it is callous to expose jurors to COVID-19 and in-person trials may lead to less representative juries, faulty verdicts, and unnecessary mistrials).

19. Dubin Research & Consulting, *supra* note 18, at 26–39.

20. NACDL EXEC. COMM., NAT'L ASS'N CRIM. DEF. LAW., CRIMINAL COURT RE-OPENING AND PUBLIC HEALTH IN THE COVID-19 ERA 9 (2020) (stating that a virtual hearing compromises a defendant's right to be physically present at trial, impairs jury selection, and prevents effective investigation and an attorney-client relationship); see Jenia I. Turner, *Remote Criminal Justice*, TEX. TECH L. REV. (forthcoming 2021) (finding in a survey of around 200 public defenders in Texas that defense attorneys tend to believe virtual hearings harm clients); see also Janna Adelstein, *Courts Continue to Adapt to Covid-19*, BRENNAN CTR. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19> [<https://perma.cc/28AU-XSEL>] (cautioning against widespread adoption of virtual hearings and arguing for more research and stakeholder engagement before expanding the adoption of virtual court hearings).

21. See generally Dubin Research & Consulting, *supra* note 20.

22. The possible exception to this would be in Michigan where the Supreme Court of Michigan has ruled that the only exception to in-person confrontation is for child witnesses. See *People v. Jemison*, 952 N.W.2d 394, 355–56 (Mich. 2020) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

23. Texas held the first Zoom criminal jury trial where it purchased iPads for jurors with technology issues and completed a traffic ticket trial. See Justin Juvenal, *Justice by Zoom: Frozen Video, a Cat—And Finally a Verdict*, WASH. POST (Aug. 12, 2020, 11:03 AM), <https://www.washingtonpost.com/local/legal-issues/justice-by-zoom->

precautions still require participants to wear masks, stand behind plexiglass, complete health screenings, and practice social distancing when in-person trials are held.<sup>24</sup> Articles highlighting the danger of holding trials during the pandemic have not proposed solutions to the concerns of prolonged detention, pressure to plead cases, and the tolling of time for speedy trial.<sup>25</sup>

While contrarian, virtual hearings and trials may often be in a defendant's best interest during the pandemic so long as virtual hearings replicate constitutional safeguards and preserve rights. But how can we be assured that remote and virtual hearings on Zoom have the same guarantees as the present system?

One of these protections is the right to a public trial.<sup>26</sup> This is where the press and public's *shared and independent* First Amendment right to view court proceedings intersects with a defendant's *exclusive* Sixth

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frozen-video-a-cat—and-finally-a-verdict/2020/08/12/3e073c56-dbd3-11ea-8051-d5f887d73381\_story.html [https://perma.cc/QK3X-DLY7] (discussing the judge's statements that jurors said they would have avoided showing up and that "[t]his type of proceeding probably won't be appropriate for serious cases at this time, but I think this trial shows jury trial by videoconference is something that merits further study, especially during this pandemic," and defense counsel's view is that they "think there are obstacles that need to be overcome, but not walls stopping this technology").

24. Some courts have taken these worries into account. New Hampshire, for instance, created an extensive jury trial protocol in August. See *State Court Trial Plan*, N.H. JUD. BRANCH (2020), <https://www.courts.state.nh.us/aoc/State-Court-Jury-Trial-Plan.pdf> [https://perma.cc/D43D-Q5K3] (stating New Hampshire's guidelines that include summoning extra jurors, screening their health, reading additional instructions, and mandating face shields); see also Robert Patrick, *Federal Court in St. Louis to Start Jury Trials, With Coronavirus Precautions in Place*, ST. LOUIS POST-DISPATCH (July 10, 2020), [https://www.stltoday.com/news/local/crime-and-courts/federal-court-in-st-louis-to-start-jury-trials-with-coronavirus-precautions-in-place/article\\_9bfd2974-051c-5a56-97bb-0dc9cb382700.html](https://www.stltoday.com/news/local/crime-and-courts/federal-court-in-st-louis-to-start-jury-trials-with-coronavirus-precautions-in-place/article_9bfd2974-051c-5a56-97bb-0dc9cb382700.html) [permalink unavailable] (discussing concerns jurors will be worried about contagion and mask and social distancing restrictions will affect testimony).

25. Wilson, *supra* note 18, at 86 (proposing wearing masks and social distancing, and arguing that "pausing all . . . jury trials is a reasonable approach"); see also Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 173–74 (2020) (suggesting wearing uniform masks in court as a safety precaution may check biases and the unscientific judgments fact finders make about credibility); Susan Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFFALO L. REV. 1275 (2020) (providing a normative evaluation of virtual trials, including thorough analysis of scholarship demonstrating demeanor evidence is of little practical use); Turner, *supra* note 20 (surveying practitioners in Texas and suggesting a cautious approach to expanding the use of virtual hearings once the pandemic concludes).

26. See, e.g., *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 606 (1982) ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole."); see also Jocelyn Simonson, *The Criminal Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177 (2014) (discussing the importance of public access because "audiences affect the behavior of government actors inside the courtroom, helping to define the proceedings through their presence").



Amendment right to a public trial.<sup>27</sup> Often these rights amplify one another, but they can also clash. This raises a new question to answer: how do we balance the public's right to be informed and a defendant's right to a public trial when critical stages of a court case happen virtually?

Drawing on existing scholarship, clinical education during the pandemic, and extensive experience litigating criminal cases, this Article proposes practical strategies for practitioners and courts to address this problem.<sup>28</sup> Contemporary trial experiments and pending cases are studied to evaluate the benefits of current technology to defendants and courts. The impact of convenient public access is reevaluated through the lens of modern technology.<sup>29</sup>

Previous articles about public access or technology's role in criminal courtrooms considered technology from a generation ago<sup>30</sup> and evaluated

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27. See *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise II)*, 478 U.S. 1, 7 (1986) (“The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness.”).

28. I do not want to discount concerns about virtual hearings and trials. My goal is to evaluate these problems from a practitioner's perspective and offer guidance for holding constitutionally sufficient virtual hearings or trials in the best way possible during the pandemic. I recognize that virtual hearings present challenges. I have had successful virtual hearings during the pandemic where evidence was easily admitted and testimony was clear, and I have had in-person hearings in the past where technology failed. Many problems in the criminal justice system, such as bias or juror attention, predate the pandemic and are replicated in virtual hearings. I also want to recognize that in many places, people are detained pre-trial, face difficulty appearing in-person for court, or lack quality legal representation because of their location, income, or burdens placed on public defenders. Using virtual technology has made it easier to communicate with detained or incarcerated clients, and present testimony from people in different parts of the country. In just one case in our criminal defense clinic, Zoom jail “visits” have allowed speaking with a client more frequently, better document competency issues by recording attorney-client interactions, and have made it easier to call family members as witnesses who live across the country for pretrial hearings.

29. Interestingly, a past argument that virtual communication was inferior relied in part on the lack of adoption by people and businesses. Obviously, this has changed. See Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1060–61 (2004) (“A telling measure of the deficiency of videoconferencing is its failure to become the common business practice it was predicted to be. Videoconferencing was energetically promoted as a substitute for in-person meetings but has not achieved common use. . . . The reason is that the two mediums are not fully equivalent.”).

30. See, e.g., Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 869–70 (2010) (finding that bail hearings held by closed circuit television in Cook County between 1999–2009 led to worse outcomes for defendants); Nancy T. Gardner, Note, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475 (1985); Christo Lassiter, *TV or Not TV—That Is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928 (1996); Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1004–08 (2004) (discussing technological constraints and the lack of adequate technology for the justice system); Shelly Rosenfeld, *Will Cameras in the Courtroom Lead to More Law and Order? A Case for Broadcast Access to Judicial Proceedings*, 6 AMER. UNIV. CRIM. L. BR. 12 (2010); Clara Tuma, *Open Courts: How Cameras in Courts Help Keep the System*

the influence of video in contexts such as immigration hearings.<sup>31</sup> They have considered the influence of commercialized broadcasts like CourtTV<sup>32</sup> and have debated broadcasting legislative sessions and Supreme Court arguments.<sup>33</sup> A new look at technology's impact is needed, especially in the context of the current pandemic.

Scholars have commented on concerns that court broadcasts (or in modern terms, livestreams) may influence how witnesses, judges, and lawyers behave, damage court decorum, or invade defendants' privacy.<sup>34</sup> Other academics have more skeptically opined that shrouding the justice system in mystery may lead to poor or incompetent judges evading scrutiny and receiving unjustified respect (and often receiving uninformed votes where judges are elected).<sup>35</sup> As one scholar said, "[t]he symbols and

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*Honest*, 49 CLEV. ST. L. REV. 417 (2001); Elizabeth Wiggins, *What We Know and What We Don't Know About the Effects of Courtroom Technology*, WM. & MARY BILL RIGHTS J. 731, 737–38 (2004) (discussing how voice frequencies can be altered by phone lines and videoconferencing, which may affect credibility judgments by decision makers).

31. See, e.g., Ingrid Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 942–49 (2015) (noting the dissatisfaction of immigration attorneys and litigants—including pro-se litigations, which are more common in immigration cases—with video hearings, as well as the possible explanations for differences between in-person and video hearings that are indirect effects of remote hearings such as reduced willingness to participate, communication, and public access); Frank Walsh & Edward Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 278 (2008) (discussing the implications of video technology on immigration cases and arguing the absence of physical presence violates the Due Process clause while noting its efficiency).

32. See MARJORIE COHN & DAVID DOW, *CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE* (1998); David Harris, *The Appearance of Justice, Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 794–96 (1993); Alex Kozinski & Robert Johnson, *Of Cameras and Courtrooms*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1107 (2010).

33. See Kyu Ho Youm, *Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning From Abroad?*, 2012 BYU L. REV. 1989; see also Lili Levi, *Professionalism, Oversight and Institution-Balancing: The Supreme Court's Second Best Plan For Political Debate on Television*, 18 YALE J. ON REG. 315, 326–28 (2001) (discussing the benefits of public access in the realm of political debate).

34. See *Estes v. Texas*, 381 U.S. 532, 578–80 (1965) (Warren, C.J., concurring); see also David Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 918 (2017) (discussing how concerns about privacy has curtailed electronic public access); Paul Coppock, Note, *Doors to Remain Open During Business Hours: Maintaining the Media's (and Public's) First Amendment Right of Access in the Face of Changing Technology*, 58 S.D. L. REV. 319, 334–35 (2013) (discussing judges who have speculated that court broadcasts will alter how people behave and hurt court decorum). See generally David Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807, 1897 (2015) (evaluating where sensitive information appears in court records).

35. See Harris, *supra* note 32; see also Chance Cochran, Note, *Hear No Evil: How Permissive Rules on the Creation and Use of Courtroom Audio Recordings Can Increase Judicial Accountability*, 33 GEO. J. LEGAL ETHICS 423, 423–25 (2020) (discussing dearth of scholarship on public access to courtroom audio, the implication of increased access for holding judges accountable, and preserving judges' autonomy).

rituals of courts may hide significant systematic injustices behind undeserved dignity and respect.”<sup>36</sup>

Virtual hearings and court livestreams may become more common as technology adoption expands and becomes a reality in many places.<sup>37</sup> Technology is a tool, but it is not an antidote without court and attorney buy-in.<sup>38</sup> The problems of indigent defense<sup>39</sup> and advocacy gaps for low-income clients<sup>40</sup> have been rigorously examined by academics. Only a few pilot programs, however, have studied how old technology impacted legal representation<sup>41</sup> or analyzed how public observation through broadcasts affected court hearings.<sup>42</sup> Until now, it has not been possible to consider the ways current technology may improve the quality of indigent defense and lead to better client outcomes.

Beyond addressing current issues affecting criminal cases, virtual technology is evaluated in this Article to see if it can help solve fundamental problems in indigent defense and promote transparency in the justice system. One focus is on how convenient public access through livestreaming court hearings improves the justice system’s legitimacy. A second focus is how virtual and remote hearings can expand the right to representation for indigent defendants and improve the quality of defense counsel. With

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36. Harris, *supra* note 32, at 795.

37. I use the term virtual hearings to mean the same as a remote hearing. To me, these terms are largely interchangeable at this point, although a remote hearing would include telephonic hearings as well.

38. See, e.g., Lucy Lang, *Virtual Criminal Justice May Make the System More Equitable*, WIRED (July 1, 2020, 9:00 AM), <https://www.wired.com/story/opinion-virtual-criminal-justice-may-make-the-system-more-equitable/> [<https://perma.cc/NY7L-FKU6>] (“Not taking action today would be more than a missed opportunity—it would be an injustice to the millions of Americans who could benefit from a justice system built for the modern era.”).

39. See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases*, A NATIONAL CRISIS, 57 HASTINGS L.J. 1031 (2006); Norman Lefstein, *On Legal Aid & Indigent Defendants, Executive Summary and Recommendations: Securing Reasonable Caseloads*, ABA STANDING COMM. (2012); see also Samantha Jaffe, Note, “It’s Not You, It’s Your Caseload”: Using Cronin to Solve Indigent Defense Underfunding, 116 MICH. L. REV. 1465 (2018) (discussing how the excessive caseloads for public defenders create a condition where deficient assistance of counsel is inevitable).

40. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/Q485-BB3X>]; see also Lisa Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL’Y REV. 15 (2018).

41. See RICHARD ZORZA, VIDEOCONFERENCING FOR ACCESS TO JUSTICE: AN EVALUATION OF A MONTANA EXPERIMENT (2007), <https://docplayer.net/3126017-Videoconferencing-for-access-to-justice-an-evaluation-of-the-montana-experiment-final-report.html> [permalink unavailable].

42. See MOLLY JOHNSON ET AL., FED. JUD. CTR. TO THE COURT ADMIN. & CASE MGMT. COMM. OF THE U.S., VIDEO RECORDING COURTROOM PROCEEDINGS IN UNITED STATES DISTRICT COURTS: REPORT ON A PILOT PROJECT (2016), <https://t.ly/ZWz7> [<https://perma.cc/FN2N-3ZJV>]; CONG. RESEARCH SERV., R44514, VIDEO BROADCASTING FROM FEDERAL COURTS: ISSUES FOR CONGRESS (2019).

appropriate precautions, the benefits of virtual hearings can create a more responsive, alert, and equitable criminal justice system.

While the change was sudden, the day courthouse doors fully reopen cannot be forecast and will likely vary among states and regions. In the short term, courts must abide by constitutional principles and create functioning, virtual, remote justice systems. On a longer timeline, courts can adopt technology and experiment with virtual and remote hearings to improve transparency, flexibility, and equal justice.

This Article proceeds in six parts. Part I overviews the constitutional guidance governing public access. Part II considers contemporary approaches by courts to virtual access and livestreams, and selectively surveys some jurisdictions' approaches (focusing on Texas, Arkansas, Minnesota, and California case studies to highlight approaches and evaluate their outcomes and constitutional adequacy). Part III considers practical ways to protect defendants' rights when criminal cases proceed virtually. Part IV evaluates the influence of virtual court hearings and livestreams on judicial legitimacy and transparency. Part V discusses how virtual and remote hearings can improve indigent defense, especially for underserved areas, and provide courts and parties with savings and flexibility. The Article concludes with suggestions for more efficient courts and public defender systems.

#### I. A BRIEF HISTORY OF PUBLIC ACCESS AND COURT BROADCASTS

The Sixth Amendment right to counsel attaches to all phases of criminal cases.<sup>43</sup> A defendant's right to a public trial includes preliminary hearings.<sup>44</sup> The Supreme Court has also held that the press and public have a similar, independent right under the First Amendment to attend all criminal proceedings in both federal and state courts.<sup>45</sup> Similarly, courts must accommodate public attendance at criminal hearings, and closures are

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43. *See, e.g.*, *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (holding the right to counsel attaches at the initial appearance, such as where bail is set and probable cause based on a police officer's statement is determined, and does not require a prosecutor to be present or even informed); *McNeil v. Wisconsin*, 501 U.S. 171, 180–81 (1991) (“The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused . . .”).

44. *See Presley v. Georgia*, 558 U.S. 209, 212 (2010) (holding the right to a public trial extended to jury selection); *see also Waller v. Georgia*, 467 U.S. 39, 48 (1984) (holding the Sixth Amendment right to a public trial extends to pretrial hearings, and stating “there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public”); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492–93 (1975) (discussing that a criminal case is a public event and even sensitive information in the public record may be broadcast).

45. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980) (establishing that the First Amendment guarantees the public a right of access to judicial proceedings).

subject to strict scrutiny.<sup>46</sup> A limitation on public access should be rare because a “presumption of openness” must be overcome to deny public access.<sup>47</sup> Specific judicial findings must show that “closure is essential to preserve higher values and is narrowly tailored to serve that interest.”<sup>48</sup> In some instances, an inadequately justified closure of court proceedings constitutes structural error, requiring automatic reversal and the granting of a new trial.<sup>49</sup>

A. *The Early Focus on Disruptions from Broadcasting Limited Public Access*

Public access to court cases predates the United States and is enshrined in the Bill of Rights.<sup>50</sup> Courts, however, initially resisted cameras, famously so, during the Hauptmann trial in 1935 when Bruno Hauptmann was tried in New Jersey for kidnapping and killing Charles Lindbergh’s infant son.<sup>51</sup> At the time, television technology was new and created a broadcasting sensation.<sup>52</sup> Courts responded after the case with broadcast blackouts.<sup>53</sup>

By 1965, all federal courts and forty-seven state courts had banned television cameras in the courtroom—federal courts had further banned radio and video broadcasting of criminal trials by arguing Federal Rule of

46. See *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 606–07 (1982); see also *Waller*, 467 U.S. at 47 (“The need for an open proceeding may be particularly strong with respect to suppression hearings.”). But see *United States v. Osborne*, 68 F.3d 94, 98–99 (5th Cir. 1995) (distinguishing *Waller* and holding that protection of the minor witness from emotional harm was a substantial reason justifying the courtroom’s partial closure).

47. *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise I)*, 464 U.S. 501, 510 (1984); see also *Richmond Newspapers*, 448 U.S. at 573 (“From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.”).

48. *Press-Enterprise I*, 464 U.S. at 510; see also *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise II)*, 478 U.S. 1, 3–4 (1986) (holding a preliminary hearing shall not be closed unless there is a substantial probability a defendant will be prejudiced by publicity that closure would prevent, and reasonable alternatives to closure cannot adequately protect the right and rejecting California’s reasonable likelihood test).

49. See, e.g., *Presley*, 558 U.S. at 212–15; *Waller*, 467 U.S. at 48.

50. See generally *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (“[E]very citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.”).

51. See *State v. Hauptmann*, 180 A. 809 (N.J. 1935).

52. See Daniel Stepniak, *Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions*, 12 WM. & MARY BILL RIGHTS J. 791, 793–95 (2004) (discussing *Hauptmann*, and commenting that the notorious camera interference may be apocryphal).

53. The ABA adopted Canon 35, which said, “the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.” Am. Bar Ass’n, *Canons of Judicial Ethics*, 62 ANN. REP. AM. B. ASS’N 1123, 1134–35 (1937).

Criminal Procedure Rule 53 prevented that access.<sup>54</sup> In *Estes v. Texas*,<sup>55</sup> the Supreme Court held the disruption of a media broadcast violated a defendant's due process rights, and public access did not extend to a reporter's right to broadcast.<sup>56</sup> Interestingly, Justice Harlan in his concurrence remarked, "the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."<sup>57</sup>

The Court's perception of broadcasting trials had changed by 1981 when it held in *Chandler v. Florida*<sup>58</sup> that television broadcast of a criminal trial was not a per se due process violation.<sup>59</sup> Following the decision, the American Bar Association (ABA) and state courts gradually crafted guidelines to allow public access and broadcast of criminal trials.<sup>60</sup> Along with *Chandler*, in *Richmond Newspapers v. Virginia*,<sup>61</sup> the Court addressed the benefits of a public trial for defendants.<sup>62</sup> Although a First Amendment case, the Court explained that an open trial is more likely to be conducted fairly, participants are more inclined to honesty, and community outrage and concern tends to be channeled away from "vengeful 'self-help.'"<sup>63</sup>

B. *The Court Emphasizes the Importance of Public Access and Eventually Allows Broadcasts*

*Chandler* departed from the reasoning in past cases, which curbed video broadcasts.<sup>64</sup> *Chandler* also analyzed public access from the perspective of a defendant's Sixth Amendment right to a public trial, and the Court concluded a public trial often is an important benefit.<sup>65</sup> It recognized a "defendant's right to a verdict based solely upon the evidence and the relevant law" but found "courts have developed a range of curative devices to prevent publicity about a trial from infecting jury deliberations."<sup>66</sup>

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54. Stepniak, *supra* 52, at 795.

55. 381 U.S. 532 (1965).

56. *Id.* at 546–47, 565.

57. *Id.* at 595 (Harlan, J., concurring).

58. 449 U.S. 560 (1981).

59. *Id.* at 576 ("[M]any of the negative factors found in *Estes*—cumbersome equipment, cables, distracting lighting, numerous camera technicians—are less substantial factors today than they were at that time.").

60. See CODE OF JUDICIAL CONDUCT CANON 3A(7) (AM. BAR ASS'N 1982). Canon 3A(7) was quickly eliminated for being too restrictive. ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES § III (1990).

61. 448 U.S. 555 (1980).

62. See *id.* at 569–71.

63. *Id.*

64. *Chandler v. Florida*, 449 U.S. 560, 577 (1981) (distinguishing *Estes v. Texas*, 381 U.S. 532 (1965)).

65. *Id.*

66. *Id.* at 574 (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 563–65 (1976)).

The Court expanded on its analysis in *Globe Newspaper v. Superior Court for Norfolk County*,<sup>67</sup> where it held that closing a criminal trial to the public must be rare, and the decision is subject to strict scrutiny analysis.<sup>68</sup> The Court based its decision on the fact that “[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.”<sup>69</sup> Expanding upon *Globe Newspaper*, the Court held in *Press-Enterprise Co. v. Superior Court of California (Press-Enterprise I)*<sup>70</sup> that before a court closes a criminal hearing it must show “[the] presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”<sup>71</sup> The findings must be adequately articulated, and a court must consider alternatives to closure.<sup>72</sup>

In *Waller v. Georgia*,<sup>73</sup> the Court articulated a test for closing a criminal hearing over a defendant’s objection.<sup>74</sup>

[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, 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.<sup>75</sup>

In *Press-Enterprise Co. v. Superior Court of California (Press-Enterprise II)*,<sup>76</sup> the Court created an experience and logic test to determine whether First Amendment rights attach to a pretrial criminal proceeding.<sup>77</sup> Applying the test, the Court ruled that the First Amendment applied to pretrial hearings.<sup>78</sup> A preliminary hearing can be closed only if there is a substantial probability of prejudice to the defendant as a result of publicity.<sup>79</sup> There must also be no reasonable alternatives that exist to protect the defendant’s rights.<sup>80</sup> The Court noted, “the absence of a jury, long recognized as ‘an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge,’ makes the

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67. 457 U.S. 596 (1982).

68. *Id.* at 606–07.

69. *Id.* at 606.

70. 464 U.S. 501 (1984).

71. *Id.* at 510.

72. *Id.* at 511 (holding the trial court failed to consider alternative to closing jury selection that would adequately have protected the interests of the jurors its order was meant to safeguard).

73. 467 U.S. 39 (1984)

74. *See id.*

75. *Id.* at 48.

76. 478 U.S. 1 (1986).

77. *See id.* at 13–14.

78. *Id.*

79. *Id.*

80. *Id.* at 14.

importance of public access to a preliminary hearing even more significant.”<sup>81</sup>

## II. THE UNPLANNED SHIFT TO VIRTUAL HEARINGS

Courts have faced new challenges during the COVID-19 pandemic.<sup>82</sup> Before the pandemic, federal courts prohibited broadcasting criminal trials.<sup>83</sup> On March 27, 2020, a provision in the CARES Act authorized federal courts to conduct “video teleconferencing, or telephone conferencing if video conferencing is not reasonably available in a host of criminal proceedings.”<sup>84</sup> This included detention hearings, initial appearances, preliminary hearings, waivers of indictment, arraignments, misdemeanor pleas and sentences.

Many federal courts began to host court proceedings virtually, often using the Zoom Webinar format. On April 3, 2020, the Administrative Office of the United States Courts provided revised guidance, announcing

[m]edia organizations and the public will be able to access certain criminal proceedings conducted by videoconference or teleconference for the duration of the coronavirus (COVID-19) crisis. . . . This authorization is interpreted to permit courts to include the usual participants and observers of such proceedings by remote access.<sup>85</sup>

Many federal courts allow public access to virtual hearings upon a timely request while others impose restrictions.<sup>86</sup> Several appellate courts are

81. *Id.* at 12–13 (citation omitted) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

82. Responses in other countries have been similar. *See, e.g.*, Kate Puddister & Tamara A. Small, *Trial by Zoom? The Response to Covid-19 by Canada’s Courts*, 53 CAN. J. POLIT. SCI. 373 (2020).

83. Broadcast coverage of criminal trials is prohibited in federal court. *See* FED. R. CRIM. PRO. 53. Some appellate courts, such as the Ninth Circuit, have allowed television broadcasting of high-profile appellate cases. *See, e.g.*, *Live! Broadcasting High-Profile Appeals Reignites Cameras in the Courtroom Debate*, REP. COMMITTEE FOR FREEDOM PRESS (Winter 2011), <https://www.rcfp.org/journals/the-news-media-and-the-law-winter-2011/live-broadcasting-high-prof/> [https://perma.cc/9R8X-Y3TB].

84. Coronavirus Economic Stabilization (CARES) Act of 2020, Pub. L. 116-136 § 15002(b) (codified as 15 U.S.C. § 116 (2018)).

85. Press Release, U.S. Courts, Judiciary Provides Public, Media Access to Electronic Court Proceedings (Apr. 3, 2020), <https://www.uscourts.gov/news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings#:~:text=judiciary%20Provides%20Public%2C%20Media%20Access%20to%20Electronic%20Court%20Proceedings,-Published%20onApril&text=media%20organizations%20and%20the%20public,guidance%20provided%20to%20federal%20courts> [https://perma.cc/W6XY-D2EC].

86. *See* Revised Public Notice, U.S. District Court Northern District of N.Y. (Apr. 15, 2020). *But cf.* U.S. District Court for the District of R.I., Amending General Order Regarding Criminal Matters During Coronavirus Pandemic (Mar. 30, 2020) (allowing public access but only permitting telephone hearings based on the “unavailability of reliable and available video conferencing”); Standing Order No.



livestreaming cases on their YouTube channels, while some district courts are permitting access to livestreams hosted by the court itself.<sup>87</sup> The future use of virtual criminal hearings is receiving reconsideration.<sup>88</sup>

Like the federal court system, many state courts have moved to telephone or virtual hearings due to health concerns and courtroom capacity constraints. State courts have experimented with different approaches. In Cook County, Illinois, courts have permitted YouTube broadcasts of court proceedings. Courts in some areas of California have allowed YouTube streams with an easy to find YouTube Channel.<sup>89</sup> Where YouTube streams exist, the broadcasts are usually only streamed, not saved, and comments are disabled.<sup>90</sup> Approaches among state courts to virtual hearings and public access are neither uniform nor always clear.<sup>91</sup>

A. *A Comparison of Access Bans: Kern County, California and Washington County, Arkansas*<sup>92</sup>

Even before the move to virtual hearings, the public's ability to watch a criminal case is logistically difficult to see in-person. Almost all cases and courtroom decisions go unnoticed.<sup>93</sup> So, most people pay little attention to cases beyond news coverage. The shift to virtual proceedings can make

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20-20, *In re Public and Media Access to Judicial Proceedings During COVID-19 Pandemic* (D.D.C. Apr. 8, 2020) (providing no guidance in a standing order other than to prohibit recording or rebroadcasting and threatening sanctions).

87. General Order, *In Re: Public Access to Video or Teleconference Hearings*, No. 2:20-mc-3910-ECM (M.D. Ala. Apr. 4, 2020).

88. See Pub. L. 116-136 § 15002(b)(1) (stating courts may find that use of virtual proceedings creates more efficiency without meaningfully sacrificing fair process). The House Judiciary Subcommittee has also addressed best practices for virtual court proceedings. See House Comm. on the Judiciary, *Federal Courts During the Covid-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future* (June 25, 2020), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3053> [<https://perma.cc/T3UA-639Y>].

89. See CaliforniaCourts, YOUTUBE, <https://www.youtube.com/c/CaliforniaCourts/channels> [<https://perma.cc/H8BF-52WM>] (last visited Jan. 20, 2021).

90. See, e.g., David Struett, *Court TV: Cook County Livestreaming Court Proceedings During Coronavirus Pandemic*, CHI. SUN TIMES (Apr. 15, 2020, 12:09 PM), <https://chicago.suntimes.com/2020/4/15/21222214/cook-county-circuit-court-livestream-youtube-proceedings-coronavirus-pandemic> [<https://perma.cc/T3MB-45J8>].

91. See generally Shanahan et al., *supra* note 14, at 4 (noting courts gave “more than 6,000 orders modifying the functioning of state civil courts, representing remarkable action in a very short period of time”).

92. I selected Arkansas as one jurisdiction to examine because it is where I practice. The vague standards of the rule have created confusion in many counties and have resulted in judges prohibiting public access to criminal hearings during the COVID-19 pandemic. Many of the issues are similar to the ones present in Kern County, California.

93. See, e.g., Eagly, *supra* note 31, at 994–1001 (discussing the harms of immigration video hearings without public access and a court watch movement to remedy the lack of transparency); Bryce Covert, *The Court Watch Movement Wants to Expose the 'House of Cards,'* APPEAL (July 16, 2018), <https://theappeal.org/court-watch-accountability-movement/> [<https://perma.cc/5JEW-PF2W>].

public access more convenient. Rightfully, many courts have avoided constitutional problems by using virtual hearings as an opportunity to make public access more convenient, but some courts have switched to virtual court during the pandemic and prohibited meaningful public access.<sup>94</sup>

Beyond violating constitutional rights, obstructing public access makes monitoring or easily participating in court hearings difficult or impossible, and transparency projects have been placed on standby.<sup>95</sup> The presence of workable judicial guidance and administrative rules seems to help maintain open criminal hearings and public access. Even when existing administrative rules do not address public access or a public criminal hearing, constitutional guarantees apply.

A criminal case can be restricted or closed only if the court finds a substantial likelihood of prejudice to a defendant, and denying public access is the least restrictive means to safeguard the defendant's right to a fair trial.<sup>96</sup> Yet, courts in some states have restricted public access to proceedings—even when ostensibly acknowledging constitutional rights.

Tanisha Brown's frustration with exclusion from her son's arraignment highlights the direct and personal effects of a public access ban. Along with Tanisha, other plaintiffs in the lawsuit were denied access to watch preliminary hearings and jury trials involving their family members, and volunteers for Court Watch—a program that monitors court proceedings to promote accountability—were excluded from watching preliminary hearings.<sup>97</sup>

Ms. Brown's lawsuit challenged Kern County Court's standing order, which restricted "access to any and all courthouses . . . to those persons required to appear in person for a court hearing," and banned all public and press access.<sup>98</sup> The Kern County court stated its order was narrowly

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94. See generally *supra* notes 88–91.

95. The lack of public access to virtual court proceedings is not unique to Arkansas. See, e.g., Jamiles Lartey, *The Judge Will See You on Zoom, but the Public Is Mostly Left Out*, MARSHALL PROJECT (Apr. 13, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out> [<https://perma.cc/JEX9-ZHYB>].

96. See *supra* notes 43–48 (discussing Supreme Court case law on the intersection of the First and the Sixth Amendment).

97. See Complaint for Injunctive and Declaratory Relief, *supra* note 1, at 4, 6, 17–19; see also Simonson, *supra* note 26, at 2179–90 (arguing that public participation like Court Watch programs are crucial for democratic criminal justice, to uncover power imbalances, to expose structural harms, and to hold court proceedings accountable through their presence); see also Wilson, *supra* note 18, at 89 (discussing that excluding the public from criminal trials raises concerns the justice system is not working properly); Beth Schwartapfel, *The Prosecutors: Court Watch NYC Is The Latest Local Group Monitoring the Criminal Justice System As It Happens*, MARSHALL PROJECT (Feb. 26, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/02/26/the-prosecutors> [<https://perma.cc/S3VN-LFT8>] (“Open courts are one of the great hallmarks of our justice system and we welcome the engagement and public accountability that court observers provide . . .”).

98. Complaint for Injunctive and Declaratory Relief, *supra* note 1, at 3 (alteration in original) (internal quotation marks omitted).

tailored to serve the state of California's compelling interest in public health and safety, and suggested that no less restrictive alternative existed.<sup>99</sup> The complaint filed by the ACLU and First Amendment Coalition noted, however, that nearby counties had implemented less restrictive means such as allowing remote YouTube access.

After Ms. Brown was denied access to her son's arraignment, Kern County amended its standing order to permit limited access through permission from the court or an attorney of record.<sup>100</sup> Kern County later created a process for remote and virtual public access through the GoToMeetings program, but it continued to deny access to some proceedings, such as voir dire, and did not maintain information on how to access virtual attendance on its website.<sup>101</sup>

In Washington County, Arkansas, the people detained, their families, and reform advocates face the same problem as Ms. Brown. The lack of public access to first appearance hearings is especially prejudicial in Arkansas because of the systemic denial of counsel at bail hearings. In many counties in Arkansas, appointed counsel is not present at an indigent defendant's first appearance, which occurs within seventy-two hours of detention.<sup>102</sup> The first appearance is the initial opportunity for defendants to address their bail and reasons for release, and the lack of counsel prejudices defendants.<sup>103</sup>

Even where public defenders are present to make bail arguments, they often lack time and resources to meet with clients and adequately develop release and bail factors for these hearings. Consequently, arguments at first appearances are hurried, and conflicts are prominent. While this problem predates COVID-19, the shift to virtual hearings has caused new problems because the local rules applied to virtual hearings preclude meaningful public access or participation from witnesses.

99. *Id.*

100. *Id.* at 4.

101. *Id.* at 6–7.

102. *See generally* ARK. R. CRIM. P. 8–9.

103. In Washington County, Arkansas, staff from the full-time public defender's office typically meet with clients the morning of the first appearance hearings (locally called an 8.1 hearing where a public defender is appointed only for bail arguments for people detained), which are combined with arraignment hearings for both people who are detained and released, at about 8:00 a.m. (arraignments occur two to four weeks later where the public defender's office is officially appointed to represent indigent clients). Bail hearings and arraignments begin at about 9:30 a.m. The county prosecutor's office works with judges to docket arraignments and traditionally schedules about twenty-five per day. The number of defendants with first appearance hearings fluctuates based on arrest volume. Normally, there are between twenty to fifty people. Bail arguments may be considered at both a first appearance and an arraignment. The public defender usually staffs two attorneys and three or four staff members or student volunteers to meet and counsel indigent defendants. In many regions, indigent clients do not receive counsel at initial hearings, even in large Arkansas counties like Faulkner and Benton. *See generally* ARK. R. CRIM. P. 8–9.

In Arkansas, the use of cameras, tape recorders, cell phones, or other equipment to “broadcast, record, photograph, e-mail, blog, tweet, text, post, or transmit by any other means except as may be allowed by the court” during court proceedings is governed by Administrative Order No. 6.<sup>104</sup> Administrative Order 6, however, was last updated in 2011 before virtual hearings in the state, and even before the state’s implementation of an electronic filing system. It also conflicts with the state’s criminal procedure rules on public access.<sup>105</sup>

Under Administrative Order 6, Arkansas courts may allow broadcasting, recording, and photography under certain conditions.<sup>106</sup> The only additional guidance is an Emergency Order dated June 11, 2020, from the Arkansas Supreme Court stating “[c]riminal jury trials shall be conducted in person, except that voir dire may be conducted by videoconference by agreement of the parties.”<sup>107</sup> The Arkansas order does not address pre-trial hearings, guidelines for if a party objects, public access, or how to conduct virtual, traditional, or hybrid hearings.

Arkansas’ rule suffers from several failures that have provided cover for judges to prohibit public access. Administrative Order 6 mentions objections but does not define a timeline for notice or clarify when an objection must be raised. This allows a judge to have unchecked discretion to rule that notice is not timely or that an objection should be sustained. There is also no standard of review in either the rule or case law. This vagueness allows judges to prohibit broadcasting by livestreaming or virtual public access if one party objects and to sua sponte prohibit public access by finding that any notice of a broadcast is not timely. At a minimum, a timeline, a balancing test to weigh objections, constitutionally valid language, and a standard of review are all needed for the rule to be functional.

In the absence of a workable rule, many Arkansas courts have prohibited public access to the disadvantage of defendants and the public. When approached about allowing public access to virtual first appearance and arraignment hearings, a local district judge who handles almost one-third of first appearances and arraignments in Washington County—one of the

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104. Ark. Admin. Order No. 6 (2011).

105. Under section 77(b) of the Arkansas Rules of Civil Procedure, “[a]ll trials and hearings shall be public except as otherwise provided by law,” and pursuant to Ark. Code Ann. 16-13-222, trial courts are open to the public with the exception of adoption hearings, juvenile matters, and domestic relations cases. ARK. R. CIV. P. 77(b).

106. Compare Ark. Admin. Order No. 6, with CAL. R. CT. 1.150. California judges must consider nineteen factors to determine if a broadcast is permitted. Rule 1.150 tells judges to consider “[a]ny other factor the judge deems relevant” and, among other factors, the need for maintaining public trust in the judicial system and public access, but categorically prohibits broadcasting jury selection. CAL. R. CT. 1.150.

107. *In re* Response to the COVID-19 Pandemic, 2020 Ark. 249, at \*2 (June 11, 2020) (per curiam).

State's largest judicial districts—responded in a public email on June 1, 2020:

As I understand it, the Circuit Judges are conducting most of their hearings, whether criminal or otherwise, by Zoom. . . . It is probably the most practical way for them to continue to move their dockets along and provide some public access, however imperfect. . . .

Balancing public safety, efficient Court operation, and access to the public has been tricky, and I welcome any suggestions anyone may have to make it better.

Public access to these proceedings is very important to me, both personally and professionally. The Judicial Branch is, to me, the most complicated and misunderstood branch of government. It is important to me that people see what we do so that they can not only understand the process, but also understand the reasons why we do what we do. I want people to understand why I make the decisions I make. More access gives people a better chance to do that.

I will make an effort to find a way to both give electronic access to anyone who wants it, and to address the problems that have arisen so far. . . . Again, it's important to me to make these hearings, and every hearing, publicly available, and any suggestions you may have will certainly be considered.<sup>108</sup>

In his email, Washington County Judge Nations' enthusiasm for transparency and public education is noteworthy. Attempting to establish a solution, community members responded with suggestions for using Zoom's Webinar software, including suggestions to identify sources of funding. In response, the group of judges who handle almost all first appearances, arraignments, and bail hearings replied on June 4, 2020:

Judge Jones, Judge Harper and I have spent several hours this week working on this problem. . . .

We do not have this Webinar service, and therefore we think we cannot currently provide access to our Zoom hearings without everyone who is watching appearing on the screen. . . . This is a big problem for us, because it impairs our ability to clearly see the faces of everyone when we are on gallery view.

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108. E-mail from the Honorable Graham Nations, Dist. Judge, Wash. Cty., Ark., to Sarah Moore, Ark. Justice Reform Coal. (June 1, 2020, 8:02 AM) (on file with author), <https://t.ly/sOIR> [permalink unavailable].

*Seeing facial expressions is a big part of what we do, and is integral to making decisions in these cases. We are given such a small window of time and such scant information when we make bond decisions that every piece of information we can get is crucial. Facial expressions, body language, and non-verbal communication have a huge bearing on these cases. These things can and do sway decisions in first appearance hearings. Judge Jones, Judge Harper, and I are not comfortable with any circumstance that will make that part of our job harder.*

We also have a degree of concern about allowing [uneven] access to these meetings to only a few people this way. . . . That lack of uniformity also bothers us. We are not insensitive to your plight. . . .

While it's important to us that the public has access (for reasons I've stated previously), we cannot allow that access to impair our ability to make decisions. . . . [I]f we had the ability with our current state-provided system to allow the public to view proceedings online without hampering our view of defendants and lawyers, we would let you do it that way. . . . Maybe . . . someone can find a way to use Zoom Conferencing and make it available to public viewing without impairing our view of the defendants and lawyers in these cases.<sup>109</sup>

Beyond acknowledging the assembly-line structure of first appearance and bail hearings, the judges' decision superseded First and Sixth Amendment rights for judicial economy. Judge Nations' graphic emphasis on needing to see "[f]acial expressions, body language, and non-verbal communication" to make decisions is interesting—his evaluation is based more on heuristics than appropriate release factors.<sup>110</sup> This is in spite of research that shows algorithms are better at predicting defendants' danger on release than judges.<sup>111</sup> Studies have also shown that a judge's psychological biases, such as the quality of a defendant's clothing, lead to different bail determinations for similarly situated defendants.<sup>112</sup> On the other hand,

109. E-mail from the Honorable Graham Nations, Dist. Judge, Wash. Cty., Ark., to Sarah Moore, Ark. Justice Reform Coal. (June 4, 2020, 6:26 PM) (on file with author) (emphasis added).

110. *Compare id.*, with ARK. R. CRIM. P. 8–9 (codifying the state's bail and release factors and nature of first appearance hearings); *see also* Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235 (2018) (discussing how high bails, which lead to pretrial detention, incentivizes pleas and are a significant factor in the nation's increase in mass incarceration).

111. *See, e.g.*, Meghan Stevenson, *Assessing Risk Assessments in Action*, 103 MINN. L. REV. 303 (2018) (surveying research on risk assessment tools such as algorithms that arguably reduce incarceration and recidivism); *see also* Jon Kleinberg et al., *Human Decisions and Machine Predictions*, 133 Q. J. ECON. 237, 270–71 (2018) (finding statistical tools are better at predicting future offenders than judges).

112. *See, e.g.*, Wiseman, *supra* note 110, at 267 (citing Mitchell P. Pines, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 COLUM.

research has found the hearing format did not affect the success rate of immigration relief in immigration hearings.<sup>113</sup>

The letter indicates, though, that with an unobstructed image, the judge can ascertain his *important* release factors. When a detainee's physical appearance, however, has such a *huge bearing* on release and bail decisions that the concern overrides constitutional rights, public observation of first appearance proceedings is essential.<sup>114</sup> If a judge's approach to setting bail relies on appearance, it creates anxiety that overt or implicit biases may be affecting outcomes.<sup>115</sup>

The local public access colloquy concluded in a final mail reply from the district judges on June 11, 2020, following the county government's decision to livestream one morning's first appearance, arraignment, and bail hearings on YouTube:

After conferring with Judge Nations, Judge Harper, Judge Threet and Judge Bryan, we are in agreement that that [sic] the broadcast of our court proceedings are [sic] a possible violation of Supreme Court Administrative Order Six. We were not conferred with before that decision was made. We have decided that the proceedings will continue to be available for viewing live in the

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J.L. & SOC. PROBS. 394, 408 (1973)). Studies have also examined the issues of video hearings in the immigration context, finding mostly negative outcomes for people's immigration cases; but these hearings involved detained individuals, early adoption, and assembly-line justice. See Eagly, *supra* note 31, at 972–77 (examining the difference between video and in-person immigration hearings and attorneys' negative views of videoconference hearings).

113. See Eagly, *supra* note 31, at 983–88 (discussing these findings only in the context of uniform immigration hearings, and recognizing that outcomes did go down when video hearings were implemented likely because of litigants' willingness to participate by pursuing claims, in part because of attorneys' perceptions of success, the added complexity pro se litigants faced, and the difficulty of attorney-client communication for detainees at immigration facilities).

114. Bias in pretrial detention and bail decisions has been identified as a contributor to racial inequality and increased incarceration. See Brandon P. Martinez et al., *Time, Money, and Punishment: Institutional Racial-Ethnic Inequalities in Pretrial Detention and Case Outcomes*, 66(6-7) J. RES. CRIME & DELINQ. 837 (2020); see also Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529 (2017) (finding higher pretrial detention rates explain forty percent of the black-white gap in rates of being sentenced to prison and twenty-eight percent of the Hispanic-white gap); Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471 (2016) (finding that detention on money bail, which affects nearly half a million people in the United States, causes a twelve percent rise in the likelihood of conviction, and a six- to nine-percent rise in recidivism); Eagly, *supra* note 31, at 974 n.184 (noting immigration judges are trained not to base decisions on heuristics because nonverbal demeanor varies widely across cultures).

115. Consider a straightforward definition of racial bias, “[it] is not merely a simplistic hatred. It is, more often, broad sympathy toward some and broader skepticism toward others.” TA-NEHISI COATES, *WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY* 123–24 (2017).

quorum court room and the county will insure [sic] that anyone will have access as long as they conform to the precautions needed as a result of Covid. This will conform to that administrative rule, constitutional requirements and basic fairness to those defendants who appear and all who which [sic] to observe.<sup>116</sup>

The basis of the judges' decision is unclear—the virtual hearings were already arguably broadcast (albeit without public access) and involved legitimate public interest. So, in the absence of a workable rule, the judges declared that timely notice of a public access request, or notice of the YouTube broadcast, was insufficient. It is not clear which ground the judges relied on.<sup>117</sup> This finding occurred in the absence of any party's objection and overlooked that a lack of an objection would make notice moot.

The Washington County judges' decision is legally dubious and corrosive to the legitimacy of first appearance and bail hearings in their courts.<sup>118</sup> From a First Amendment perspective, it freezes speech by prohibiting access.<sup>119</sup> As for following constitutional rules, the judges did not identify a substantial probability that a defendant would be prejudiced by public access, or make any findings on the existence or lack of reasonable alternatives to protect defendants' rights.<sup>120</sup> Before effectively closing the hearings to the public (without hearing any objections), the judges failed to articulate an overriding interest that a defendant was likely to be

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116. E-mail from the Honorable Clinton Jones, Dist. Judge, Wash. Cty., Ark., to Sarah Moore, Ark. Justice Reform Coal., & the Honorable John Threet, Dist. Judge, Wash. Cty., Ark. (June 11, 2020, 3:47 PM) (on file with author), <https://t.ly/sOIR> [permalink unavailable].

117. *Compare id.*, with FRANZ KAFKA, *THE TRIAL* 161–62 (John R. Williams trans., Woodsworth ed. 2009) (1925) (describing, in the Parable of the Gatekeeper, how a person who believes the law should be accessible to everyone experiences impossible difficulties trying to access the law—considered the source of supreme authority and truth—and is obstructed with a series of doors guarded by a series of even more fearsome doorkeepers).

118. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (“Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone: ‘Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.’” (quoting JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (1827))).

119. *See Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (“A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.”); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (holding a criminal case is a public event and sensitive information can be broadcast).

120. *See Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 13–14 (1986).



prejudiced, did not determine that the closure was not overly broad, and did not consider reasonable alternatives to closure.<sup>121</sup>

The restriction on public first appearances and arraignments arguably denied defendants their Sixth Amendment right to a public trial.<sup>122</sup> Although the judges restricted a right that benefits both defendants and the public, they did not make specific findings for limiting public access, and they impermissibly burden-shifted the responsibility to defendants and the public to identify reasonable alternatives.<sup>123</sup> This defies the Supreme Court's holding that "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials."<sup>124</sup>

Beyond improperly restricting public hearings, the Washington County judges placed defense attorneys in a predicament. For most court proceedings, an administrative policy would be useful so that defense attorneys can discuss it with their clients. Without guidance, the likely solution is for defense attorneys to discuss the option of a public hearing or trial with clients, and litigate their clients' Sixth Amendment right to a public trial.

Meanwhile, public advocacy organizations continued to request access and wrote for guidance from the Arkansas Supreme Court in a letter dated June 15, 2020:

We are writing to respectfully ask the Court to issue guidance for all our state courts to use in maintaining public access to court proceedings during Covid-19, given that courts have been advised to limit the number of attendees and many judges are holding court proceedings virtually. We feel this is important to maintain public access via virtual attendance to court . . . . Specific guidance would help our state courts comply with Administrative Rule No. 6 while following the current emergency guidelines issued by this Court and still allow the public to have access to the courts.<sup>125</sup>

No response was received. Soon after, in an order dated July 21, 2020, an Arkansas trial court in Benton County set a jury trial to begin on July 29, 2020 despite vague judicial guidance.<sup>126</sup> The trial court ordered all peo-

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121. *See, e.g.*, *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (describing the judicial findings required to close a court proceeding to the public).

122. *See Presley v. Georgia*, 558 U.S. 209, 215 (2010).

123. *See id.*; *Waller*, 467 U.S. at 48; *Press-Enterprise II*, 478 U.S. at 13–14; *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984); *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 606 (1982).

124. *See Presley*, 558 U.S. at 215.

125. Letter from the Ark. Justice Reform Coal. to Marty Sullivan, Dir., Ark. Supreme Court (June 15, 2020) (on file with author), <https://t.ly/sOIR> [permalink unavailable].

126. *See Order Scheduling Jury Trial, State v. Duffy*, No. 04CR-19-2936 (Ark. Cir. July 22, 2020).

ple in the courtroom to wear masks.<sup>127</sup> The defendant objected to a six-person jury panel and virtual jury selection using the GoToMeetings virtual software.<sup>128</sup> The court sustained the defendant's objection on the jury size but overruled the defendant's voir dire objection, and it ordered virtual selection of a jury in three-person panels in one-hour shifts.<sup>129</sup> Finally, the defendant's motion to allow a witness to testify virtually was granted without objection from the state.<sup>130</sup>

The case demonstrates a defendant's interest in using virtual testimony in a hybrid trial. The court, however, laid a foundation for a complicated trial where everyone would wear masks and showcased problems with the Arkansas Supreme Court's June trial guidance order. After continuing the case while tolling speedy trial for months, the circuit court set a trial date for a week later without any consideration of the prejudice of an in-person trial, or the court's ability to summon a constitutionally valid jury venire. Neither the judge nor the parties discussed an alternative venue to allow social distancing.

The defendant quickly petitioned for an expedited writ of mandamus and requested a temporary stay on July 24, 2020, stating, among other grounds, the circuit court violated the June 11 Arkansas Supreme Court order that said, "voir dire may be conducted by videoconference by agreement of the parties."<sup>131</sup> The petition also argued that the court's order effectively denied the defendant adequate assistance of counsel.<sup>132</sup> The defendant argued that the court's chosen voir dire format violated his Sixth Amendment right to an impartial jury, contending the court had impaired drawing a jury from "fair [and accurate] cross section" of the community by excluding jurors with low-incomes or inadequate technology.<sup>133</sup> The defendant also construed the court's jury selection format as a sua sponte addition of an unlawful juror qualification requirement.<sup>134</sup>

The Arkansas Supreme Court responded with a one-paragraph order granting the defendant's petition on July 27, 2020. The order did not provide further guidance, other than stating:

[Justice] Womack . . . would order a writ of prohibition to stop the voir dire over the Defendant's objection and give the circuit court discretion to either move forward with in-person voir dire

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Expedited Petition for Writ of Mandamus at 4–5, *Duffy v. State*, No. CR 20-469 (Ark. July 24, 2020).

132. *Id.* at 10–12 (citing numerous cases on IAC issues from *Powell v. Alabama*, 287 U.S. 45 (1932) to *United States v. Cronin*, 466 U.S. 648, 659–60 (1984)).

133. *Id.* at 6–9.

134. *Id.* (first citing ARK. CODE ANN. § 16-31-101 (2003); then citing *Berghuis v. Smith*, 559 U.S. 314, 319 (2010); and then citing *Duren v. Missouri*, 439 U.S. 357 (1979)).

on schedule if they are able to do so in compliance with the regulations or[ ] alternatively[ ] to continue the case to a later date while tolling speedy trial.<sup>135</sup>

The Arkansas Supreme Court's decision to grant a stay avoided a crisis in this case, but it did not improve on the guidance in their current trial order. Potentially more troubling, the only glimpse into future guidance came from one Justice Womack, whose opinion would preclude virtual voir dire if one party objects while tolling speedy trial. This creates a scenario where the state's objection to virtual voir dire could force defendants to choose between an indefinite continuance and an in-person trial. Defense attorneys need to make a record by objecting to continuances that toll speed trial and by advocating for reasonable trial accommodations, such as (1) larger trial venue; (2) additional time to question jurors during virtual voir dire; or (3) virtual testimony.

Both Kern County and Washington County ignored constitutional concerns because of judicial preferences, not technology. Overly discretionary or vague rules help create a criminal justice system dictated by judges' whims. The Kern County and Washington County examples are not outliers. They are case studies of state courts failing because of insufficient judicial guidance and trial courts ignoring fundamental rights.<sup>136</sup>

#### B. *A National Concern: Public Access to the George Floyd Case*

The George Floyd killing and criminal case where four officers are charged with violent offenses in Hennepin County, Minnesota, has demonstrated the increased public attention on the criminal justice system and has sparked renewed demand for judicial and law enforcement transparency.<sup>137</sup> The case has also demonstrated significant public access concerns because of its extraordinary national attention. The broadcasting debate in the case shows serious differences between states' public access guidelines and highlights a situation where there is tremendous public interest in monitoring a case.

Minnesota's administrative broadcast rule balances the First and Sixth Amendment rights as competing interests.<sup>138</sup> The court rules are struc-

135. Formal Order, *Duffy v. State*, No. CR-20-249 (Ark. July 24, 2020) (issuing an unsigned order with a signed, dissenting, text-only decision from Justice Womack).

136. Additional examples include New York City courts, which have allowed limited physical access to hearings and requests for one-time video links for criminal hearings, and New Orleans courts, which are conducting bail and other pre-trial hearings using Zoom and have published online instructions for contacting judges to request links to watch criminal hearings. *See Lieb, supra* note 9.

137. *See Wesley Lowery, Why Minneapolis Was the Breaking Point*, ATLANTIC, <https://www.theatlantic.com/politics/archive/2020/06/hemse-lowery-george-floyd-minneapolis-black-lives/612391/> [<https://perma.cc/G5LF-FLN2>] (last updated June 12, 2020, 4:45 PM).

138. *See MINN. GEN. R. OF PRAC.* 4 (2020).

tured to safeguard due process rights by preventing the public, which includes prospective jurors, from accessing information that would not be available to the jury. Minnesota Rule 4.01 states, “no visual or audio recordings, except the recording made as the official court record, shall be taken . . . during a trial or hearing of any case or special proceeding incident to a trial or hearing.”<sup>139</sup> Rule 4.02(d) provides some exceptions for criminal cases so long as all parties consent, but it prohibits any recording of jurors, witnesses who object prior to testifying, and hearings or arguments outside the presence of a jury.<sup>140</sup> The rule defines hearings or arguments outside the presence of a jury to include all pretrial hearings such as suppression hearings or motions in limine.<sup>141</sup>

Judge Peter A. Cahill, presiding over the case of the four defendants charged with George Floyd’s murder, denied a motion by journalists for video or audio coverage.<sup>142</sup> The state objected, but none of the defendants agreed and instead argued their constitutional right to a fair and public trial would be enhanced by broadcasts of the pretrial hearings.<sup>143</sup> Judge Cahill banned any pretrial broadcasts, citing Rule 4.02(d)(v) and Rule 4.02(d), which requires all parties to consent to such broadcasting.<sup>144</sup> His ruling simply stated that a pretrial broadcast when combined with the “substantial pretrial coverage” would “risk tainting a potential . . . jury pool.”<sup>145</sup> On July 9, 2020, Judge Cahill issued a gag order finding that “continuing pretrial publicity in this case . . . will increase the risk of tainting a potential jury pool and will impair all parties’ rights to a fair trial,” which was vacated on July 22.<sup>146</sup>

Judge Cahill’s struggle to balance pretrial publicity with public access in a nationally followed case is not new.<sup>147</sup> Post-*Estes*, however, courts have

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139. *See id.* R. 4.01.

140. *See id.* R. 4.02(d).

141. *Id.*

142. *See* Order, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. 4th Jud. Dist. June 26, 2020) [<https://perma.cc/BX2S-HUNT>].

143. *Id.*; *see also* Riham Feshir, “Judge Rules Against Audio and Video Coverage in Floyd Killing Case for Now,” MINN. PUB. RADIO (June 26, 2020, 1:42 AM), <https://www.mprnews.org/story/2020/06/26/four-excops-charged-in-floyd-killing-want-media-coverage-of-court-hearings> [<https://perma.cc/88HX-32BX>] (“The defendants argue that this relief is necessary to provide the defendants with a fair trial,” wrote Thomas Plunkett, who is representing former officer J. Alexander Kueng ‘and to assure an open hearing in light of the ongoing pandemic.’”).

144. *Id.*

145. *Id.*

146. Gag Order, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. 4th Jud. Dist. July 9, 2020), <https://t.ly/A9ru> [permalink unavailable]; Order Vacating Gag Order, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. 4th Jud. Dist. July 22, 2020).

147. *Cf.* Sheppard v. Maxwell, 384 U.S. 333, 361–63 (1966) (holding, in an older case, that extensive pretrial publicity violated the defendant’s due process rights, and the trial court should have “insulate[d] [the defendant] from reporters and photographers” with gag orders for witnesses (citing *Estes v. Texas*, 381 U.S. 532, 545–46 (1965))).

found a terse and general analysis like Judge Cahill's order as insufficient to restrict press and public access. For instance, in *Nebraska Press Association v. Stuart*,<sup>148</sup> a trial judge issued an order to reporters to not publish or broadcast incriminating information about the defendant pretrial.<sup>149</sup> Reversing the verdict because the trial judge's findings were deficient, the Supreme Court stated the trial judge's concern about pretrial publicity affecting the jury venire was valid, but the trial court's finding of harm was speculative, its decision neglected to consider less restrictive alternatives, and its gag order was unlikely to prevent news from spreading anyway.<sup>150</sup> Observing that "pretrial publicity[,] even pervasive, adverse publicity does not inevitably lead to an unfair trial," the Court said:

It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.<sup>151</sup>

Like in *Nebraska Press Association*, the Supreme Court has not tolerated trial courts closing pretrial hearings to the public except in rare cases.<sup>152</sup>

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest . . . along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.<sup>153</sup>

Linking the First Amendment right of public access and the Sixth Amendment right to a public trial, the Supreme Court in *Waller* reflected that "[our] cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant."<sup>154</sup> In *Waller*, the Court reversed the trial court for closing a suppression hearing, remarking the need for public access to a suppression hearing is "particularly strong" because "[t]he public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scru-

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148. 427 U.S. 539 (1976).

149. *See id.* at 542–43.

150. *Id.* at 566–67.

151. *Id.* at 554, 567.

152. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 45, 48 (1984).

153. *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise I)*, 464 U.S. 501, 510 (1984).

154. *Waller*, 467 U.S. at 46 (alteration in original) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)).

tiny.”<sup>155</sup> Similarly, in *Presley v. Georgia*,<sup>156</sup> the Court declared a defendant’s right to a public trial includes permitting family members access to watch jury selection. The Court held:

Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. Nothing in the record shows that the trial court could not have accommodated the public at Presley’s trial. Without knowing the precise circumstances, some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members.<sup>157</sup>

From these cases, we know courts bear the burden of developing reasonable alternatives to closing the courtroom, and the defendant has no burden to propose alternatives.<sup>158</sup> Beyond this, the Supreme Court has rejected the argument that a generic concern that jurors may be influenced by public access is sufficient to close a courtroom.<sup>159</sup> “If broad concerns . . . were sufficient to override a defendant’s constitutional right to a public trial, a court could exclude the public . . . almost as a matter of course.”<sup>160</sup>

Public interest reflects importance. A community’s or the nation’s desire to see a fair, effective, and transparent criminal justice system signifies its conscience. As the Court observed in *Chandler*, “[a] case attracts a high level of public attention because of its intrinsic interest to the public and the manner of reporting the event. The risk of juror prejudice is present in any publication of a trial.”<sup>161</sup> The open court debate in Minnesota highlights the fundamental importance of public access and a public trial. Closing or restricting access to a criminal case of such magnitude encourages skepticism and creates legitimate worry that the criminal justice system will not work.<sup>162</sup> In this case study, it is also futile when the nation is saying George Floyd’s name.

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155. *Id.* at 47.

156. 558 U.S. 209 (2010).

157. *Id.* at 215.

158. *See id.*; *Press-Enterprise I*, 464 U.S. at 510.

159. *See Presley*, 558 U.S. at 215.

160. *Id.*

161. *Chandler v. Florida*, 449 U.S. 560, 575 (1981).

162. *See infra* discussion in Part IV.

C. *The Texas Trial Experiments—The First Virtual Civil Trial and Experimental Auditorium Criminal Trials*

In May 2020, Collin County, Texas piloted a virtual Zoom trial for a civil, non-binding case.<sup>163</sup> Jury selection and the trial were virtual and livestreamed on YouTube.<sup>164</sup> The case involved a one-day trial over an insurance dispute, which was specifically chosen as a low-stakes case for the experiment.<sup>165</sup> In a statement to the National Center for State Courts, the Judge Emily Miskel, who presided, described the trial:

I was pleasantly surprised to learn how much the jurors liked this. They were enthusiastic about it. And jurors who had served on traditional juries in the past said there were things they preferred about remote jury service. They said it was more respectful of their time, and the witnesses and exhibits were easier to see. The jurors were more enthusiastically positive than any other group I've talked to, more so than attorneys and judges.

Remote jury trials may have a future. We could also consider a hybrid approach to jury service during the pandemic. We may find that portions of a jury trial may be safer to do remotely than in a courtroom.

We also may find that remote court proceedings play a role in access to justice. In Texas, we have rural counties where no attorneys happen to live—and I know that's true in many other states—so this technology can play a role in connecting attorneys with people who need them.<sup>166</sup>

While Judge Miskel identified the potential future of virtual hearings and several people who benefit, reports from the media were less enthusiastic.

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163. See Jake Bleiberg, *Texas Court Holds First US Jury Trial Via Videoconferencing*, ASSOCIATED PRESS (May 22, 2020), <https://apnews.com/article/e434e2df6e0b09fba1a32ec3fcf4670a> [permalink unavailable].

164. *Id.*

165. *Id.* Florida courts have also established a pilot project for five counties to hold virtual trials and have held one experimental civil jury trial with jury selection by Zoom and testimony by traditional courts with all participants wearing masks. See Liane Morejon & Andrea Torres, *Historic Shift to 'Virtual' Miami-Dade Court Continues With 1st Civil Jury Selection on Zoom*, LOCAL 10 NEWS (July 9, 2020, 6:26 PM), <https://www.local10.com/news/local/2020/07/09/historic-shift-to-virtual-miami-dade-court-continues-with-1st-civil-jury-selection-on-zoom/> [https://perma.cc/9CRR-JLDV]; see also Glenn A. Grant, *Virtual Grand Juries?*, LAW.COM: N.J. L.J. (June 16, 2020, 10:30 AM), <https://www.law.com/njlawjournal/2020/06/16/virtual-grand-juries/?sreturn=20210021213603> [https://perma.cc/3CMY-W4CH] (commenting on New Jersey's virtual grand jury design).

166. *Stories from Inside the Courts: Judge Emily Miskel*, NAT'L CTR. FOR ST. CTS., <https://www.ncsc.org/newsroom/public-health-emergency/newsletters/from-inside-the-courts/judge-emily-miskel> [https://perma.cc/RVD6-9QUQ] (last visited Feb. 2, 2021).

Jurors appeared distracted at times, and there were video glitches during testimony.<sup>167</sup>

Following the pilot trial, the Supreme Court of Texas issued specific guidance on public access noting the “presumption of openness,” and that “improper or unjustified closure of court proceedings constitutes structural error, requiring ‘automatic reversal and the grant of a new trial.’”<sup>168</sup> The Court’s guidance further stated:

It is the court’s affirmative burden to ensure meaningful and unfettered access to court proceedings. In fulfilling this burden, the court must take all reasonable measures necessary to ensure public access. Lack of access to a single hearing (suppression), or even a portion of a single hearing (voir dire), is enough to mandate reversal and a new trial. . . . [I]t is the court’s burden to ensure public access to each hearing and take reasonable measures to remove barriers . . . [C]ourts must find a practical and effective way to enable public access to virtual court proceedings . . . .

Under the standards established by the United States Supreme Court, the protective measures employed must be limited to those necessary to protect an overriding interest and no broader. . . . For this reason, no standing order or global rule for closure of specific categories of hearings may be preemptively issued by a court without running afoul of the requirement to provide the public with access to court proceedings. The court should not close the entirety of a hearing from public view in order to protect a single witness or topic of testimony. Because the court must apply only the least restrictive measures to protect the overriding interest, only specific portions of a hearing or trial that meet this exacting burden may be conducted outside of the public view, and that only in rare cases.<sup>169</sup>

The pilot trial, while demonstrating concerns with juror attention, shows a virtual trial is possible, especially if best practices for courtroom management are used. Texas, however, has not proceeded with a virtual criminal

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167. See Charles Scudder, *In a Test Case, Collin County Jury Renders Verdict on Zoom for the First Time; Too Risky for a Full Trial?*, DALL. MORNING NEWS (May 22, 2020, 11:35 AM), <https://www.dallasnews.com/news/courts/2020/05/22/in-a-test-case-collin-county-jury-meets-on-zoom-for-the-first-time-but-some-lawyers-say-its-too-risky-for-real-trial/> [<https://perma.cc/KK9N-CPTF>].

168. TEX. OFF. CT. ADMIN., BACKGROUND AND LEGAL STANDARDS—PUBLIC RIGHT TO ACCESS TO REMOTE HEARINGS DURING COVID-19 PANDEMIC 2 (2020), <https://www.txcourts.gov/media/1447316/public-right-to-access-to-remote-hearings-during-covid-19-pandemic.pdf> [<https://perma.cc/T4NX-P5YR>] (quoting *In re A.J.S.*, 442 S.W.3d 562 (Tex. App. Ct. 2014)).

169. *Id.* (footnotes omitted) (stating the constitutional rules that must be followed).



trial. Instead, Texas courts have held in-person, criminal trials in large venues like school auditoriums.<sup>170</sup> This format creates different problems. For instance, jurors may not be able to view evidence, hear testimony, be as likely to pay attention, or even show up during a pandemic.

After the first auditorium trial, the public defender who tried the case shared that she felt the jurors could not hear her speak and she was forced to shout.<sup>171</sup> She said, “[i]t was the most stressful trial I personally have been through,” and noted that, “for the first time ever, she cried during her closing argument. ‘I was just drained, and exhausted.’”<sup>172</sup> Based on reports of in-person trial experiments during the pandemic, defense attorneys should consider whether a traditional trial is best for their client, or if using virtual technology would be better. The choice should be up to the defendants. As Judge Miskel said, “[y]ou shouldn’t need government permission to exercise your right to a public court hearing.”<sup>173</sup>

### III. MAKING VIRTUAL HEARINGS AND TRIALS FUNCTIONAL AND CONSTITUTIONAL

Virtual hearings must be compatible with public access and a defendant’s right to a public trial. Especially for trials, but for all hearings, a virtual hearing must provide the constitutional safeguards of a traditional hearing. The major concerns voiced about virtual hearings are: (1) virtual hearings do not fulfill the guarantees required by the Confrontation Clause; (2) they impair paneling and selecting a jury; and (3) they are inherently inferior by affecting how participants behave, by being unreliable, and by failing to preserve the decorum of the court, attorney–client communication, or the privacy of participants.<sup>174</sup>

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170. See Angela Morris, *Order In The Courtroom: Texas Courts Venture Into Unusual Spaces Amid Pandemic*, LAW.COM: TEX. LAW. (July 23, 2020, 7:17 PM), <https://www.law.com/texaslawyer/2020/07/23/order-in-the-auditorium-texas-courts-venture-into-unusual-spaces-amid-pandemic/> [<https://perma.cc/AQV2-9SVT>].

171. *Id.*

172. *Id.* Compare Willard Shepard, *Miami-Dade Court Holds State’s First Virtual Jury Trial Amid Pandemic*, NBC MIAMI (July 14, 2020, 7:03 PM), <https://www.nbcmiami.com/news/local/hems-dade-court-holds-states-first-virtual-jury-trial-amid-pandemic/2262205/> [<https://perma.cc/47SS-94LZ>] (stating the plaintiff testified while wearing a mask while the judge, jury, and attorneys were behind plexiglass in Florida’s pilot civil trial where Zoom was used only for jury selection), with Rachel Lean, *Verdict Is In: Online Trials, Jury Selection Work in Broward*, LAW.COM: DAILY BUS. REV. (July 20, 2020, 1:37 PM), <https://www.law.com/dailybusinessreview/2020/07/20/verdict-is-in-online-trials-jury-selection-work-in-broward/#~:text=Broward%20Circuit%20has%20been%20testing,amid%20the%20COVID%2D19%20pandemic> [<https://perma.cc/5ZVE-D45Q>] (highlighting the statement by Chief Judge Jack Tuter of the Broward Circuit Court in Florida: “There is no doubt in my mind jury trials can be conducted via a video platform” (internal quotation marks omitted)).

173. Banjo, *supra* note 10.

174. See *supra* notes 18–21 and accompanying text; see also Eagly, *supra* note 31, at 988–94 (discussing difficulty with attorney–client communication with de-

These concerns, while valid, overlook that court formats do not have to be binary. The benefits of a virtual hearing or trial and convenient public access may outweigh the difficulties of using new formats. There are many options to resolve concerns.<sup>175</sup> Most routine criminal court hearings can be done virtually, and remote and virtual hearings are tools that should be more common and permanent options.

Defense attorneys who treat a virtual hearing as inherently deficient may end up avoiding counseling clients on whether a public, virtual hearing is a better option, especially during the pandemic. Many defendants are currently, or soon will be, choosing between a virtual or modified in-person court proceeding, or waiting in jail through the pandemic. Depending on the case and the defendant, a virtual proceeding may be superior to a traditional one in the short-term. Clients are harmed when defense attorneys unreasonably prolong their detention or court case. Defense attorneys also risk waiving reversible issues if they do not consider new litigation issues created by virtual hearings and the pandemic. Yet the defense bar's consensus is that most virtual hearings should be evaded.<sup>176</sup>

Courts across the country are forcing defendants to choose (or deciding for them) if, when, and how their case is litigated. Defendants will need their attorneys to be equipped to offer guidance. Defense attorneys must develop strategies to effectively litigate cases on a virtual platform, make appellate records to preserve new issues for appellate review, and advocate for the format or courtroom structure that benefits their clients.

#### A. *First Appearances and Bail Hearings*

Because of the consequences and prejudice from pretrial detention, and the struggle of public defenders to provide adequate counsel, virtual preliminary hearings receive academic and public attention.<sup>177</sup> In *Hamil-*

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tainees in immigration cases and communication between prosecutors and immigration counsel when video hearings are the only form of communication and happen in an assembly-line style).

175. For example, hybrid hearings where some witnesses testify virtually can work. Courts already allow some form of hybrid testimony when parties agree, such as allowing crime lab witnesses to testify virtually. *See, e.g., supra* note 107 and accompanying text; *see also* Turner, *supra* note 20, at 12–14; Bridget Murphy, *Psychologist Testifies in First 'Hybrid' Criminal Trial in Nassau Court*, *NEWSDAY* (July 14, 2020, 7:53 PM), <https://www.newsday.com/news/health/coronavirus/coronavirus-nassau-courts-murder-trial-virtual-1.46875987> [<https://perma.cc/DN8G-A4XW>].

176. Dubin Research & Consulting, *supra* note 18, at 26–39; *see also supra* note 20 and accompanying text (discussing the opinions of defense attorneys about pandemic trials).

177. *See, e.g.,* Crystal S. Yang, *Toward an Optimal Bail System*, 92 *N.Y.U. L. REV.* 1399 (2017) (examining the social and penal costs of pretrial detention and recommending restructuring the pretrial detention system); Samuel R. Wiseman, *Fixing Bail*, 84 *GEO. WASH. L. REV.* 417 (2016) (discussing the problems with money bail including incentives judges have to detain defendants, issues with indigent defense at bail hearings, and proposals for bail reform).

*ton v. Alabama*,<sup>178</sup> the Supreme Court recognized the critical nature of pretrial proceedings, writing that absent or inadequate counsel at the arraignment stage can affect the whole trial.<sup>179</sup> In other words, deficient or absent defense counsel at the first appearance can be a per se inadequate assistance of counsel violation subject to a more favorable standard of post-conviction review for defendants.<sup>180</sup> In response, families and advocacy groups have focused on transparency and access to critical pretrial hearings.<sup>181</sup> For instance, Court Watch programs, such as the one described in the ACLU and First Amendment lawsuit for Tanisha Brown, often focus on first appearance and bail proceedings.<sup>182</sup>

Concerns with virtual hearings often stem from courts using outdated video technology that distorts viewing or is low-quality, holding assembly-line proceedings,<sup>183</sup> not permitting defense witnesses, or preventing adequate communication with defense counsel.<sup>184</sup> Past studies have shown some harm from video hearings to defendants, but the studies evaluated cases with low quality technology and no public access.<sup>185</sup> The primary study showing bad outcomes is a review of bail hearings circa 1999 in Cook County, Illinois.

In a 2010 study, researchers examined data from 645,000 defendants who had their cases heard at two different times: (1) eight years prior to beginning bail hearings by video in 1999; and (2) eight years following

178. 368 U.S. 52 (1961).

179. *See id.* at 54–55; *see also* *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) (citing examples of when counsel deficiencies are so fundamental they are subject to automatic reversal).

180. *See* *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008); *see also* Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 *STAN. L. REV.* 1581, 1613–20 (2020) (discussing how some errors such as the absence of counsel at first appearance proceedings may at times be, depending on the state system and procedures used, a pervasive, systemic error that permits claims of ineffective assistance of counsel under the more permissive standard from *United States v. Chronic*, 466 U.S. 648 (1984)).

181. Pretrial detainees are especially affected by the 2020 pandemic because of emergency orders continuing arraignments and cases and the heightened risk of contagion in jails. *See, e.g.*, Holly Yan, *Prisons and Jails Across the US Are Turning into ‘Petri Dishes’ for Coronavirus. Deputies Are Falling Ill, Too*, CNN (Apr. 10, 2020, 9:49 AM), <https://www.cnn.com/2020/04/09/us/coronavirus-jails-prisons/index.html> [<https://perma.cc/R2QQ-BGNJ>]; *see also* KAFKA, *supra* note 117, at 7 (“And you don’t know how long these cases can last, especially recently!”).

182. *See supra* note 97 and accompanying text.

183. Often referred to as a “cattlecall,” which while common, is a dehumanizing term.

184. *See* Bryce Covert, *Video Hearings: The Choice ‘Between Efficiency and Rights,’* *APPEAL* (June 5, 2019), <https://theappeal.org/video-hearings-the-choice-between-efficiency-and-rights/> [<https://perma.cc/9JRN-4AWQ>].

185. *See generally* Bandes & Feigenson, *supra* note 25 (discussing attorney opinions on demeanor evidence), *see also supra* notes 30–31 and accompanying text (research discussing the harms of video hearings using older technology in immigration hearings and at first appearances); *infra* note 230 (discussing research on video testimony from child witnesses).

courts' decisions to use video.<sup>186</sup> The study found that bail set during video court was higher than bail set for people with in-person hearings.<sup>187</sup> Explanations for why bail increased included rudimentary technology, poor access to attorneys before the hearings, and lack of public access, which prohibited testimony by family members.<sup>188</sup> One law professor who coauthored the study described the Cook County courts approach at the time as follows:

The video feed of the defendants was black-and-white, shaky, and difficult to see. If a defendant wanted to address anyone in the room upstairs there was a phone he could pick up, but given the speed with which the cases moved that “didn’t remotely happen,” [the law professor] said. “It was just jaw-dropping the way the video . . . made the person on the video screen seem like not a real person.”<sup>189</sup>

Improved technology can only reduce perception bias, not eliminate concerns. Consider the common argument that only a person’s face is visible in a virtual hearing or that the image is too small. This is usually the case in video chatting, but testimony using a webcam placed at a distance allows a person to be fully in the frame and allows viewers to evaluate body language. Others have pointed out that fact finders may not perceive demeanor the same because of how people interact with video technology. For instance, a speaker may look at the screen instead of the camera, use a bad camera angle or background, or pause before speaking.<sup>190</sup> These are valid concerns, but many of them are remedied through experience, using quality technology, and either instructions or attorney advocacy. Perception bias can be handled the same way attorneys already handle bias, by identifying and addressing the issue through argument, motion practice, jury instructions, and education. Scholars have also pointed out that social distancing in courtrooms may affect viewing evidence and testimony as well.<sup>191</sup>

Even with current technology, First and Sixth Amendment rights can clash when a defendant does not want to be publicly seen on webcam or a livestream. Attorneys can object, but the standard is rigorous for closing a

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186. See Diamond et al., *supra* note 30, at 898.

187. *Id.*

188. See *id.* at 898–902; see also Poulin, *supra* note 30, at 1144–45 (commenting reliance on remote hearings at first appearances precludes building an attorney-client relationship). While I agree with Poulin, the nature of assembly-line first appearances by itself is a significant obstacle to attorney-client relationship building and the issue is not technology but time. Plenty of my clients have noted they feel there is an ability to develop a rapport and trust through virtual meetings, and client communication is often done by phone or text.

189. Covert, *supra* note 184.

190. See Bades & Feigenson, *supra* note 25, 1294–95.

191. See Wilson, *supra* note 18, at 90 (noting seating configurations in large auditoriums may also disrupt jurors view of the trial).

hearing. Convenient public access will lead to slightly more public exposure for defendants. A criminal defendant's right to privacy or request to close a trial is subject to the public's First Amendment right to view criminal court cases.<sup>192</sup> In reality, privacy for defendants is already low. When people are arrested, they are usually exposed by online mug shots and arrest logs, and convictions are public.<sup>193</sup>

Consider the reasons a defendant would wish to avoid public exposure. First appearances often show people with acute mental illness or substance use issues in a poor light. The public will see people who may be acquitted, those entering a diversion program, or those who will have their record eventually sealed.<sup>194</sup> These are legitimate worries, and attorneys should object, but in most cases these grounds are not sufficient to meet the constitutional test for denying public access. In *Nixon v. Warner Communications*,<sup>195</sup> the Supreme Court discussed that while the Sixth Amendment guarantee of a public trial belongs to the accused, the guarantee of a public trial assures the public and press access.<sup>196</sup>

While courts should be respectful of privacy concerns for people who are vulnerable or may be able to seal their arrest or case records, the answer is not infringing on the First Amendment. The most practical way to address privacy concerns is to limit courts to a livestream or publicly archive court hearings for only a short time period, while prohibiting third-party recording.<sup>197</sup> This serves the public interest in education and transparency while mitigating the harms in a less restrictive way than banning livestreams or virtual access.

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192. See *Presley v. Georgia*, 558 U.S. 209, 212 (2010); see also *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise II)*, 478 U.S. 1, 13–14 (1986); *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise I)*, 464 U.S. 501, 510 (1984). Cf. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (“[P]olitical institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.”).

193. See *Access to Mugshots Gets Close Look Across the Country*, REPORTERS COMM. FOR FREEDOM PRESS, <https://www.rcfp.org/journals/news-media-and-law-summer-2014/access-mug-shots-gets-close/> [<https://perma.cc/XX4J-QEK7>] (last visited Jan. 23, 2021); see also Chris Carola, *Mug Shot Proposal Pits Privacy Versus Right to Know*, ASSOCIATED PRESS (Feb. 19, 2019), <https://apnews.com/article/5e48d07e739e4b198c0f45feb470f73d> [<https://perma.cc/FN8S-5XTM>] (discussing civil liberty groups' objections to limiting public information about arrests and the price people pay extortive companies to have their booking photos removed).

194. Witnesses also have significant privacy concerns. Safeguarding a witness against possible reprisal, or preventing embarrassment and emotional disturbance to the witness, have been reasons given to exclude the public from watching a criminal case. Virtual technology is an option to provide physical distance for a witness and protect their privacy through using technology tools, such as obscuring voice or appearance on livestreams, and pseudonyms to provide some anonymity to witnesses.

195. 435 U.S. 589 (1978).

196. See *id.* at 610.

197. Violations can be enforced through contempt sanctions.

In many cases, convenient public access and the right to a public trial are compatible and benefit clients by enhancing institutional accountability and transparency. The public can evaluate the quality of the criminal justice system, which often includes deficiencies that are not widely known.<sup>198</sup> These structural problems are addressable when they can be identified. With convenient public access and the subsequent enhancement of transparency, common problems such as the absence of counsel at preliminary proceedings, excessive public defender caseloads, and sentencing disparities are more likely to improve.<sup>199</sup>

#### B. *Managing Virtual Dockets and Pretrial Hearings*

A judge's ability to control a virtual courtroom is different, but not necessarily more difficult. Virtual software, like Zoom, includes tools such as private breakout rooms for bench discussions or private sidebars, disabling chat, and waiting rooms. For hearings with testimony, a judge can mute parties or jurors. The public can be restricted to viewing through a webinar feature, like on Zoom, or a livestream, like on YouTube, to prevent interruptions.

Virtual hearings and public observation are most likely to affect judges and attorneys—the people already comfortable with a traditional court atmosphere. Some judges have speculated that a court livestream or broadcast will encourage attorney theatrics or reduce public confidence in the criminal justice system. Part of the resistance to transparency, especially from attorneys, is probably from self-interest—attorneys want to avoid scrutiny, and judges may worry their decisions will be second-guessed.

The research tells a different story. The most recent broadcast pilot program in federal courts ran from 2011 to 2015.<sup>200</sup> Judges were surveyed before the program and expressed mixed opinions about whether the pilot program would affect their court.<sup>201</sup> The judges stated cameras in the courtroom might distract witnesses, motivate attorneys to prepare better, and prompt more courteous behavior from attorneys.<sup>202</sup> After the federal pilot program concluded, however, most judges and attorneys responded that most of the negative changes they expected were small or non-existent.<sup>203</sup> Judges also reported some positive effects—34% of the judges thought broadcasts made attorneys moderately more courteous.<sup>204</sup>

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198. See Jaffe, *supra* note 39, at 1475–76 (stating that public defenders in Atlanta have on average fifty-nine minutes to spend on a case; defenders in Detroit have only thirty-two minutes per case; and defenders in New Orleans have only seven minutes per case).

199. See Primus, *supra* note 180, at 1613–20.

200. JOHNSON ET AL., *supra* note 42, at 1.

201. See *id.* at 6–7.

202. *Id.* at 23, 26 tbl.10.

203. *Id.* at 27.

204. *Id.* at app. § D-7.

The open question is whether convenient public access incentivizes better attorney preparation, encourages judicial accountability, or improves defendants' outcomes in reality or just in theory. Convenient public access may make judges more susceptible to public opinion.<sup>205</sup> This may be especially true for elected judges. Arguably, elected judges should be responsive to public opinion or at least held publicly accountable.<sup>206</sup> In some cases, elected judges may enjoy the platform of a livestreamed trial. Similarly, transparency should increase prosecutor accountability, whose role is to represent their community and be responsive to their community's views.

Judges have mentioned the burden of a preliminary hearing to rule on pretrial motions if there is an objection to virtual testimony or livestreaming. Most cases, however, are not contested through extensive litigation.<sup>207</sup> For the cases that are litigated, rulings on pretrial issues related to virtual testimony or livestreaming would be only one of many motions in limine that a judge would address before a trial.

Evidence from the federal pilot program of courtroom broadcasts is again compelling. The study's final analysis found that on average, judges "are likely to be favorable in their views of video recording."<sup>208</sup> The 2016 report found that the greatest demand on judges was notifying parties and obtaining consent.<sup>209</sup> The administrative demands of the program were lower in courts that standardized notice and consent procedures.<sup>210</sup> The primary modifications suggested by judges were changing to an "opt-out" system rather than an "opt-in" system, which avoided the need to obtain consent from all parties and instead place the duty on parties to object.<sup>211</sup>

Traditional concern about judicial respect is really a belief disguised as a worry that the perception of judicial inerrancy is more important than qualified and professional judges; as a result, the myth exists that decorum suffers from public access and community engagement. Symbols and pageantry are important, but accountability and adaptation are too. Preserving the solemnity and dignity of trial judges does not outweigh

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205. See generally Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 325–26 (1992).

206. Studies of C-SPAN and C-SPAN 2 found an increase in speeches and speaking filibusters, but these findings are probably not translatable to criminal court where most people are not elected. See generally Franklin G. Mixon Jr. et al., *Has Legislative Television Changed Legislative Behavior?: C-SPAN2 and the Frequency of Senate Filibustering*, 115 PUB. CHOICE 139 (2003); Franklin G. Mixon Jr. et al., *Gavel-to-Gavel Congressional Television Coverage as Political Advertising: The Impact of C-SPAN on Legislative Sessions*, 39 ECON. INQUIRY 351 (2001).

207. See *infra* discussion on pleas in Part IV.

208. JOHNSON ET AL., *supra* note 42, at pmb. VIII.

209. *Id.* at pmb. X.

210. *Id.*

211. *Id.* at pmb. ix.

constitutional rights or institutional accountability.<sup>212</sup> Respect for the criminal justice system and a judge comes from the community's knowledge and awareness, not mystery.<sup>213</sup>

An informed public should increase accountability, improve attorney quality, and improve defendants' outcomes.<sup>214</sup> Even if viewership numbers are low, the ability for the public to conveniently watch court and criminal cases is more important than the number of viewers. A small audience can be a lookout and notify the press or community about injustices.

### C. *Virtual Voir Dire and Jury Trials*

Summoning a fair and representative jury, seating *attentive* jurors who can easily examine the evidence, and complying with the Confrontation Clause's requirements are what concern attorneys the most.

#### 1. *Virtual Trials Can Be Fair and Functional*

Virtual trials are a recent possibility. While technology is not problem proof, the ability to evaluate testimony and view evidence has significantly improved, and virtual presentations can be enhanced with quality camera placement, lighting, and reliable internet speed.<sup>215</sup> Attorneys can train

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212. See generally Harris, *supra* note 32, at 789–90 (“[T]he availability of accurate information necessary for intelligent voting translates into something more—accountability for our institutions.”).

213. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980); *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 606 (1982).

214. See *id.*

215. High-speed internet is essential for virtual hearings. Most people have access to high-speed internet available for detained defendants, and jails also can provide high-speed internet access. See *infra* note 287. This is not to say that a smartphone is sufficient for a defendant to appear for a trial, but it should be sufficient for a brief check in with the court for a continuance. In our clinic, we sometimes conduct interviews with clients and they appear on their smart phone. Similarly, the local drug courts let people check in for court using their smartphone and attorneys report being able to evaluate a participant's conduct and sobriety and sanctions have been effective. Where quality is absent or costs are restrictive, courts can provide virtual terminals in a courthouse or public places like a library. See *infra* notes 288–90 and accompanying text. Some public school systems have also recently implemented free, high-speed internet programs for low-income students, which is a model courts can follow on a smaller scale for jurors or indigent defendants. See, e.g., Vera Castaneda, *Spectrum and Other Providers Offer Free Internet for Students at Home*, L.A. TIMES (Mar. 20, 2020, 3:49 PM), <https://www.latimes.com/socal/glendale-news-press/news/story/2020-03-20/spectrum-and-other-internet-providers-offer-free-internet-for-students-at-home> [<https://perma.cc/Z9U3-SDH6>]; see also Lauren Camera, *Disconnected and Disadvantaged: Schools Race to Give Students Access*, U.S. NEWS (Apr. 1, 2020), <https://www.usnews.com/news/education-news/articles/2020-04-01/schools-rush-to-get-students-internet-access-during-coronavirus-pandemic> [permalink unavailable] (discussing the nationwide trend to expand internet access so students can attend virtual classrooms, and how the absence of internet access disproportionately impacts children of color—“37% of American Indian and Alaska Native children lack



on software, and judges can experiment with best practices.<sup>216</sup> As long as the pandemic continues, attorneys should consider that the alternatives—placing people in close proximity while wearing masks or behind plexiglass barriers—create a situation that is likely to increase juror prejudice, decrease jury deliberation time, and obstruct everyone from seeing expressions or hearing testimony.<sup>217</sup>

For a virtual hearing, administrative problems are similar, but management is different. For example, a judge needs to allow parties to speak but also control noise pollution. Virtual software allows a judge to manage noise and allow contemporaneous objections. Attorneys can be left unmuted by a judge but control their own mute buttons. As a backup, a limited chat feature can be left open to permit objections in the event a judge might mute a party. Attorneys and the judge could, alternatively, be present in the courtroom while jurors and witnesses are remote, or defense counsel and attorneys could be in the same physical space while appearing virtually.<sup>218</sup> There are many ways to manage a virtual hearing depending on the case and a judge's preferences.

Attorneys can also talk privately with defendants in virtual breakout or meeting rooms during a normal status hearing or during a trial recess.<sup>219</sup> These software tools allow the meeting host to separate the defendant and attorney into a separate session and rejoin the group after a private conference. Privacy settings in breakout rooms or chats can protect confidentiality and privacy. Using breakout rooms for virtual bench conferences may not add more time as compared to attorneys approaching a judge to discuss objections.

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access to the internet, 19% of black children and 17% of Hispanic children compared to 12% of white children and Asian children”).

216. See generally STATE COURT ADMIN. OFFICE, MICHIGAN TRIAL COURTS VIRTUAL COURTROOM STANDARDS AND GUIDELINES, [https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR\\_stds.pdf](https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/VCR_stds.pdf) [https://perma.cc/5VLTBLZ7] (last updated Aug. 4, 2020); see also House Comm. on the Judiciary, *supra* note 88.

217. See Wilson, *supra* note 18, at 79–80 (commenting jurors during a pandemic are likely to “show up angry, scared, distracted, or all three,” and arguing this scenario could benefit either the defense or the prosecution); see also Alana Richer, *Courts Get Creative to Restart Trials amid Pandemic*, ASSOCIATED PRESS (July 15, 2020), <https://apnews.com/article/77a45ff4332687ccc63877f118e4d7bb> [https://perma.cc/GD5M-CY3C] (discussing measures in trial courts such as plexiglass and concerns of infection).

218. This would be my preferred approach to a virtual trial to allow constant attorney–client interaction. During the pandemic, however, I have been able to communicate with clients by text or chat using a different platform than the judge and appeared using the same room as clients. Possibly determining if a virtual objection was contemporaneous could be easier for an appellate court because the objection would presumably be time stamped. While some attorneys may struggle with moving to a virtual format, many should have experience with virtual conferencing.

219. See *supra* note 218.

Once a jury is empaneled, the major difference in testimony and evidence presentation between traditional and virtual court is the format. In the Texas virtual trial experiment, jurors were bothered by household distractions (although that was a non-binding civil case which may have played a role in their lack of attention). Instructing jurors to pay attention and having a method to keep jurors' faces viewable on a screen may increase attention. Distracted or zoned-out jurors are not unique to virtual trials. Trial attorneys already pay close attention to jurors. Many have vivid memories of seeing wandering eyes, yawns, and blank stares. Attorneys can handle these issues just like in a traditional trial. If a juror seems especially distracted, a party can notify the judge and ask that the juror be questioned about paying attention.

Technology solutions can improve presenting evidence to jurors. Kiosks and court technology loans can supplement internet access issues, which is the threshold issue.<sup>220</sup> Technology can help jurors see or hear testimony better than in traditional trials. A juror can adjust their volume if they cannot hear well and can use screensharing and magnification features to see exhibits better. Admitted exhibits can be sent to a jury electronically through a link, and jurors can deliberate virtually.

Internet connections or glitches, of course, can affect a juror's ability to hear facts and arguments. Potential solutions include (1) adding jury instructions that mandate that jurors let the court know if their connection is disrupted, (2) polling the jury to see if a juror missed any testimony after each witness, and (3) either allowing re-examination or replaying recorded testimony.<sup>221</sup>

## 2. *Virtual Trials Can Allow Meaningful Confrontation as Constitutionally Required*

Attorneys are accustomed to in-person testimony, but the Confrontation Clause embodies only a "*preference* for face-to-face confrontation."<sup>222</sup> Confrontation may be limited to satisfy sufficiently important interests.<sup>223</sup> For instance, in *Maryland v. Craig*,<sup>224</sup> the Supreme Court allowed a defendant a constitutionally sufficient opportunity to test a child witness's credi-

220. See generally 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/> [https://perma.cc/P8TB-NQ3F].

221. This is not to say jurors should be permitted to endlessly watch replays of testimony; only that if a virtual trial is implemented, these are potential solutions. A judge should use discretion to prevent any potential abuses of replaying by a juror. This worry could make allowing re-examination a better solution than replaying testimony.

222. *Maryland v. Craig*, 497 U.S. 836, 849 (1990) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)).

223. *Id.* at 849–51.

224. 497 U.S. 836 (1990).

bility and substance of testimony before the jury, after defendant's counsel cross-examined the child witness and revealed her general demeanor.<sup>225</sup> The Court held:

That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy*, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.<sup>226</sup>

Using the Court's test from *Craig*, if a defendant objects to virtual testimony, a court should evaluate whether there is an important public policy interest and the testimony's reliability. Even when the *Craig* test is not met, a defendant may benefit from choosing or allowing virtual testimony. Often, pretrial hearings involve only a few witnesses or testimony on limited issues. A defendant may prefer to proceed with a virtual hearing instead of sitting in pretrial detention while their case is rescheduled. In this sense, virtual hearings and trials should improve a defendant's outcome.<sup>227</sup>

Defense attorneys often demand in-person testimony based on the received wisdom that jurors and judges can evaluate testimony better when they can physically observe a witness.<sup>228</sup> Just as the belief in demeanor evidence has been questioned,<sup>229</sup> research shows defendants may benefit from virtual testimony. One frequently cited study comparing credibility judgments between in-person and televised child testimony concludes that the format affected viewers' assessment of a witness's credibility. For example, mock jurors in one study rated child witnesses who testified in-person as more accurate, intelligent, attractive, and honest than children who testified on closed-circuit television.<sup>230</sup>

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225. *See id.* at 851–54.

226. *Id.* at 850 (first citing *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988); then citing *Coy*, 487 U.S. at 1025 (O'Connor, J., concurring)).

227. From the prosecution perspective, virtual testimony may encourage prosecution witnesses to testify in some situations. Often this technology is already used for juvenile victims by allowing them to testify by video even when a criminal hearing or trial is in-person. In a general sense, it allows witnesses the option to not be in the physical courtroom, which can be intimidating, and it makes it easier for witnesses by avoiding traveling to court for the preliminary hearings. Virtual hearings also allow witnesses to not sit around waiting for their turn to testify.

228. *See* Dubin Research & Consulting, *supra* note 18, at 26–39; *see also supra* note 20.

229. *See generally* Bandes & Feigenson, *supra* note 25.

230. *See* Holly K. Orcutt et al., *Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 *LAW & HUM. BEHAV.* 339 (2001); *see also* Bandes & Feigenson, *supra* note 25, at 1318–19, 1342 (speculating that the lack of physical presence may lead to less empathy and

These studies, though, are decades old. Current technology and its adoption by more people, along with quality camera placement and connection speeds, can allow people's body language and facial expressions to be evaluated. A more recent study questioning jury instructions on credibility determined that

[t]he idea that nonverbal behavior is revealing about deception is a myth. Two factors probably contribute to this myth about the importance of nonverbal behavior in lie detection. First, people often overestimate the importance of nonverbal behavior in the exchange of information. . . . The second factor that may contribute to the myth about the importance of nonverbal behavior in lie detection is the idea that behavior is more difficult to control than speech.<sup>231</sup>

Even with research that shows people are not good at determining credibility, the belief in human lie detection is persistent.<sup>232</sup> Studies demonstrate that judges and juries should not depend on social or nonverbal cues to evaluate credibility.<sup>233</sup> Analysis of immigration decisions reveals that, despite attorney discomfort with the process, outcomes may not be

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citing the recent experiences of people who felt virtual court did not seem real, such as person whose divorce was adjudicated in a Zoom hearings); Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed Circuit Technology on Children's Eyewitness Testimony*, 22 LAW. & HUM. BEHAV. 165 (1998) (discussing that in a experiment of child testimony to mock jurors, jurors ability to determine the accuracy of testimony was not diminished by closed-circuit video testimony, but showed some bias by jurors toward the testimony based on perceptions of demeanor confidence). *But see* Eagly, *supra* note 31, at 976–77 (“Research conducted primarily on remote child victim testimony in simulated criminal trials has found that televised testimony has no observable effect on jury verdicts.”). To be sure, a virtual chat and an in-person chat are not the same just as a virtual and a physical hug are not the same, but the concern is whether virtual testimony is adequate. As for court experiences not feeling “real,” that is common. I have had many times as a trial lawyer where clients have said what is happening does not feel real. Most experiences in a courtroom are abnormal in comparison to the rest of life.

231. Aldert Vrij & Jeannine Turgeon, *Evaluating Credibility of Witnesses—Are We Instructing Jurors on Invalid Factors?*, 11 J. TORT L. 231, 237–38 (2018); *see also* Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133, 145, 155–60 (2015) (finding in an empirical study of Connecticut judges that judges were inconsistent with their confidence in evaluating remorse or how they interpreted verbal and nonverbal cues).

232. *See* Bandes & Feigenson, *supra* note 25, at 1284–85, 1293 n.48 (critiquing the belief in the reliability of demeanor evidence as based on widely held fallacies, and noting the problem may be exacerbated by virtual hearings despite improving technology in some ways and reduced in other ways); *see also* Lauren Kirchner, *How Fair is Zoom Justice?*, MARKUP (June 9, 2020, 10:00 AM), <https://themarkup.org/coronavirus/2020/06/09/how-fair-is-zoom-justice> [<https://perma.cc/LP3V-EY95>] (noting media critiques of virtual court, including the dehumanizing aspect of video court). *But see* Eagly, *supra* note 31, at 978–84 (addressing how immigration video hearings affected detained litigants feeling of fairness and the dehumanizing effect while noting the conditions of confinement contributed to these responses).

233. *See* Bandes & Feigenson, *supra* note 25, at 1286–87 (“What is believable depends as well as on the assumptions and biases of the fact-finder who is evaluat-

affected by technology as much as perceived.<sup>234</sup> For instance, one immigration attorney noted, “I can’t think of any case that I’ve handled where I could say that [televideo] might have made a difference,” and an immigration judge explained “judges are taught to focus on the content of testimony rather than nonverbal cues, video does not make a difference because ‘you really watch a person on that screen and you really pretty much can hear them the same way you can hear them [in person].’”<sup>235</sup> In a recent essay discussing mask wearing and its impact on demeanor, one scholar commented, “[d]emeanor is understood to be a guide to a witness’s credibility in the sense that we can ‘read’ it for clues to a person’s truthfulness. Probing behind this assumption reveals it to be both culturally mediated and without basis in science, rather than reflecting a truism about human beings.”<sup>236</sup>

Still, many defense attorneys and judges emphasize the need for proximity believing they can assess credibility by observing appearances and nonverbal actions.<sup>237</sup> As Judge Nations shared in Washington County, Arkansas, for example, he believes he can determine a defendant’s bail, in part, on how a defendant appears through current virtual technology.<sup>238</sup> While Judge Nation may not be considering the appropriate factors, he is determined to observe defendants’ appearances, even if, as Judge Richard Posner remarked, “[j]udges fool themselves if they think they can infer sincerity from rhetoric and demeanor.”<sup>239</sup>

Whether a trial is virtual or traditional, and as long as the pandemic continues, criminal courts are in unexplored territory, and attorneys have to adapt as advocates.<sup>240</sup> Preserving a record in either scenario will require new issues to be litigated, and avoiding a virtual trial does not, by

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ing a witness—whether a story seems believable will depend on whether it resonates with a fact-finder’s experience of the world.” (footnote omitted).

234. See Eagly, *supra* note 31, at 973–74.

235. *Id.* at 972, 974 (alterations in original) (footnote omitted) (first internal quotation marks omitted) (first quoting Telephone Interview #18 with Partner, Small-Size Law Firm (Aug. 21, 2013) (on file with author); then quoting Telephone Interview #48 with Representative, Nat’l Ass’n of Immigration Judges (Jan. 21, 2014) (on file with author)).

236. Simon-Kerr, *supra* note 25, at 161.

237. See *supra* notes 18–21. *But see* M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 321 (2018) (“Accurately assessing nonverbal behavior, however, is difficult. We erroneously assume that certain expressions, postures, and gestures have universal meaning.”).

238. See E-mail from the Honorable Graham Nations, *supra* note 109.

239. *United States v. Wells*, 154 F.3d 412, 414 (7th Cir. 1998) *cited by* Bandes & Feigenson, *supra* note 25, at 1284 n.19.

240. Briefly, this includes advocating or making a record on appeal through motion practice for a number of issues, including tolling of a speedy-trial, court set-up, client placement, Confrontation Clause concerns, assurance that jurors are from a fair and accurate cross-section of the community, and objections to excused jurors during jury venire. Consider the simple example of a trial where the defendant objected to either a virtual or traditional hearing on confrontation grounds. A motion in limine would need be filed, an attorney needs to proffer alternatives,

itself, lead to meaningful confrontation.<sup>241</sup> The defense bar consensus that virtual trials are inferior does not apply to every case.<sup>242</sup> Defense attorneys need to consult with clients and consider a virtual or hybrid approach to be effective counsel.

### 3. *Virtual Jury Trials Can Meet Constitutional Requirements and Possibly Improve Jury Diversity and Deliberation*

As long as a jury reflects a fair and accurate cross section of a defendant's community and complies with jury qualification rules, it meets the Constitution's initial threshold.<sup>243</sup> A jury still has to be attentive, and voir dire has to be meaningful for a virtual jury trial to fulfill due process standards and safeguard rights as well as a traditional trial.

Jurors do not volunteer for court, and voir dire of highly personal matters—for instance, a juror's experience with substance use or sexual abuse—is highly sensitive.<sup>244</sup> In the Arkansas example, the state supreme court's administrative rules and guidance on criminal jury trials seem counterintuitive.<sup>245</sup> The most difficult part of a trial in a virtual format is voir dire. And a quality jury selection in most cases would require extensive use of private breakout rooms to ask sensitive questions, and additional time for conversations with potential jurors.

This is again where a defendant's strategic interest in limiting public access may conflict with the public's First Amendment right to public access. Few attorneys want to ask jurors personal and sensitive questions in a public, virtual format. Effective voir dire, if done virtually, would require significant use of breakout rooms. Courts have rejected most arguments

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and the attorney needs to object contemporaneously with each witness and move for a mistrial to make an adequate appellate record.

241. Wearing masks, social distancing, and plexiglass barriers may violate the confrontation clause more than virtual examination. The obstruction from masks and barriers disrupts sound and non-verbal behaviors too. *See supra* note 24; *see also* Dubin Research & Consulting, *supra* note 18, at 26–39; *see also supra* note 20 (discussing the opinions of defense attorneys about pandemic trials).

242. *Cf.* Dubin Research & Consulting, *supra* note 18, at 26–39; *supra* note 20.

243. *See generally* Taylor v. Louisiana, 419 U.S. 522 (1975) (a representative cross-section of the community is fundamental to the jury trial guaranteed by the Sixth Amendment, that such requirement is violated by the systematic exclusion of women from jury panels); *see also* Nina W. Chernoff, *No Record, No Rights: Discovery & the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719, 1755–60 (2016) (discussing the varieties of states that fail to ensure a constitutional jury); Wilson, *supra* note 18, at 82–85 (noting surveys that show Black, indigenous, and people of color (BIPOC) and Democrats are more likely to be concerned about COVID-19, which implicates the diversity of a jury panel).

244. *See* Wilson, *supra* note 18, at 67 (discussing how voir dire requires jurors to discuss sensitive information); *see also* CONG. RESEARCH SERV., *supra* note 42, at 20 (citing Steven D. Zansberg, *The Public's Right of Access to Juror Information Loses More Ground*, COMM. LAW., Winter 2000, at 11–15).

245. *See supra* note 104.

that exclude the public from jury selection,<sup>246</sup> and exclusion over a defendant's objection is reversible error.<sup>247</sup> A solution is for the court to allow public virtual jury selection but restrict public access to sensitive conversations with breakout rooms, which mimics how courts conduct traditional trials.

Every trial attorney worries a juror might watch or hear about evidence not admitted, view proffered testimony, or learn about rulings on objections. Jurors are already vulnerable to hearing about information outside the purview of the jury from media and courtroom attendees.<sup>248</sup> At least two ways exist to protect defendants in such instances.

The first is to expand on jury instructions to further mandate jurors not to discuss the trial with others or watch any coverage while empaneled, and add more alternative jurors if one does not obey the instructions. The second is to restrict livestream and virtual access while a trial is in progress. This can be done by livestreaming only the parts of the trial already before a jury or requiring registration of viewers who want to watch the trial and levy a penalty for recording. Rules against third-party recordings can be enforced by contempt penalties just like other violations are sanctioned.

An unexplored question is how jurors' behavior may change in a virtual format. Some jurors may feel more comfortable in a virtual situation; while most people have used Facetime or Skype to speak with family and friends, and many have implemented Zoom and Microsoft Teams in their workplace, a courtroom is a strange and often intimidating place to people unfamiliar with the justice system. Jurors may consider the consequences of their decisions the same, feel less irritation toward parties for summoning them for duty, or spend less time examining the defendant who will be off camera.<sup>249</sup>

Even though a virtual jury trial can be functional and protect constitutional rights, some questions cannot yet be answered. One compelling question is how virtual jury rooms may affect deliberations. Will jurors deliberate longer if they are not physically enclosed or feel less pressure to compromise? We do not know, which is why virtual jury trials—while

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246. See, e.g., *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise I)*, 464 U.S. 501, 509–10 (1984).

247. See, e.g., *Presley v. Georgia*, 558 U.S. 209, 216 (2010).

248. See, e.g., *Chandler v. Florida*, 449 U.S. 560, 575 (1981).

249. The presence of a defendant during a virtual trial deserves discussion. Presumably a defendant will not be in constant view like a traditional trial. This significantly eases the defense attorney's burden to constantly monitor a client's demeanor. On the other hand, defendants need access to communicate with their attorney during the trial through either being next to their attorney or having an ability to confidentially chat on a platform. Courts must also safeguard a detained defendant from any signifier of being in custody, including where they are located during a trial. Also consider, the irritation jurors summoned to an in-person trial during a pandemic may feel. See Wilson, *supra* note 18, at 74–77 (describing the health risks and inconveniences that jurors summoned for in-person jury trials face from voir dire to deliberation).

promising—should currently be optional, not mandated.<sup>250</sup> While many questions are currently impossible to answer, courts can become more responsive, efficient, and fair by allowing a remote or virtual option for hearings or testimony.

#### IV. PUBLIC ACCESS CAN INCREASE LEGITIMACY AND TRANSPARENCY

Public access to the courts promotes democratic competency in the public. This, in turn, helps citizens engage in better institutions and enables reform because information supports effective self-government.<sup>251</sup> Convenient public access to courtrooms lets the people gain a greater understanding of the judicial system and local cases.<sup>252</sup> It also provides the public with a portal into the criminal justice system that does not exist when courtrooms are cloistered. “[A] trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.”<sup>253</sup>

The current status of public access, however, has been described as “[a] room [that] is open to the public, but this is effectively a quasi-secret proceeding. For the vast majority of the population—those lacking the time or resources to travel to this out-of-the-way destination—the trial will be experienced, if at all, via second-hand accounts in the press.”<sup>254</sup> Noting the “community therapeutic value” of openness, the Supreme Court has said, “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”<sup>255</sup>

Beyond due process, the *appearance* of fairness is also important. The public’s ability to be alerted when the justice system is deficient is critical

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250. Ideally, lower level cases should be tried first while virtual trials are a necessity due to the pandemic to allow approaches and outcomes to be studied. Other scholars have suggested a different approach of trying only the most serious cases in-person. *See id.* at 95 (“As an initial matter, only serious charges should be tried during the pandemic.”). This argument is based on the logic that if a jury must encounter higher risks of COVID-19 exposure, the stakes of the case had better be high too. I must admit I do not agree with the logic of trying the most serious cases when concerns about the representativeness of juries and juror attention are at the highest or agree that plea bargaining can alleviate some of the concerns. This also neglects the concern that people with non-serious cases who are in-custody are disproportionately affected by postponing trials.

251. *See Ardia, Court Transparency and the First Amendment, supra* note 34, at 839–40.

252. *See Rosenfeld, supra* note 30, at 19; *see also Tuma, supra* note 30, at 419–20 (stating that the benefits of filming courtroom proceedings far outweigh the risks given that modern technology is minimally intrusive).

253. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980).

254. *Kozinski & Johnson, supra* note 32, at 1109 (describing a camera free courtroom as an apocryphal judicial “Garden of Eden”); *see also Simonson, supra* note 26, at 2177 (noting the exclusion of the public from criminal cases).

255. *Richmond Newspapers*, 448 U.S. at 570, 572.



to hold the judicial branch accountable and essential to its legitimacy.<sup>256</sup> An unjust system, or the widespread perception of injustice, diminishes the moral force and authority of the justice system.<sup>257</sup>

Many criminal justice systems encourage broad public access.<sup>258</sup> One example comes from international tribunals. When prosecuting war crimes in the former Yugoslavia, the tribunal administrators deemed public involvement essential. The tribunal staff advocated for cameras because “cameras enabled the workings of the court . . . to be revealed to the international community.”<sup>259</sup> Reflecting on the extensive history of open criminal trials in English and American jurisprudence, the Supreme Court emphasized:

[T]he significant community therapeutic value of public trials was recognized: when a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. To work effectively, it is important that society’s criminal process “satisfy the appearance of justice,” which can best be provided by allowing people to observe such process. From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, it must be concluded that

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256. See Harris, *supra* note 32 (discussing how procedural television shows and commercial court broadcasts erode the public’s awareness of the justice system and set unrealistic expectations).

257. See *Richmond Newspapers*, 448 U.S. at 567 (“Indeed, when in the mid-1600’s the Virginia Assembly felt that the respect due the courts was ‘by the clamorous unmannerlynes of the people lost, and order, gravity and decorum which should manifest the authority of a court in the court it selfe neglected,’ the response was not to restrict the openness of the trials to the public, but instead to prescribe rules for the conduct of those attending them.” (citing and quoting ARTHUR SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 132 (1930))); see also LEO TOLSTOY, *WAR AND PEACE* 960–61 (Richard Pevear & Larissa Volokhonsky trans., Vintage Books reprinted ed. 2011) (1836) (describing the Napoleonic tribunal “[w]ith . . . [the] precision and definiteness which is supposedly above human weakness, and with which the accused are usually treated, Pierre, like the others, was questioned . . . . These questions, . . . like all questions asked at trials, were aimed at only furnishing that channel down which the judges wished the answers of the accused to flow, leading him to the desired goal, that is incrimination. . . . Pierre experienced the same thing than any accused man experiences in any court: perplexity as to why all these questions were being asked him.”).

258. See Youm, *supra* note 33, at 2025 (“[T]elevision, as a medium, has the power to place the public inside the court room and actually observe the proceedings. If openness is the objective, this is about as good as it can get.” (internal quotation marks omitted) (quoting Beverly McLachlin, *The Relationship Between the Courts and the News Media*, in *THE COURTS AND THE MEDIA: CHALLENGES IN THE ERA OF DIGITAL AND SOCIAL MEDIA* 32 (Patrick Keyzer et al. eds., 2012))).

259. *Id.* (quoting Paul Mason, *Reflections of International Law in Popular Culture: Justice Seen to be Done? Electronic Broadcast Coverage of the International Criminal Tribunal for the Former Yugoslavia*, 2 J. INT’L MEDIA & ENT. L. 210, 213 (2001)).

a presumption of openness inheres in the very nature of a criminal trial under this Nation's system of justice.<sup>260</sup>

While criminal trials have evolved, a belief persists that public viewership will sensationalize cases.<sup>261</sup> A long-standing argument against broadcasting criminal cases is that it can misinform the public and distort the facts of a trial. This concern is more valid when courtroom broadcasts are commercialized.<sup>262</sup> This worry, by itself, is constitutionally insufficient to restrict public access.<sup>263</sup>

Convenient and broad public access offers unexplored benefits to the criminal justice system. It allows the community access but avoids selection or editorial bias. It also allows the public to monitor cases at a time when the Fourth Estate is financially struggling to fill any reporting gaps.<sup>264</sup> A court livestream provides a complete and accurate image of the criminal justice system. This counteracts inaccurate stereotypes and exposes attorneys and judges to public scrutiny.<sup>265</sup>

Modern technology and media consumption have fostered an expectation that more complete information about a news event will be readily available online. Primary source documents and raw video footage of political proceedings or newsworthy events are often available on the internet, therefore contributing to the sense that information about today's current events does not have to be mediated by the press. Thus, the contemporary "cameras-in-the-courtroom" debate today may be framed in part to improve direct public access to information about court proceedings.<sup>266</sup>

Livestreaming criminal court as a public service, similar to CSPAN, allows a broader audience to conveniently watch unedited court proceed-

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260. *Richmond Newspapers*, 448 U.S. at 556 (quoting *Offutt v. United States*, 384 U.S. 11, 14 (1954)).

261. See *supra* note 34 and accompanying text.

262. See Harris, *supra* note 32, at 821–25 (discussing the negative aspects of CourtTV, which, while countering scripted court dramas, glamorized litigation and had selection bias).

263. *Chandler v. Florida*, 449 U.S. 560, 575 (1981).

264. See *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) ("The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."); see also Cochran, *supra* note 35, at 431 ("[O]ver 65 million Americans live in counties with only one local newspaper—or none at all." (internal quotation marks omitted) (quoting Clara Hendrickson, *Local Journalism in Crisis: Why America Must Revive Its Local Newsrooms*, BROOKINGS INST. (Nov. 12, 2019), <https://www.brookings.edu/research/local-journalism-in-crisis-why-america-must-revive-its-local-newsrooms/> [https://perma.cc/6XGW-VMXH])).

265. See Harris, *supra* note 32 at 826–27 (noting concept of "Community Court TV" would allow viewers an objective look at their local court system, judges, and the seriousness and type of proceedings in their community).

266. See CONG. RESEARCH SERV., *supra* note 42.

ings.<sup>267</sup> This mitigates unrealistic expectations created by television procedurals and entertainment court shows. Convenient access lets people access the primary source. This enhances legitimacy, especially in a media environment where snapshots of court are printed in papers or broadcast on the news, which may be out of context or lead to public distrust if people cannot access the full proceeding. Convenient public access should affect the criminal justice system, but a claim that public viewing causes harm is speculation.<sup>268</sup> A typical court day probably will not be a ratings sensation. A livestream should not be entertainment. It should be documentary.

Pleas are prosaic, and objections in real life are different than on scripted dramas (although criminal court hearings can sometimes be entertaining as well as informative). A livestream allows viewers such as family, friends, and students to easily view proceedings.<sup>269</sup> Livestreaming also allows attorneys and students to observe judges and cases to improve their knowledge and skill. Most importantly, a livestream allows the community to follow high profile cases when interest piques.

This interest is not hypothetical. Public interest in the Minnesota case where George Floyd was murdered is an example of considerable and national public interest. Even where cases are not national news, the press, families, and justice advocates routinely watch court (when they can) to track cases, gather data, and report on injustices. These goals are why the press has sought access in Minnesota, and why Court Watch and advocacy groups have demanded their right to watch criminal courts in California and Arkansas.

Livestreaming court proceedings can benefit more people than just the press or justice advocates. Convenient access to court cases can expand community knowledge. Research shows that more convenient public access increases overall viewership.<sup>270</sup> In a federal pilot program of courtroom broadcasts, “[a] majority of the participating judges and attorneys surveyed thought that video broadcasts of court proceedings increased public access or education to a moderate or great extent.”<sup>271</sup> The study found that numerous surveyed viewers “stated that they watched the video due to a general interest in proceedings or for an educational rea-

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267. See generally Levi, *supra* note 33, at 326–28 (discussing the public benefits of open access in the realm of political debate).

268. See CONG. RESEARCH SERV., *supra* note 42, at 22 n.117 (citing COHN & DOW, *supra* note 32, at 62).

269. *Id.* at 18. (“[I]t is often argued that the public would benefit from the improved openness and transparency that videos of the court would bring. By seeing inside the courtroom, observing full arguments, and seeing the norms court participants follow, the public may better understand the judicial process.”).

270. See *id.* at 11.

271. *Id.* at 11.

son.”<sup>272</sup> Community engagement serves the criminal justice system’s goal to achieve justice, and civic knowledge supports reform.

Through transparency and knowledge, the public can be engaged and empowered to hold courts and attorneys accountable. An interested voter can assess a prosecutor’s approach to a case, a prospective client can evaluate a possible attorney, and justice reform organizations can track case outcomes and measure performances. A livestream may also be recorded for training or education opportunities (with court permission and likely without public archival). Similarly, viewers interested in what is shown on the news or social media can investigate the source material by watching the livestreams. In this sense, court livestreams (or any form of convenient public access) increases legitimacy, strengthens accountability, and helps the public be informed and engage with the criminal justice system.

Sometimes what is boring shows what is broken.<sup>273</sup> In a system defined by “The Pathological Politics of Criminal Law,” criminal justice has devolved too often into a system defined by prosecutorial power.<sup>274</sup> This is shown by the evolution of the criminal justice system into a plea system.<sup>275</sup> Across the country, “ninety-four percent of state convictions are the result of guilty pleas.”<sup>276</sup> Public attention can restore accountability in a plea bargaining system where media coverage and public attendance is usually absent.<sup>277</sup>

There are many explanations for the prominence of pleas. Pleas may be mundane, but their prominence is important. Public exposure can cast a light into the shade of daily plea hearings. A compelling explanation for the phenomenon is that a defendant wants the lowest sentence, while a prosecutor aims for a sentence based on their personal case evaluation or an office policy. This leads to a system based on plea negotiations and charge bargaining.<sup>278</sup> A typical negotiation involves prosecutors “trad[ing] away ‘extra’ years of incarceration the defendant desperately

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272. *Id.* In 2014, of 21,530 people who viewed a pilot program recording, 258 viewers completed a survey. *Id.*

273. See Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1306 (2018) (describing how charge bargaining drives mass incarceration through a “subconstitutional state law of criminal procedure”).

274. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 579–80 (2001).

275. See William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548–50 (2004) (discussing the plea bargain as a broken “settlement market” that favors prosecutors that has dynamically changed the criminal justice system).

276. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 n.9 (2004) (“In 2000, of approximately 924,700 felony convictions in state courts, about 879,200 (95%) were by guilty plea.”).

277. See generally Simonson, *supra* note 26 (discussing how public access can provide accountability in a system where jury trials are rare).

278. See Crespo, *supra* note 273, at 1310–16.

wants to avoid but that the prosecutor doesn't particularly value."<sup>279</sup> With high sentencing ranges for most cases, prosecutors can leverage charge bargaining to extract guilty pleas.<sup>280</sup> The methods used to achieve guilty pleas, crimes chosen for prosecution, sentences imposed, and people convicted become visible when public observation is possible.

Unlike the current plea system, the goals of the justice system are exalted. In the justice system, cases are not prosecuted only on behalf of victims, but in the interest of society because a crime is committed against the community when a law is broken.<sup>281</sup> Society uses language in charging documents such as, against the peace and dignity of a state. There is sometimes a literal victim of a crime, but protecting a community's sense of security, fairness, and justice is frequently a higher goal of criminal justice.

Similarly, sentencing factors include deterrence, and heinous offenses are publicly condemned. When covering the public multi-month trial of a war criminal and *genocidaire* as a journalist, Hannah Arendt commented, "[t]he very monstrousness of the events is 'minimized'" when a trial is conducted by only a limited tribunal.<sup>282</sup> She observed that broadcasting the crime and the perpetrator's trial is essential to allow a community to grieve, heal, and also remember the need to prevent future offenses.<sup>283</sup>

If the purpose of a justice system includes achieving community justice and deterring crime, meeting these goals is easier when criminal proceedings are public and community engagement is convenient. The tradition of encouraging the public to view important cases exists because justice requires community participation and acknowledgment. Beyond improving transparency, encouraging better attorneys, and increasing public officials' accountability, the justice system's broader societal significance is accomplished when the community can watch.

#### V. REMOTE AND VIRTUAL HEARINGS CAN IMPROVE THE QUALITY OF INDIGENT DEFENSE

Even when virtual hearings are no longer a pandemic necessity, virtual and remote hearings can replace some physical court appearances and be used as an option more frequently. The essential requirement is that virtual hearings still ensure access and fairness.<sup>284</sup> The argument that there is no substitute for evaluating in-person testimony in a remote, vir-

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279. *Id.* at 1312.

280. *Id.* at 1310–16.

281. *See generally* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570–71 (1980).

282. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 270 (Penguin Books 5th ed. 2006) (1963).

283. *See id.*

284. *See generally* James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241 (2012).

tual hearing is based on anecdotes—not studies—and neglects the significant improvement in technology.

Courts and policy makers should not ignore the difficulties of conducting remote and virtual hearings in some areas. Dependable internet access is a concern for virtual trials. Many Americans, especially in rural areas, lack reliable, high-speed internet connection—not to mention sufficient technology.<sup>285</sup> These issues disproportionately impact poorer Americans and can skew the jury pool. Even when internet access and sufficient technology exists, connections may lag or slow, which can cause jurors to miss important moments. Poor internet access or technology should be a factor in considering whether a virtual trial or remote testimony is appropriate, but it should not be a bar.

The areas with poor internet access are often the most rural or low-income—usually the areas where defendants and courts would benefit the most from virtual hearings.<sup>286</sup> The substantial cost savings to governments from virtual hearings could be used to provide technology and expand high-speed internet access. Internet access is also not completely absent in most places or out of reach for indigent clients. A study conducted by the Pew Research Center found that eighty-one percent of Americans have a smartphone, which indicates wide access to virtual platforms.<sup>287</sup> As long as technology and internet access is available, attending a court hearing can be done by downloading an app and logging into a virtual hearing.

Courts can modify the conditions of the virtual hearing to make reasonable accommodations, such as limiting virtual hearings to preliminary hearings or allowing witnesses or counsel to appear virtually. Remote access for jurors can provide adequate technology as well by setting up terminals or providing technology and internet access for the duration of the trial. Texas has set up virtual Zoom kiosks in courthouses.<sup>288</sup> Other states have added kiosks to attend virtual court in libraries, conference centers, and other public spaces.<sup>289</sup>

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285. Monica Anderson et al., *10% of Americans Don't Use the Internet. Who Are They?*, PEW RES. CTR. (Apr. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/> [<https://perma.cc/BT3V-89PG>].

286. See ZORZA, *supra* note 41; see also Pruitt et al., *supra* note 40, at 51–52, 52 n.155; see also Katheryn Hayes Tucker, *Rural Lawyer Shortage Concerns Leaders of the Legal Profession; Access to Justice: The Rural Lawyer Gap*, LAW.COM: DAILY REP. (Jan. 8, 2015, 6:00 PM), <https://www.law.com/dailyreportonline/almID/1202714375765/Rural-Lawyer-Shortage-Concerns-Leaders-of-the-Legal-Profession./> [<https://perma.cc/7ATM-7TLQ>] (discussing the access to counsel challenges in rural areas).

287. See *id.*

288. See Morris, *supra* note 220.

289. *Id.*

The limited research on how technology improves representation has focused on expanding legal aid.<sup>290</sup> From these studies, it appears virtual and remote hearings can help expand the quality of representation for indigent defendants.

A. *Expanding Quality Representation for Low-Income Defendants*

The failure of indigent defense is well-known. There are many egregious examples, such as Missouri's public defender implementing a wait-list or the public defender's office in Broward County, Florida, implementing an office policy in 2005 that attorneys could not advise clients to plead guilty without meaningful client contact.<sup>291</sup> In 2004, the ABA review of indigent defense found that "[o]verall, our hearings support the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation."<sup>292</sup>

Technology and virtual hearings can help with overloaded public defender offices and expand the reach and specialization of attorneys for indigent clients. Technology directly helps clients by making it easier to attend court dates and communicate with attorneys. It also allows attorneys to work more efficiently and effectively.<sup>293</sup>

Virtual hearings should not, ideally, be the new normal, but they can allow more flexibility and expand access to quality representation. Courts and attorneys gain flexibility, save time, and reduce cost. Attorneys may also practice more easily in underserved areas without living there. All of these benefits improve the quality of indigent defense.

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290. See ZORZA, *supra* note 41; see also Pruitt et al., *supra* note 40, at 51–52, 52 n.155 (discussing successful legal aid efforts to reach rural California residents using video technology).

291. See Backus & Marcus, *supra* note 39, at 1033–34.

292. Zachary Zurek, *Gideon's Promise: Can the Michigan Indigent Defense Commission Act Fix the State's Broken Indigent Defense Delivery System*, 61 WAYNE L. REV. 123, 126 n.24 (2015).

293. Virtual hearings have made it easier to attend multiple short hearings in one day in different courts. There have been several times during the pandemic when I attended two Zoom dockets on the same morning. Virtual hearings have also expanded the geographic range where I can effectively represent clients. Similarly, meeting with clients, especially clients who are detained or in prison, is also much easier and more meaningful with videoconferencing than by phone. These benefits were predicted before technology caught up and can help attorneys with large caseloads, especially public defenders. See Poulin, *supra* note 30, at 1166 (commenting on the "relaxed and effective informal communication" virtual communication allows and arguing "[t]he courts should make videoconferencing available to defendants and their attorneys to enhance the interaction between incarcerated defendants and their counsel, which is often characterized by neglect and disengagement").

1. *Virtual and Remote Court Hearings Can Reduce Assembly-Line Justice*

A familiar proposal to solve the indigent defense crisis is to increase participation from the private bar.<sup>294</sup> Principle Two of the ABA's Ten Principles of a Public Defense Delivery System says, in aspiration, "[w]here the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar."<sup>295</sup> Poor representation often happens because of high caseloads and the reluctance of quality attorneys to work in underserved areas.<sup>296</sup> Many underserved areas include small communities and indigent residents, thus, compounding these problems. Sustaining a local private practice is nearly impossible.<sup>297</sup> So attorneys—public and private—perpetuate the advocacy gap by avoiding high need areas.

The cost savings from virtual hearings can be passed on to paying clients, and attorneys can expand their practice region. This allows clients greater choice because the pool of realistically available attorneys is larger, and the savings potentially lower the cost of an attorney, as the market becomes more competitive and overhead is reduced. A possible benefit is a reduction in public defender caseloads—either because private attorneys lower their rates, begin practicing in more areas, or become more likely to accept pro bono cases. The flexibility of remote and virtual hearings allows attorneys with experience—such as attorneys with juvenile cases or trial practice in a larger area—to work in specialized units with greater ease.

Economists have endlessly studied the issue of whether cost savings are passed on to consumers.<sup>298</sup> The answer is often based on the industry and the industry culture. Legal representation includes ethical duties and voluntary guidelines of pro bono service.<sup>299</sup> Realistically reducing the costs of representation will incentivize only some attorneys to voluntarily lower costs or take more pro bono cases—sometimes a small effort can have a big impact.<sup>300</sup> Enhancing the size of a criminal defense legal mar-

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294. Tucker, *supra* note 288.

295. AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002).

296. *See generally supra* note 39 (highlight public defender caseloads).

297. *See* Tucker, *supra* note 288.

298. This is called cost pass through in economics and describes what happens when a business changes the prices of its products or services when their costs change. *See generally* Sam Peltzman, *Prices Rise Faster than They Fall*, 108 J. POL. ECON. 466 (2000) (discussing a phenomenon where prices are twice as likely to rise as they are to fall, but falling prices when cost savings occur is a sign of a competitive market).

299. ABA Model Rule 6.1 says private attorneys should provide fifty hours of pro bono services each year. *See* MODEL RULES OF PROF'L RESPONSIBILITY r. 6.1 (AM. BAR. ASS'N 2019).

300. The benefit of even a small amount of pro bono or low bono services can have incredible symbolic significance. In indigent defense, the presence of pro bono counsel increases attorney morale, changes the static nature created when the same prosecutors and defense attorneys jousting in the same courtrooms while



ket and reducing overhead costs, similarly, can create competition, which theoretically reduces prices and likely increases client choice.<sup>301</sup>

2. *Expanding Indigent Legal Representation Through New Technology Can Help Shrink Legal Deserts*

Quality legal representation is linked with pay and location. The absence of adequate indigent defense is apparent in areas with a low attorney-to-population ratio—considered legal deserts. These areas are often rural.<sup>302</sup> Studies show indigent rural residents are half as likely to receive legal aid assistance as urban residents.<sup>303</sup> Inadequate public defense systems have contributed to higher rural jail populations (which have risen over 400% between 1970 and 2013 while some urban jail population rates have fallen) and mass incarceration.<sup>304</sup>

Beyond the lack of attorneys in underserved areas, most legal aid and public defender models rely on some form of local funding, which often means the poorest regions receive the fewest resources.<sup>305</sup> For public defender funding, sixteen states fund indigent defense primarily at the county level, while Pennsylvania and Utah fund it entirely at the county level.<sup>306</sup> Twenty-eight states fully fund indigent defense with state revenue while another four are primarily state funded.<sup>307</sup>

In 2007, Montana Legal Services (MLSA) published a report of the Montana Video Experiment.<sup>308</sup> The study concluded that the use of video court increased access to justice in the legal aid context. It also found that although appearance and participation by video were not the same as in-person appearance, in most cases, the benefits outweighed the problems:

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adding new ideas, and increases the sense of respect for work that sometimes feels like a Sisyphean task.

301. See Peltzman, *supra* note 298.

302. See Pruitt et al., *supra* note 40, at 19.

303. LEGAL SERVICES CORP., *supra* note 40.

304. See JACOB KANG-BROWN & RAM SUBRAMANIAN, VERA INSTITUTE OF JUSTICE, OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA 9, 11 (2017).

305. A few notable exceptions, like Missouri, have completely state funded public defender systems. In Arkansas, where I currently practice, a division of statutory responsibilities means the state public defender commission pays for employee salaries, but counties pay for overhead expenses like office space, technology, and training. In reality, wealthier counties provide much better technology and benefits and also supplement the number of state funded attorney and staff positions with additional county funded positions. For a description of several public defender funding models, see JENNIFER SAUBERMANN & ROBERT SPANGENBERG, THE SPANGENBERG GRP., STATE INDIGENT DEFENSE COMMISSIONS 2-4 (2006); see also Backus & Marcus, *supra* note 39, at 1046–53.

306. See THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 54 (2009); see also SAUBERMANN & SPANGENBERG, *supra* note 305, at 5.

307. See THE CONSTITUTION PROJECT, *supra* note 306.

308. ZORZA, *supra* note 41, at 1.

Put most simply, when it occurs, the use of video court appearances by MLSA attorneys and pro bono lawyers means that those who would otherwise be forced to appear without lawyers have the benefit of counsel. Moreover, the use of video appearance technology means that legal aid has a presence in counties from which they would be absent if video were not there as an option. For the courts and other agencies, the technology is resulting in reduced costs and increased ability to schedule and control the courtroom schedule. However, the technology is used much less frequently within the legal aid environment than had initially been hoped, and must be used with some caution.<sup>309</sup>

The study found a significant impact in how videoconferencing “transformed the discussion about access to justice so that resources and need are now perceived and analyzed statewide.”<sup>310</sup> Overall improvements included better judicial control of calendars, cost savings, and the ability to increase indigent representation and pro bono representation.<sup>311</sup> Downsides included attorneys needing to become comfortable to virtual hearings and new technology.<sup>312</sup>

The Montana experience is not an outlier. In a separate study of rural legal deserts, contributors noted that common areas of need among rural families were family and health law, immigration advocacy, and eviction defense.<sup>313</sup> Successful legal outreach often involved linking rural areas to urban attorneys through technology.<sup>314</sup>

While researchers have proposed and studied technology solutions for access to justice for legal aid, the lack of regional parity in indigent defense has mostly escaped focus.<sup>315</sup> Where there is a regional gap in representation, the primary solution has been to incentivize attorneys to move to underserved areas for short periods of time through fellowships.<sup>316</sup>

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309. *Id.* at 12.

310. *Id.* at 14.

311. *Id.* at 15–16.

312. *Id.* at 17–22.

313. See Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 223–24 (2010) (discussing that an equal protection violation is a viable claim when significant regional indigent defense underfunding prevents adequate representation).

314. See Pruitt et al., *supra* note 40 at 51–52, 52 n.155 (noting successful legal aid efforts to reach rural California residents).

315. See Pruitt & Colgan, *supra* note 313.

316. See Pruitt et al., *supra* note 40, at 105–13 (describing a legal fellowship recruitment program in South Dakota that recruited fifteen attorneys, some to areas with effectively no criminal defense attorneys).

B. *Technology Can Help Improve Systemic Problems and Reduce Costs*

Virtual hearings can save attorneys, witnesses, and defendants time, and make court appearances and testimony more convenient. Typically, defendants and their attorneys (and prosecutors) have to appear multiple times in court to resolve even simple cases. Each court date requires waiting for the judge to call the case, and attendance can be expensive both financially and in time.

In a normal status hearing, attorneys lose time waiting for court to end, which means public defenders are wasting time instead of working on clients' cases. The drain of court delays also discourages private attorneys from taking pro bono cases. Another major benefit for indigent defendants is how virtual testimony allows witnesses who would be financially prohibited from traveling or missing work to testify. A virtual testimony option increases flexibility and lowers obstacles.

For a defendant, especially one who is low-income, a court appearance can mean missing work (and often pay), possibly finding childcare, and arranging or paying for transportation. These problems compound one another, especially for people at the margins. Even small costs are obstacles for people close to the poverty line and are unnecessary for status hearings where cases are reset to a new court date. Over time, the costs of work absences, arranging for childcare, or transportation can become oppressive. In many cases, it eventually leads to a defendant failing to appear for court—which means a new arrest and detention that is often accompanied by a job loss, eviction, additional childcare issues, or a higher bail—all of which contribute to poverty, social costs, and mass incarceration.

For routine court appearances, virtual hearings can reduce the cost of appearing for court, lower failure to appear rates (which can reduce pre-trial detention and incarceration), and give attorneys, especially public defenders, more time to work on cases. When testimony is needed, virtual hearings or—at least—virtual testimony can help low-income witnesses appear for court and allows other witnesses to avoid being sequestered until their time to testify.

Similarly, jurors with obstacles—e.g., school conflicts, geographic conflicts, or an inability to miss work travel—can participate easier. The burden of adding alternate jurors, using an enhanced jury pool, or changing venues is reduced when jury participation is easier. Most importantly, virtual jury service—if implemented in a way that is less demanding on jurors—can result in a more fair and accurate cross-section in a jury venire. Jurors are often excused when they explain that they cannot miss work, have childcare issues, travel frequently, or are students, which results in a more homogenous jury pool—typically older, wealthier, or retired individuals.

Remote, virtual hearings also allow attorneys to appear in more distant places. The flexibility comes from reduced travel expenses, recovered

time, and overhead savings. In place where courts have experimented with remote technology, such as Nebraska, groups such as law enforcement transport, translators, and attendees have benefitted from cost savings; further, technology has helped mitigate the loss in judges and attorneys as people move from rural to urban areas.<sup>317</sup>

Assessing the program, one judge with a juvenile docket commented on the need for virtual court technology for short hearings with high production costs. “It costs each of the counties that have to pay the detention bills a ton of money . . . . The sheriff has to drive four hours and 200 miles for a five-minute deal. It really stretches the budgets, and it’s something that video technology would help resolve.”<sup>318</sup> Communities may consider using the savings to reinvest in other community programs, save money, or use funds to booster holistic criminal justice solutions.

In a practical example, virtual and remote technology has supported participants in specialty courts such as drug and veterans treatment courts.<sup>319</sup> They allow for courts to have updates from clients in treatment centers, while getting to observe the client and speak to the treatment staff. This allows for more control over long-term treatment plans. Program evaluators can be present at more court hearings than ever before, allowing them to have a more accurate picture of the progress of the court. Friends and family members can more easily attend hearings of incarcerated clients and give insight on the best course of action. Clients who are doing well can attend status hearings, quickly give updates, or ask questions without missing work, obtaining childcare, or finding transportation.

Transcription benefits from virtual technologies also include: (1) cost and time savings for court reporters or staff who take notes, (2) a quick reference guide for attorneys and judges, (3) a preliminary alternative while a certified transcript, if needed, is prepared, and (4) the allowance an immediate review of issues or trials for error.<sup>320</sup>

### C. *Toward Better Indigent Defense*

Currently, in many states, the most experienced public defenders are spread out between offices or concentrated in the areas of a state that are most desirable. A broader use of virtual hearings could allow public de-

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317. Grant Schulte, *Rural Judges Turning to Video Technology*, LINCOLN J. STAR, [https://journalstar.com/news/state-and-regional/govt-and-politics/rural-judges-turning-to-video-technology/article\\_63c7b812-8f0f-5d11-9323-49370b790c37.html](https://journalstar.com/news/state-and-regional/govt-and-politics/rural-judges-turning-to-video-technology/article_63c7b812-8f0f-5d11-9323-49370b790c37.html) [<https://perma.cc/E6H9-XY7J>] (last updated Jan. 31, 2017).

318. *Id.* (internal quotation marks omitted).

319. The drug court in Washington County, Arkansas has used Zoom for most of their hearings during the pandemic. It plans to implement virtual hearings more in the future because it saves participants and staff’s time and reduces failure to appear rates.

320. Zoom, the most common virtual court technology, provides contemporaneous transcriptions. So does a YouTube livestream.

fender's offices to create specialty trial teams that would allow for better representation, especially on more serious cases.<sup>321</sup> Remote hearings can also allow for experimentation with client and public defender matching based on either skill set or client choice.<sup>322</sup>

While novel, allowing some degree of client choice is a potential evaluation tool for deficient public defenders. It is also consistent with the reasoning in *Gideon v. Wainwright*<sup>323</sup> that “there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses” as proof that “lawyers in criminal courts are necessities, not luxuries.”<sup>324</sup> One of the universal experiences of public defenders is the worry of being labeled an obstructionist for litigating issues. Conflicts are inherent in representing so many clients—goodwill is exhausted on one client at the expense of another, and institutional politics discourage litigation.

This is not an excuse, but it is a reality for many public defenders, and anything that protects public defenders from judges or institutional consequences for zealous litigation promotes better indigent defense. In areas with public defenders appointed by courts or commissions, client selection can allow public defenders to operate with greater independence from judges or politically appointed commissioners. Even in states that have full-time offices, public defense organizations often use some form of appointment for conflicts and appellate attorneys.<sup>325</sup>

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321. For example, public defenders across a state can coordinate more easily on serious felonies, and trial teams can include defenders with expertise in certain cases with unique problems or scientific issues. Possibly, public defender retention may increase if offices can pool resources, allow attorneys with children to access court from home more often, and let attorneys and investigators work more collaboratively across offices. Compare Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769 (2016) (identifying issues in public defender systems and suggesting structural and cultural solutions to achieve better representation for indigent defendants), with Memorandum from Gregg Parrish to Ark. Pub. Def. Comm'n Pers., COVID 19 Return (Oct. 9, 2020) (on file with author) (mandating all employees of the Arkansas State Public Defender System return to work in-person, without accommodations for health or childcare, during the pandemic and requesting prompt notification of the expected retirements and resignations due to the public defender commission's chosen policy).

322. In some places, public defender services have experimented with allowing clients to choose their public defender, which is common in commonwealth nations. Scotland found this practice increases a client's trust in their representation. See Lefstein, *supra* note 39, at 32.

323. 372 U.S. 335 (1963).

324. *Id.* at 344.

325. This concept admittedly has a flaw in the obvious situation where a lot of clients request a few high-quality attorneys, which can be remedied by policies such as an attorney is only available as a choice if the attorney's caseload allows it. The proposed solution also raises an information asymmetry issue—will clients select the best attorneys? In my experience, clients share detailed information about attorneys. One of the first hurdles to overcome as a public defender when building an attorney-client relationship is addressing the client's lack of choice.

## CONCLUSION

In the keynote address of a 2010 ABA conference, Laurie Robinson, at the time the Assistant Attorney General for the DOJ's Office of Justice Programs, commented, "Justice Felix Frankfurter *had written . . .* 'the history of liberty [is] largely . . . [the] history of [the] observance of procedural safeguards.' Sometimes, our highest ideals fail to play out amid unwarranted fear and old habits."<sup>326</sup>

The pandemic has forced courts to implement new approaches and break habits. While the shift to virtual and remote hearings will inevitably involve trial and error, constitutional rights can be preserved in a virtual courtroom—but it needs cooperation from a judicial system that has traditionally embraced technology with reluctance.

Even when courts fully reopen, virtual court hearings and convenient public access are part of the justice system's evolution. The pandemic expanded courts' use of virtual hearings. Technology for virtual hearings is already essential to a functioning judiciary. Reasonable judicial management can address privacy concerns without limiting public access. The proposals in this paper can also accommodate judges, attorneys, jurors, and clients. Importantly, the framework identified can preserve First and Sixth Amendment rights and due process guarantees.

Embracing livestreams and using virtual, remote hearings and testimony can create a more equitable and better functioning court system. Courtroom livestreams promote judicial legitimacy, transparency, and accountability. Virtual tools can also increase the quality of representation and outcomes for indigent or lower-income defendants. Technology can be a patch or a blueprint to a better criminal justice system.

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326. Laurie Robinson, Assistant Att'y Gen., Office of Justice Programs, U.S. Dep't of Justice, Keynote Address at the National Public Defense Symposium (May 20, 2010), *reprinted in* 7 TENN. J.L. & POL'Y (SPECIAL ISSUE) 25, 34 (2010) (alterations in original) (footnotes omitted) (quoting *McNabb v. United States*, 318 U.S. 332, 347 (1943)).