Photo montage by Cathy Zlomek

COVID-19's Next Victim? The Rights of the Accused

On May 24, 2020, Benjamin Netanyahu walked into a courtroom in Jerusalem to face charges of corruption. The occasion was momentous by any measure — Mr. Netanyahu became the first sitting Israeli prime minister to stand trial. But despite these historic charges, the media appeared equally fixated on what Mr. Netanyahu was wearing. Why? He walked into court donning a blue surgical facemask, consistent with public health restrictions for the coronavirus.[1] And Mr. Netanyahu was not alone. All of the lawyers and judges in attendance also wore masks, while the three-judge panel positioned themselves behind a glass divider.[2] Few have considered how these changes will impact Mr. Netanyahu's trial, but none can deny that the stage for one of the biggest trials in the world had been fundamentally altered.

This is no isolated incident. The COVID-19 pandemic is transforming the world's legal institutions with alarming speed. In the United States, many federal and state courts have indefinitely suspended most in-person proceedings, including a near-total shutdown of criminal and civil jury trials, to limit the spread of the coronavirus. In view of health concerns, some trials were even halted mid-testimony, with judges declaring mistrials to limit the risk of infection.[3]

Maintaining an indefinite pause on jury trials is a temporary response to a global pandemic, not a long-term solution. State courts handle roughly 106,000 trials per year, tens of thousands of which have already been suspended.[4] Likewise, many defendants facing criminal charges remain in custody, possibly endangering their right to a speedy trial and further risking exposure to the coronavirus.[5] As stay-in-place orders ease and public spaces begin to reopen, jury trials will have to resume in some capacity.

When this occurs, safety from infection will rightly be at the forefront of everyone's mind. Toward that end, judges have been developing innovative solutions to protect participants, especially jurors. Plans have included, *inter alia*, requiring masks, moving trial and deliberations to overlarge rooms to ensure social distancing, reducing the size of juror pools, and/or conducting proceedings via video conferencing platforms (*e.g.*, Zoom or Microsoft Teams).[6]

But while safety is imperative, the integrity of the jury system is also sacrosanct. Trials have operated roughly the same way since the founding of this country — and for very important reasons.[7] Allowing criminal defendants to look their accusers in the eye, for instance, serves the truth-seeking function of cross-examination. Likewise, packed courtrooms open to the parties' friends and families, as well as the press, promote systemic fairness. Limiting not only *who* may view the proceedings, but also *how* they are viewed, could fundamentally alter the judicial system.

As courts experiment with new procedures, they must take affirmative steps to protect defendants' civil liberties — especially in the criminal context. As a threshold matter, while "trial by video" may be permissible in civil cases, it is wholly insufficient for criminal cases. Due process concerns would likely render a digital jury trial unconstitutional in

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the face of government prosecution. A long line of cases establishes defendants' right under the Sixth Amendment to be *physically* present. Thus, video conferencing technology cannot replace criminal jury trials. What is needed, then, is a nuanced discussion about how best to resume in-person proceedings.

It would be naïve to dismiss the difficulties of restarting face-to-face jury trials. Participants must feel absolutely comfortable and safe in all aspects of the proceeding. Myriad issues must be considered — including voir dire, procedures for deliberation, effective advocacy, providing public access, speedy trial rights, and enforcing the basics of social distancing.[8]

At minimum, the pandemic will make it difficult to obtain a fair cross-section of the community, as required by the Sixth Amendment. In a recent study conducted by Dubin Research and Consulting ("DRC"), 74 percent of respondents indicated that they would be concerned about their health if called to serve as a juror and would be anxious about being in close proximity with other potential jurors. Given these concerns, high-risk (or simply risk-averse) individuals will undoubtedly self-select — refusing to respond to jury summonses for fear of infection. The judiciary must carefully consider these consequences and take active steps to mitigate them — before rushing to resume criminal trials. It is time to formulate a comprehensive plan for conducting criminal jury trials in a post-COVID-19 world.

This article proceeds in four sections. Section I describes how courts have addressed, or have proposed to address, the pandemic to date. Section II explains how conducting trials by video would violate criminal defendants' core rights, based upon constitutional precedent and human psychology. Section III explores the reality of resuming in-person trials during a pandemic and identifies a host of obstacles that courts must first address. Finally, Section IV provides a set of core principles that should guide the operation of jury trials during these challenging times.

I. The Current State of Affairs

A. The Pandemic Halts Court Proceedings and Trials

Even as the pandemic was on the horizon in early March 2020, the courts proceeded with business as usual. Jurors, litigants, judges, clerks, and lawyers all packed into crowded elevators, hallways, and courtrooms. In New York City, all 33 of the city's courthouses remained open, and people kept showing up for work.[9] And there were good reasons for doing so. Closing a court is not the same as closing a restaurant or a school. People's liberties and constitutional rights would be at risk without a functioning judiciary to enforce them.

COVID-19 began to derail court proceedings in mid-March 2020. On March 16, a Manhattan judge declared a mistrial in the case of a doctor accused of sexual abuse after his defense attorney arrived at court with coronavirus-like symptoms.[10] The judge initially tried to continue the proceedings by letting an attorney examine a witness via speakerphone from a different room in the courthouse, but ultimately announced, "Jurors, this case is over. I have to declare a mistrial. We need a fair trial. We need a lawyer who can represent his client."[11] That same day, as COVID-19 cases began to skyrocket, New York's Office of Court Administration issued an indefinite moratorium on trials and grand jury proceedings. But by then, judges, court personnel, jurors and litigants had contracted the virus, and sadly, in some cases it claimed their lives.[12]

This same pattern repeated across the country, as lockdown orders were issued and cases were stopped in their tracks. For instance, the pandemic forced Los Angeles officials to close the county's courthouses, halting the murder trial of Robert Durst (the heir to a New York real estate empire) after opening statements had already been given.[13]

Now, as states begin to inch their way towards normalcy — by opening their cities in phases — courts have begun to reopen in parallel. For example, counties in rural Mississippi that have two or fewer reported deaths attributed to COVID-19 mailed jury summonses for trials beginning the week of May 18.[14] Likewise, some courts in California, such as the Contra Costa County Superior Court, opened their doors on May 26.[15] Even the Durst trial is expected to resume on July 27.[16]

Figure 1: Overview of State Jury Trial Restrictions

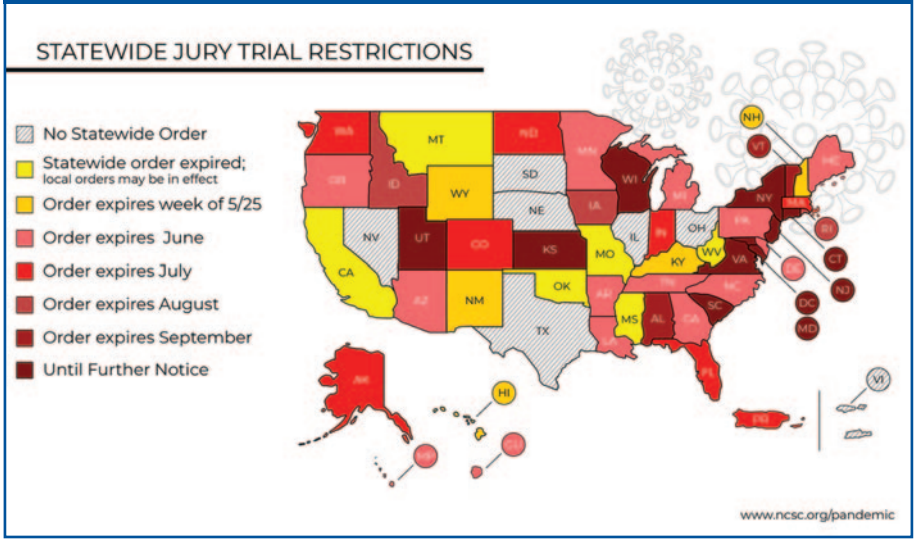


Figure 1 details the current status of each state's restrictions on jury trials. It indicates that the majority of states will have lifted jury trial restrictions by July 2020.

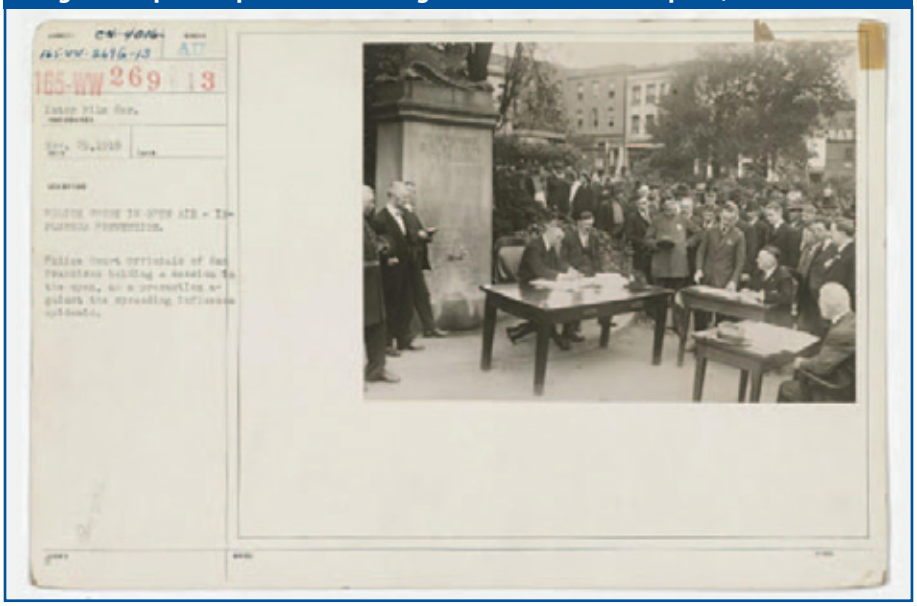
The question on everybody's mind, then, is *how* courts plan to contain the coronavirus. The following section explores the historic precedent for any such judicial response.

B. Historic Responses to Pandemics

The courts' actions in response to this pandemic are not entirely without precedent. The 1918 influenza pandemic is the closest analog — it was the most severe pandemic in recent history. Nicknamed the "Spanish flu," the influenza was caused by an H1N1 virus with genes of avian origin. At its worse, the Spanish flu infected 500 million people worldwide, which at the time was about a third of the Earth's population. Although there is no universal consensus regarding where the virus originated, it spread worldwide from 1918-1919.[17]

Not all U.S. courts appear to have closed in response to the 1918 influenza epidemic. One historian noted that in New York in October 1918, "New Yorkers caught spitting were usually rounded up and brought before courts

Figure 2: Open-air police court being held in Portsmouth Square, San Francisco



in large numbers," including over 130 men in a single day who were fined $1 for violating anti-spitting laws.[18] Meanwhile, other courts appear to have introduced precautionary measures in response to the epidemic. It was believed that fresh air helped counteract the spread of the virus, so some court proceedings were held outside.[19] Figure 2, an image in the National Archives, shows one such assembly in San Francisco.[20]

The Supreme Court, on the other hand, postponed scheduled arguments for October 1918 in response to the Spanish flu epidemic for about a month.[21] The Court also restricted who could be admitted into the courthouse, denying entry to all persons but lawyers.[22]

The Court had previously shortened its argument calendars in August 1793 and August 1798 in response to yellow fever outbreaks.[23] During the 1798 epidemic, other courts continued to hold arguments but were moved to courthouses outside of the epicenters of the outbreaks.[24] This included the Philadelphia circuit court, which held session in Norristown, north of the city.

While precautionary measures and court closures have historical authority, many of the constitutional rights afforded to defendants today had not yet been defined by the Supreme Court. One historian noted that the Bill of Rights was only beginning to be leveraged in the 1920s, having spent nearly 130 years in relative obscurity, rarely cited by the Supreme Court.[25] In fact, in 1918, the Supreme Court had only recently approved of "drawing of a jury from a part of the district, rather than from the entire district."[26]

Thus, the modern judiciary had little precedent to guide its response to COVID-19. The next section outlines how courts in various jurisdictions have chosen to proceed.

C. How Courts Have Responded to the Pandemic to Date

i. Telephonic Hearings

The inability to resume court proceedings in person forced courts across the nation to embrace technology in ways they never had before. The leading example is the U.S. Supreme Court, which broke from tradition by conducting arguments via conference call.[27] Within the federal court system more broadly, teleconference hearings have been *encouraged* in some jurisdictions (*e.g.*, Eastern District of New York, Southern District of California, and Northern District of Illinois), while outright *required* in others (*e.g.*, Eastern District of Pennsylvania, District of Maine, and Northern District of Florida).

ii. Videoconference Hearings

Videoconferencing platforms have been adopted in an effort to restart the justice system. Most recently, in the U.S. District Court for the District of Massachusetts, Judge Nathaniel M. Gorton held a remote video proceeding during which actress Lori Loughlin and her husband, Mossimo Giannulli, pled guilty in the notorious college admissions case.[28] However, the hearing, which was conducted over Zoom, was not without hiccups. The judge had to remind speakers to mute or unmute themselves.

With respect to proceedings necessitating jurors, certain courts have also begun launching pilot programs to determine whether technology can meet their needs. For example, on May 14, New Jersey launched a pilot program to hold virtual grand jury proceedings via Zoom in Bergen and Mercer counties.[29] Similarly, on May 22, Florida Chief Justice Charles Canady ordered the creation of a pilot program for civil jury trials via remote technology.[30]

D. How Courts Plan to Resume Jury Trials

Federal and state courts that have announced plans to resume jury trials generally fall into two categories. The first approach virtualizes the entire trial experience. The second approach favors in-person jury trials — but with enhanced safeguards intended to contain the virus. A representative sample of each approach is presented below, based on current information.

i. A Virtual Trial — Texas

Texas has emerged as a leader in embracing remote video technology by being the first state to conduct a civil bench trial and jury trial on the platform. On April 22, Harris County Judge Beau Miller held a one-day bench trial in an attorney fee dispute case.[31] The proceeding was livestreamed on the court's website. Judge Miller noted that there had been more than 2,000 virtual audience members throughout portions of the day.

Less than a month later, the state charted new territory by using remote video to conduct a civil jury trial.[32] A Collin County summary jury trial kicked off with two state court judges and three attorneys vetting 25 prospective jurors.[33] The presiding judge instructed jurors that, despite the use of Zoom, they were still in court and could not Google information or use their phones. He also warned jurors that they might need to ask family members to leave the room.

For voir dire, the panel was divided into two groups. The attorneys questioned 12 jurors, while the remaining 13 jurors were placed in a virtual break-out room. During this process, the attorneys asked prospective jurors to raise their hands to show where they stood on relevant issues. They were then called upon to discuss their answers further. Once the voir dire process was complete, which took 45 minutes, the judge asked the parties

to "approach the bench." In the world of Zoom, this meant that the judge created a new break-out room for litigants to communicate without the jurors hearing. Once they returned to the main Zoom meeting, the trial proceeded with the 12 jurors on the panel. The trial's only noted hiccup was when a juror wandered offscreen during a break and could not hear the judge calling him back.[34]

The virtual interface mirrors the configuration depicted in Figure 3, with all potential jurors visible simultaneously alongside the litigants, attorneys, and presiding judge.

ii. A (Modified) In-Person Trial — New York

The Southern District of New York is undertaking the necessary transformation to resume in-person jury trials, although no reopening date has been announced. Chief Judge Colleen McMahon announced that plexiglass will be the norm — courtrooms will be refurbished so that witnesses testify behind a clear plastic barrier. Likewise, jurors will be seated further apart in the jury box in accordance with social distancing restrictions.[35]

Social distancing will also be enforced in the security line with distancing indicators on the floor and limits on the number of people allowed in the elevators. District Executive Edward Friedland added that there will be limits to the number of lawyers in the courtroom wells and who can observe.[36] In addition to masking and following hygiene protocols, court personnel will be screened for the virus and asked to self-report symptoms.[37]

Thus far, the court has not indicated whether jury deliberations will be conducted in traditionally designated areas, what protocols will be enacted around jurors handling evidence, or if the number of people that can observe the proceeding will be limited (*e.g.*, potentially barring the family of the defendants from attending the trial). While the Southern District of New York has not announced whether it will adopt a videoconferencing platform for virtual trials, prior to New York City's PAUSE order being issued, District Judge Alison Nathan took the unprecedented step of allowing an ill juror to deliberate via FaceTime.[38] Judge Nathan noted, "[W]e are in extraordinary circumstances and given the situation it is appropriate to proceed thusly."[39]

With respect to the New York State courts, Chief Judge Janet DiFiore described several safety measures that will be implemented. These include the mandatory use of masks by all persons entering the courthouse, social distancing protocols, strict cleaning and sanitizing standards, and the installation of plexiglass partitions in strategic courthouse locations.[40]

iii. Other Approaches

A handful of courts in the country recently resumed in-person operations. For example, on May 26, California's Contra Costa County Superior Court reopened all locations and resumed jury trials with precautionary measures.[41] These include mandated face coverings at all times while inside the courthouse, taking the temperature of anyone entering the court and denying entry to those who have a temperature of 100 degrees or higher, admitting no more than 50 prospective jurors in the assembly room, and excusing potential jurors exhibiting COVID-19 symptoms or those who are high-risk (*e.g.*, over 60 years of age or immunocompromised).[42] The court's press release also states, "**No Nonessential Parties.** Due to social distancing limitations, individuals who are not essential to Court matters should not accompany parties to Court for any matter or case type."[43] The press release makes no mention as to whether courtroom proceedings will be broadcast to the public.[44]

California's Monterey Superior Court, which will open in June, announced on its website that "fewer trials will be in session at any one time to reduce the number of people in the courthouse."[45] With respect to jury deliberations, the court announced that deliberations will occur in the courtroom rather than in the traditional jury deliberation room. In order to adhere to social distancing guidelines, the court also announced that "members of the public may be precluded from attending jury trials in person," while adding that public call-in lines have been created for each courtroom so that members of the public can call in and listen to trials.

Figure 3: Representative User Interface (Zoom)

Other jurisdictions have found that they need to step out of the courthouse in order to safely conduct a jury trial. For example, in northwestern Montana, a school gym will be transformed into a courtroom, as it is the only place in the county where 100 prospective jurors can gather while adhering to social distancing guidelines.[46] This will be the home to a domestic-assault trial set to begin on June 9. Whether this venue will still be used when school resumes remains to seen.

The Supreme Court of Arizona even issued an order limiting peremptory challenges to two per side in order to minimize the size of the jury pool. Specifically, it modified procedural rules "to afford litigants only two peremptory strikes for potential jurors per side in all civil and felony cases tried in the superior court, and one peremptory strike per side in all misdemeanor cases."[47] By limiting the number of jurors released on peremptory grounds, the court hopes "to reduce the number of citizens summoned to jury duty" and, therefore, the risk of infection.[48]

Most recently, the U.S. District Court for the Northern District of Texas announced plans to resume in-person jury trials, including trials against criminal defendants. U.S. District Judge James Wesley "Wes" Hendrix scheduled a jury trial in *United States v. Santos*, which is set to begin on June 15, 2020, in the Abilene courthouse.[49] The case involves a felony charge for attempted enticement of a minor.[50] In anticipation of trial, Judge Hendrix issued a *Notice of Trial Procedures*, which enumerates various safety measures intended to mitigate COVID-19. Among other things, the court will take jurors' temperatures, disinfect common spaces, and ensure social distancing.[51] Regarding the latter protocol, the court will conduct voir dire in the Lubbock County Central Jury Pool building because it is large enough to permit the jury panel to remain at least six feet apart at all times.[52] Likewise, jury deliberation will "occur in a large room to permit social distancing."[53] The court will also require participants, including witnesses, to wear clear plastic face shields. Finally, while Judge Hendrix intends to limit seating in the physical courtroom, a live audiovisual feed will be provided — both in an overflow room and through remote means.[54]

Thus, there exists a wide range of responses to the pandemic, mirroring the relative impact of COVID-19 in each jurisdiction and the local communities' resulting attitudes. But despite these numerous approaches, one thing is clear. While virtual trials may be sufficient to handle civil cases, they cannot substitute for in-person proceedings when applied to criminal defendants. The following section explores these fatal constitutional shortcomings.

II. Virtual Criminal Trials Cannot Overcome Key Constitutional Hurdles

To keep the wheels of justice turning, most courts have been conducting a host of proceedings by video or teleconference, including arraignments, guilty pleas, and sentencing, with the consent of the defendant. This is a significant change for the legal system, where longstanding rights entitle defendants to be charged, tried, and judged by people they can look in the eye.

While no court has yet conducted a full jury trial remotely, there have been clear moves in that direction. For instance, in a statewide order staying all jury trials, Chief Justice Tani G. Cantil-Sakauye of California noted, "Courts may conduct such a trial at an earlier date, upon a finding of good cause shown or through the use of remote technology, when appropriate."[55] Likewise, the U.S. District Court for the Southern District of New York recently began allowing grand jurors to convene and deliberate via video conference.[56]

However, while "jury trial by video" may be permissible in the civil context, it raises grave constitutional concerns when applied to criminal proceedings. The arguments against remote testimony in criminal trials are plentiful. Remote testimony may violate defendant's right to be confronted with the evidence against him or her because the testimony is not "face-to-face." Remote testimony cannot ensure truthfulness to the same extent as requiring the witness to testify live before the defendant. Remote testimony limits the information available to defendants when assessing juror bias. And remote testimony, as opposed to live testimony, does not provide the court and jury with the same opportunity as does live testimony to assess the demeanor and truthfulness of the witness. Each of these issues is addressed in turn below.

A. Criminal Defendants Have a Fundamental Right to Physically Face Their Accuser

The Sixth Amendment's Confrontation Clause assures the right of an accused "to be confronted with the witnesses against him."[57] The U.S. Supreme Court has declared that face-to-face confrontation forms "the core of the values furthered by the Confrontation Clause."[58] This core value serves dual purposes. First, facing one's accusers deters false accusations, as it is far more difficult to lie when looking directly upon the accused.[59] Second, face-to-face confrontation enables jurors to "examine the demeanor of the witness as the witness accuses the defendant, as well as the demeanor of the defendant as he hears the accusations. …"[60] This, in turn, enables jurors to more properly assess credibility.[61]

Whether the Confrontation Clause forbids virtual trials represents new terrain. No authority exists — in the federal Constitution or most state analogues — that outright prohibits the practice. On the other hand, no authority explicitly permits them, either.[62] Thus, in assessing whether an appellate court would affirm a verdict arising out of a remote video proceeding, we must consult analogous precedents involving videoconferencing.

i. The Supreme Court's Guiding Principles

The Supreme Court encountered the issue of live, audiovisual testimony on two occasions. In *Coy v. Iowa*, the Supreme Court reversed a sexual-assault conviction, concluding that the lower court's decision to permit two child witnesses to testify behind a large screen where they could not see the defendant violated the defendant's confrontation rights. In reaching this conclusion, Justice Scalia, writing for the majority, stated: "We have never doubted … that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[63] He further stated that "the irreducible literal meaning of the Clause" is "[the] right to meet face to face all those who appear and give evidence at trial."[64] According to Scalia, "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution,'"[65] in that a witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts."[66] He further added, "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former [case], even if the lie is told, it will often be told less convincingly."[67]

Despite this strong language, however, the right to confrontation is not absolute.[68] In *Maryland v. Craig*,[69] the Court held that the Confrontation Clause does not prohibit a state from using one-way closed-circuit television to capture testimony of a child witness in a child

abuse case — even where the child cannot view the defendant while testifying.[70] The Court declared that, "[a]lthough face-to-face confrontation forms 'the core of the values furthered by the Confrontation Clause,' … it is not the sine qua non of the confrontation right."[71] Rather, the Court found that the Confrontation Clause "reflects a *preference* for face-to-face confrontation at trial," which "must occasionally give way to considerations of public policy and the necessities of the case."[72]

Applying these principles, *Craig* created a two-part test for determining whether an exception to the Confrontation Clause's face-to-face requirement is warranted: "[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where [1] denial of such confrontation is necessary to further an *important public policy* and [2] the reliability of the testimony is otherwise assured."[73] With respect to the first prong, *Craig* added the additional requirement of a "*case-specific*" finding of necessity.[74]

Thus, the Supreme Court indicated a willingness to retreat from a literal application of the Sixth Amendment — but only in "narrow circumstances" and on a "case-specific" basis.[75]

ii. A Split Amongst the Circuit Courts

Lower courts do not agree on how to apply the foregoing precedent. Some federal courts view the Confrontation Clause as guaranteeing the defendant a general right to contemporaneously cross-examine adverse witnesses.[76] Other courts provide a more specific right to examine witnesses face-to-face in the defendants' physical presence.[77] Whether a court is inclined to permit remote prosecution-witness testimony depends, in part, on the level of significance it attaches to the face-to-face component of the Sixth Amendment.

For instance, in *Gigante*,[78] the Second Circuit found no violation of a defendant's Confrontation Clause rights when the trial court permitted a mob informant dying of inoperable cancer to testify from a remote location by two-way, live videoconferencing technology.[79] While acknowledging that in-court testimony may have "intangible elements ... that are reduced or even eliminated by remote testimony," the court rejected the notion that the defendant was entitled to face his accuser "in the same room."[80] Instead, the Court held that the two-way videoconferencing procedure "preserved the face-to-face confrontation celebrated by *Coy*."[81]

The Eleventh Circuit came to the opposite conclusion in *Yates*. There, the trial court's decision to allow two Australian nationals to testify remotely from Australia against two defendants in a criminal trial in Alabama violated the defendants' Confrontation Clause rights, notwithstanding that the witnesses were beyond the government's subpoena powers.[82] Applying the *Craig* test, the court found that confrontation was not "necessary." Specifically, it found that, although "presenting the fact-finder with crucial evidence is, of course, an important public policy, … the prosecutor's need for the videoconference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the defendants' rights, to confront their accusers face-to-face."[83] The court noted that a Rule 15 deposition in Australia with all necessary parties was a potential alternative, which would have preserved the defendants' confrontation rights.[84]

iii. Application to the Coronavirus Pandemic

Precedent suggests that traditional constitutional rights (such as confrontation) can be satisfied or modified if video conferencing satisfies other sufficiently important interests. Of course, existing confrontation clause jurisprudence did not consider the scope of a national emergency like COVID-19. The challenges posed by the virus — *i.e.*, the continued operation of the judiciary during a time when in-person jury trials could be deadly — are certainly extreme. Keeping participants alive is indeed a public policy of prime importance.

But *Craig* requires more. It requires that any use of remote testimony be individually considered on a "case-specific" basis. Categorical assessments are simply not permitted. Any attempt by a court to impose a blanket rule, *e.g.*, one which permits virtual testimony in all cases during the pandemic, would run afoul of this constitutional principle.

This requirement is no afterthought. The Supreme Court has rejected attempts to deprive defendants of face-to-face confrontation based on such blanket rules. For instance, in 2002, the Court considered a proposed amendment to Rule 26 of the Federal Rules of Criminal Procedure that would have explicitly permitted video testimony in "exceptional circumstances."[85] Under Proposed Rule 26(b), federal courts would have been able to authorize two-way, live videoconferencing technology from a remote location in criminal cases "in the interest of justice" when the requesting party established (1) "exceptional circumstances for such transmission," (2) the transmission used "appropriate safeguards," and (3) the witness was otherwise "unavailable" to attend the trial in person.[86] The Court declined to adopt the proposal, however, for failure to "limit the use of testimony via video transmission to instances where there has been a *case-specific finding* that it is necessary to further an important public policy." The majority appeared to consider a separate statement filed by Justice Scalia, wherein he indicated that the proposed amendment was of "dubious validity under the Confrontation Clause."[87] He observed that "*[v]irtual confrontation might be sufficient to protect virtual constitutional rights. I doubt whether it is sufficient to protect real ones*."[88] A court order that permits remote video trials during a pandemic — while well-meaning — would fail to meet this high bar.

It must also be noted that the diversity of state constitutions means that any analogy to the Confrontation Clause will be inapplicable in some states — especially states whose highest courts have disagreed with *Craig*. For instance, the Illinois Supreme Court held, "[W]e conclude that the confrontation clause of the Illinois Constitution provides that a defendant is entitled to a face-to-face confrontation with a witness."[89] Virtual trials are plainly unconstitutional in such states on separate grounds, irrespective of Supreme Court precedent.

iv. Case Law on Unavailability Provides Additional Guidance

Case law concerning the treatment of sick witnesses provides further guidance. In very limited circumstances, prosecution witnesses have also been permitted to testify remotely due to severe illness. No court has permitted virtual testimony based on the *prospect* that a witness will become ill *in the future*.

To the contrary, courts typically squabble over the extent and duration of the illness necessary to evidence unavailability. For example, in *Gigante*, Peter Savino, "a former associate of the Genovese family," was "in the final stages of an inoperable, fatal cancer, and was under medical supervision at an undisclosed location."[90] After hearing testimony from physicians, the trial judge found that it would be medically unsafe for the witness to travel to New York for the trial, and allowed him to testify via two-way video.[91]

Similarly, in *Horn v. Quarterman*,[92] the Fifth Circuit allowed remote two-way testimony by a witness who was terminally ill, hospitalized for liver cancer, and

not expected to improve. The Court found that, "after discussing Birk's condition with Birk's doctor, that use of the unorthodox procedure was necessary, and emphasized that other aspects of the Confrontation Clause were maintained." On that basis, it found that the "state court records reflect that a case-specific finding of necessity was made. …"[93]

Nobody seriously disputes that witnesses suffering from the coronavirus and confined to a hospital may be permitted to testify remotely. But current proposals to conduct virtual trials make an additional logical leap. They permit remote testimony for witnesses that are not yet sick — but merely risk becoming sick if they provide in-court testimony. Such speculation is insufficient to establish unavailability.

B. Defendants Have a Right to Participate in Their Own Defense

A criminal defendant's right to be present at his trial is "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause."[94] This right is closely tied to an accused's right to confront witnesses as he must necessarily be in the courtroom to obtain the face-to-face confrontation of the evidence against him contemplated by the Sixth Amendment.[95] The defendant's right is also protected, in some situations, by the Due Process Clause. The Supreme Court has explained that a defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge. … [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."[96] Additionally, the defendant's presence is also often mandated by court rule. For instance, Federal Rule of Criminal Procedure 43 sets forth the circumstances in which the defendant's presence is required, not required, and can be waived.[97]

Remote video trials, where the court conducts the proceedings over an online webinar, raise several issues for a defendant's right to be present.

i The Right to Be Present, Like the Right to Confront, Does Not Meet the *Craig* Bar

First, there is the question of whether appearing by video on a webinar would qualify as being present within the meaning of the Sixth Amendment. Though Justice Scalia, among others, argued that testimony via videoconference "improperly substitute[ed] 'virtual confrontation' for the real thing required by the Confrontation Clause in a criminal trial,"[98] the *Craig* decision again clarified that the Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with the witnesses against them.[99] Thus, a remote video trial, in the absence of case-specific findings of necessity, would likely violate a defendant's rights to be present for the same reasons as his or her confrontation rights.

ii. Virtual Trials May Impair Defendants' Ability to Detect Juror Bias

A defendant's right to be present at trial extends to the empaneling of the jury.[100] For instance, Federal Rule of Criminal Procedure 43(a) requires that "witness testimony must be taken in open court," absent "compelling circumstances" and "appropriate safeguards."[101] This rule has been interpreted to "afford[] a defendant the right to be present during jury empanelment."[102]

Other jurisdictions adhere to this basic rule.[103] The case of *People v. Antommarchi* is illustrative.[104] During voir

dire, the judge questioned several prospective jurors at the bench regarding personal matters they did not wish to share in open court. These sidebar conferences took place while the defendant remained a few feet away. The defendant appealed his conviction to the New York Court of Appeals, claiming that his absence from the sidebar conferences deprived him of his right to be present at every material stage of trial. The New York Court of Appeals agreed and reversed his conviction. The court reasoned that:

> Defendants are entitled to hear questions intended to search out a prospective juror's bias, hostility or predisposition to believe or discredit the testimony of potential witnesses and the venire person's answers so that they have the opportunity to assess the juror's "facial expressions, demeanor and other subliminal responses."[105]

The prospect of a virtual voir dire, therefore, raises a slew of concerns. The ability to get an up-close view of witnesses on video chat might help jurors analyze facial expressions more closely. Or it could cut the opposite way, inflaming existing prejudices. Even with the advent of high-definition videoconferencing software, participants may be less likely to detect the nuances of body language and facial expressions when testimony is transmitted remotely. This will almost certainly make it more difficult for defendants to identify juror bias and impartiality. In addition, it is unclear whether remote selection would emphasize one-on-one, face-to-face communication — only showing one potential juror at a time. Litigants want to be able to see that panel as a whole in order to observe the reaction of other jurors to whom a particular question is not pending.

Indeed, even those courts planning to conduct in-person voir dire face challenges. For instance, it remains to be seen how the installation of glass dividers between jurors, such as proposed in the Southern District of New York, would impact the defendant's view of each juror. Any restriction on the defendant's ability to observe potential jurors would infringe upon his or her right to be present.

iii. Logistical Challenges May Further Prejudice a Criminal Defendant

During a remote video proceeding, how will judges ensure that the defendant has access to his or her counsel throughout the proceeding? Would Zoom's private chat function be sufficient? Would a defendant be permitted to text with his lawyer? Or will the defendant have to interrupt the proceeding each time he needs to communicate with his counsel? Regardless, requiring the client's access to his or her attorney to come through video eliminates many of the assurances that come from being in close proximity with one's lawyer. Likewise, the ability to confer and react in real-time would be greatly reduced.

iv. Remote Video Proceedings Blur the Line Between Waiver and Acceptable Conduct

Still other Sixth Amendment issues may arise when trying to determine issues of waiver of the defendant's right to be present. The right to be present, like confrontation clause rights, may be waived by a defendant's voluntary absence and/or due to misconduct by the defendant.[106] For instance, in *Illinois v. Allen*, the Court upheld the forcible removal of a disruptive defendant from the courtroom.[107] The defendant was repeatedly warned that his conduct would result in removal from the courtroom and that, if he behaved, he would be permitted to return.[108] He did so and was returned to the courtroom.[109] According to the Court, "[W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom."[110]

But webinar platforms, such as Zoom, provide the participant with tools to control when they can be heard or seen. The participants can mute their lines so that no sound can be heard and can also control when their computer's camera is turned on or off. Could a defendant failing to keep his camera or microphone on constitute a voluntary absence or misconduct befitting a waiver determination? Remote video trials require courts to rewrite the rules of acceptable courtroom behavior.

Likewise, videoconferencing platforms provide the meeting host with tools to control who can be seen and heard. Would a judge's use of these tools in response to disruptive behavior be appropriate? One might assume so since the Court found binding and gaging a disruptive defendant to be appropriate in certain circumstances,[111] but defense attorneys should be prepared to face these questions and many others as the courts work out a remote video format.

C. Virtual Testimony Would Fundamentally Alter the Psychology of Jurors

i. Moral Suasion on Jurors and Jurists

The ability to observe the defendant during in-person proceedings helps humanize the defendant to the jury. The importance of how proximity affects empathy is embodied in social psychologist Stanley Milgram's landmark study on power. In the study, Milgram gave his participants the roles of "teachers" and asked them to administer electric shocks to what they were told were other participants (the "learners"). The studies revealed that the closer the teacher was to the learner, the less likely the teacher was to continue administering shocks.[112] Accordingly, virtual proceedings distance the jurors from the defendant in a way that may affect their empathy for him or her.

The dignification of the defendant is also compromised in virtual proceedings, as it renders the jury unable to see the relationship between a trial attorney and his or her client. Just like the spatial distance between an attorney and a witness that is being cross-examined or the distance between the attorney and the jury box conveys meaning, the distance between a lawyer and his or her client conveys meaning as well.[113] Virtual proceedings eliminate the ability of jurors to see the close-knit bond that attorneys develop with their clients, which is manifested in ways such as the attorney lightly touching the client when introducing him or her to the jury panel, how closely they may sit during a trial, or how they interact with one another, whether it be through notes or whispering. This bond can convey respect and signal to jurors that the defendant, irrespective of the allegations, is worthy of that respect.

Overall, the relationship between the defendant and counsel may also suffer through the use of videoconferencing technology, especially if defendant and counsel do not participate in the videoconference from the same room (which would likely be the case due to social distancing guidelines). The defendant may have a difficult time following the proceedings without a lawyer sitting next to him or her explaining what is happening and may be hesitant to voice concerns.

While a defendant's right to a live proceeding is crucial, it is important to note that the precautions courts are taking in response to the pandemic (*e.g.*, distancing jurors, installing plexiglass in the courtrooms, distributing masks to each juror) will undoubtedly also apply to the defendant. If a defendant has to wear a mask that covers his or her nose and mouth, or the jurors' view of the defendant is obstructed by plexiglass barriers, jurors will not be able to fully experience the visual and nonverbal cues that are integral to their communication and judgment abilities.

ii. Ability of Jurors to Assess Credibility

When the liberty, and potentially the life, of the defendant are on the line, it is of the utmost importance that the trial court instill in the jury an understanding of the human consequences of their verdict. There is no substitute for the human interaction which takes place in the courtroom.

As anyone who has participated in a videoconference meeting or call with family or friends can attest, it is a poor proxy for face-to-face communication. Multiple articles have been written since COVID-19 forced business and social interactions online about "Zoom fatigue," the mental exhaustion associated with online videoconferencing.[114] Researchers state that remote video calls can drain participants' energy, in part, because they force us to "focus more intently on conversations in order to absorb information," as opposed to the nonverbal cues we usually rely upon.[115]

Nonverbal communication is a broad term that encompasses elements such as eye contact, facial expressions, gestures, kinesics (body movement), proxemics (studies of distance), and paralanguage (variations in pitch, speech rate, and volume).[116] By one account, 55 percent of communication comes from body language, 38 percent is in the tone of voice, and 7 percent is in the actual words that are spoken.[117] Putting a trial in a virtual setting compromises nonverbal communication, which has been shown to play an important role in how one's spoken statements are received. A typical video call, which only frames the participant from the shoulders up, impairs the ability to read many nonverbal cues, such as gestures, and requires sustained and intense attention to words instead. Videoconferencing technology also eliminates the ability to make eye contact, which is often used to assess the confidence of the speaker.[118] Virtual proceedings also present a challenge in assessing other nonverbal cues such as pauses in speech and physical mannerisms.

Moreover, video and audio connectivity issues may also reduce the ability to glean anything from micro-expressions or speech patterns. Social psychologist Robert E. Kraut conducted a study in which he had participants judge the truthfulness of a story an actor was telling.[119] He found that a prolonged pause was viewed as deceptive. Virtual trials could potentially hurt the credibility of a witness if there is a lag in connectivity from the time an attorney finishes asking a question to the time the witness responds. Certain mannerisms, such as rigid posture and relaxed facial expressions, are considered indicative of lying and deceit.[120] Virtual proceedings may distort how jurors use mannerisms in assessing credibility. For example, a defendant or witness may appear rigid if she is experiencing discomfort due to unfamiliarity with the videoconferencing technology. Conversely, a defendant or witness may convey a more relaxed facial expression if he is tuning in from a room in his home.

This is critical as jurors are often instructed to evaluate witness demeanor in determining witness credibility.[121]

All of this leads to the widely acknowledged statement from the Eleventh Circuit that "confrontation through a video monitor is not the same as physical face-to-face confrontation."[122] Jurors' ability to directly observe the witnesses' demeanor, body language, and interactions in order to gauge the truth of their statements will be greatly impacted by videoconferencing technology.[123]

iii. Decreased Juror Attention Spans

As more and more individuals moved to videoconferencing in response to COVID-19, participants reported a tendency to become distracted.[124] As we consider moving to remote video trials, lawyers and judges must be concerned that jurors will be distracted or fail to pay attention when not in a courtroom.

Under the Sixth and Fourteenth Amendments, a criminal defendant is entitled to a fair and impartial jury.[125] An impartial juror is someone capable and willing to decide the case based solely on the evidence presented at trial.[126] Juror conduct that prevents a defendant from receiving a fair and impartial trial can warrant a new trial or other action by the court. But juror misconduct, which can include jurors falling asleep or obtaining information from outside sources, is hardly something new in U.S. trials. According to one study, 69 percent of the state and federal judges surveyed had seen at least one juror sleeping during a trial.[127] Unfortunately, there is little one can do to ensure jurors provide the defendant with their full attention. Instead, defense attorneys must continue to be vigilant to ensure their client's right to a fair and impartial jury is not violated by jurors participating in a remote video trial.

For these reasons, and those set forth above, virtual trials are insufficient to protect the rights of criminal defendants.

III. Courts Must Take Steps to Safeguard In-Person Proceedings Against COVID-19

That is not to say that in-person trials may proceed as they did in a pre-pandemic world. To the contrary, the coronavirus imposes unique challenges on jury proceedings. Courts must consider these consequences and develop careful (and transparent) plans to address them prior to resuming operation. In particular, COVID-19 will make it difficult to guarantee a fair cross-section of the community, fair deliberations, a speedy trial, and public access to the proceedings. Each is addressed below.

A. The Pandemic Will Make It Difficult to Obtain a Representative Cross-Section

The Sixth Amendment to the U.S. Constitution guarantees each criminal defendant the right to a trial "by an impartial jury."[128] The Supreme Court has held that an "impartial jury" is one drawn from "a representative cross-section of the community."[129] Impartiality requires not only that the jurors chosen are unbiased, but also that the petit jury be selected "from a representative cross-section of the community."[130] To establish a *prima facie* violation of the fair cross-section requirement, the defendant must show that (1) a "distinctive" group in the community, (2) is unfairly and unreasonably underrepresented in the venire from which juries are selected when compared to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.[131] If a *prima facie* violation is established, the jury selection process may only be sustained under the Sixth Amendment if the

exclusion "manifestly and primarily" advances a "significant state interest."[132]

In the wake of the pandemic, courts noted difficulty obtaining a representative cross-section of jurors. This is a key reason courts suspended jury trials with regard to COVID-19. For instance, in its order precluding the calling of jurors for trials, the District Court for the City and County of Denver, Colorado, noted that "[t]hese and other developments with regard to COVID-19 in the geographic area comprising this district adversely affect the Court's ability to obtain an adequate complement of jurors from a fair cross-section of the community."[133]

Now, as jury trials get ready to resume, there is very little insight into how COVID-19 will impact juror demographics. Quantitative studies detailing the impact on juror yields are still forthcoming.[134] However, certain conclusions can be drawn based on the virus's trajectory to date. Specifically, jury pools are likely to significantly underrepresent those populations particularly sensitive to infection, including the elderly, persons with comorbid conditions, minorities, low-income individuals, and the unemployed.

i. COVID-19 Will Yield a Self-Selection Bias

There is a real risk that jurors will resent being asked to serve on a jury during a global pandemic. From May 15 to 27, 2020, DRC conducted an anonymous survey of 420 jury-eligible citizens in the counties that comprise the Southern District of New York (*i.e.,* New York, Bronx, Westchester, Rockland, Putnam, Orange, Dutchess, and Sullivan) and the Eastern District of New York (*i.e.,* Kings, Nassau, Queens, Richmond, and Suffolk). The results should sound alarm bells. Seventy-four percent of all respondents indicated that they would be concerned about their health if called to serve as a juror and that they would be anxious about being in close proximity to other potential jurors. In addition, over 65 percent of respondents indicated that they would be anxious about having to take public transportation to commute to the courthouse. Sixty-six percent of respondents stated that they would feel unease being in the courthouse at all — even if the court followed standard safety guidelines (*e.g.*, provided hand sanitizer, required everyone to wear a face-covering or mask, and enforced social distancing). These pervasive anxieties could breed resentment toward the court systems and have the effect of distorting jurors' judgment in their decision-making at trial — that is, if they show up at all.

Potential jurors may simply ignore the jury summonses and not be willing to risk their well-being. A real likelihood exists that the jury yield will fall into either of two categories — brave souls with a strong sense of civic duty or those ignorant about the coronavirus. This would have the effect of eliminating all other groups. Jury clerks from the respective federal and local jurisdictions need a plan of action — to ensure that defendants' Sixth Amendment right to a fair cross-section is upheld.

ii. Certain Demographics Will Likely Be Excluded from the Jury Pool

Just what types of demographic groups are likely to be excluded from the jury yield? Those persons particularly vulnerable to the coronavirus — whether based on medical or economic grounds — are particularly likely to be underrepresented.

a. Elderly Persons

According to the CDC, individuals aged 65 and older are at a higher risk of severe illness and death from COVID-19.[135] In jurisdictions where in-person jury trials resume, it is likely the elderly will be underrepresented on jury venires because they are less likely to leave their homes until the pandemic has subsided. The elderly may also be at a disadvantage in attending proceedings virtually, depending on their access to the hardware and ability to navigate the software. While most jurisdictions allow individuals older than 70 to opt-out of jury service, these individuals should be allowed to serve if they want. The current state of affairs will effectively prevent them from doing so.

b. Persons with Comorbid Conditions

Some courts have also taken steps to exclude high-risk individuals from the jury pool. For instance, the Contra Costa County Court stated that individuals who are "immunocompromised" may be excused from service upon providing sufficient proof.[136]

What constitutes a high-risk individual? The China Medical Treatment Expert Group for COVID-19 analyzed data from 1590 laboratory-confirmed hospitalized patients from 575 hospitals across mainland China between December 11, 2019, and January 31, 2020.[137] It found that 20–51 percent of COVID-19 patients were reported as having at least one comorbidity, with diabetes (10–20 percent), hypertension (10–15 percent) and other cardiovascular and cerebrovascular diseases (7–40 percent) being most common. Previous studies have demonstrated that the presence of any comorbidity has been associated with a 3.4-fold increased risk of developing acute respiratory distress syndrome in patients with H7N9 infection.[138] Of course, COVID-19 is more readily predisposed to respiratory failure and death in susceptible patients.

A study in New York state found similar results. Just over 86 percent of reported COVID-19 deaths involved at least one comorbidity, according to the state's department of health.[139] And the leading comorbidity, seen in 55.4 percent of all deaths, was hypertension. In comparison, a recent estimate from the U.S. Department of Health & Human Services put the prevalence of high blood pressure at about 45 percent in the overall adult population.[140] The NYSDOH reported that the rest of the 10 most common comorbidities in COVID-19 fatalities were diabetes (37.3 percent), hyperlipidemia (18.5 percent), coronary artery disease (12.4 percent), renal disease (11.0 percent), dementia (9.1 percent), chronic obstructive pulmonary disease (8.3 percent), cancer (8.1 percent), atrial fibrillation (7.1 percent), and heart failure (7.1 percent).

The CDC's website lists at least nine categories of persons who might be at higher risk for severe illness from COVID-19, including "People 65 years and older, [p]eople who live in a nursing home or long-term care facility, [p]eople with chronic lung disease or moderate to severe asthma …, [p]eople with severe obesity …, [p]eople with diabetes, [and] [p]eople with chronic kidney disease undergoing dialysis," among others.[141]

Accordingly, courts seeking to exclude high-risk individuals would skew away from these populations. Indeed, even without a formal policy, jurors particularly sensitive to COVID-19 may self-select and fail to report. Either way, the resulting cross-section would likely underrepresent persons with hypertension, diabetes, and the like.

Having a medical condition itself does not likely constitute a "distinct group" for purposes of a "fair cross-section claim." It would be difficult to show, for instance, that people with diabetes share a common thread or basic similarity in attitude ideas, experiences, or a community of interests, as required to establish cognizability.[142] However, there is a strong correlation between other protected classifications. For instance, the U.S.

Department of Health and Human Services (Office of Minority Health) reported that African American adults are 60 percent more likely than non-Hispanic white adults to have been diagnosed with diabetes by a physician.[143] Likewise, the racial disparity in hypertension has been recognized for decades, with African Americans at greater risk than Caucasians. A 2015 study published in the American Journal of Medical Science, for instance, found that population attributable risk for hypertension among white men was 23.8 percent compared with 45.2 percent among black men, and 18.3 percent for white women compared with 39.5 percent for black women.[144]

c. Racial and Ethnic Minorities

Though data related to the impact of COVID-19 on the health of racial and ethnic minority groups is still emerging, the CDC has reported that "current data suggest a disproportionate burden of illness and death among racial and ethnic minority groups."[145] An April 17, 2020 Morbidity and Mortality Weekly Report (MMWR), which included race and ethnicity data from 580 patients hospitalized with lab-confirmed COVID-19, found that black patients represented a larger percentage of hospitalized patients compared to the percentage of the population.[146] New York City identified substantially higher death rates among Black/African American persons (92.3 deaths per 100,000 population) and Hispanic/Latino persons (74.3) that were substantially higher than that of white (45.2) or Asian (34.5) persons.[147] With that in mind, will courts be more willing to excuse jurors from impacted minority groups who are concerned for their health and safety in serving on a jury?

A court excluding black or Hispanic jurors, which have been found to be "distinctive groups" for the purposes of the Sixth Amendment,[148] from jury duty at a significantly high rate could potentially so skew the juror pool during the jury-selection process that the defendant's Sixth Amendment rights would be violated.

The same result may occur if jurisdictions move to remote video trials. According to Pew Research, the percentage of U.S. adults who have access to home broadband is lower for black and Hispanic households. In 2019, only 61 percent of Hispanic adults and 66 percent of black adults in the United States reported being home broadband users (compared to 79 percent of white adults).[149] If jurisdictions move to remote video trials, the percentage of jurors who will have access to the required technology may reduce the representation of certain minority groups in the venire. This, too, could potentially implicate the fair-cross-section requirement if black or Hispanic jurors are underrepresented in the jury pool.

d. Low-Income Persons

Moreover, this issue may not be limited to race. The Supreme Court has held that economic status may define a distinctive group for the purposes of the Sixth Amendment.[150] One study conducted by the Center for Public Integrity showed that families in neighborhoods with median household incomes below $34,800 are five times more likely to lack access to broadband internet than households in areas with a median income above $80,700.[151] Low-income potential jurors trying to meet the requirements of virtual jury duty may face multiple challenges, including accessing a computer (or a computer that is not being using for another purpose, such as a child attending virtual school) or connecting to the internet. This latter issue may particularly affect individuals living in public housing developments that offer free, but spotty, Wi-Fi service that cannot support video feeds. To mitigate these issues, court systems will need to consider proposals sup-

porting equal access to jury service. This may require the court system to provide resources such as extra computers and potentially even internet-equipped spaces that are (1) easily accessible for all and (2) laid out to allow jurors to socially distance from each other.

The resumption of in-person jury duty may also have the effect of excluding wealthy individuals who are sheltering in out-of-jurisdiction vacation homes until the pandemic has subsided. On the other hand, virtual jury duty may have an even more deleterious effect on the jury venire.

e. Unemployed Persons

The April jobs report cited the worst employment data that the nation has seen since 1948 — in the aftermath of World War II. Most media outlets are reporting an unemployment rate of 14.7 percent. However, there is reason to believe that the real unemployment rate is closer to 20 percent — a fifth of the national workforce.[152] There is little known about the effect of mass unemployment on juror turnout, but following the great recession of 2008, there were anecdotal reports of jurors seeking to be excused from jury duty at higher rates due to "fear[s] of financial ruin."[153]

One might think that unemployment is good news for the stockpile of eligible jurors. More unemployed people means fewer reasons to find a way out of jury duty and more time to perform one's civic duty. However, this was not the case during the country's last major economic downturn. In the wake of the 2008 financial crisis, media reports indicate that people were *less* available for jury service.[154] They noted that "[i]n this time of double-digit unemployment and shrinking benefits for those who do have jobs, courts are finding it more difficult to seat juries for trials running more than a day or two."[155]

Money woes inflicted by the recession spurred more hardship claims, especially by those called for long cases. Indeed, with rising unemployment, pay cuts and foreclosures, missing a day or two of work — let alone spending possibly months on jury duty — has become impractical for families and business owners alike. The economic situation puts courts in an awkward position of having to say to people who are the sole wage earner in a family, or people who are self-employed and do not get paid when they do not work, that they have to serve. If juries resume this year, the number of jurors released on hardship grounds will only increase.

B. The Pandemic Will Make It Difficult to Ensure Fair Deliberations

Much has been written about courts' plans to install physical safeguards in the courtroom itself, including, for instance, plexiglass dividers. However, the need to institute physical precautions is not limited to just the courtroom. Rather, all aspects of the juror's courthouse experience need to be accounted for. As described above, DRC's survey results indicate that the vast majority of potential jurors have anxiety about being in close physical proximity to other potential jurors. The necessity to be in close proximity to other jurors is perhaps no greater than during jury deliberations — exactly the moment when jurors must perform their constitutional function. As much as the courtroom must be made safe for jurors, court systems also need to create physically safe and compliant deliberation spaces. Otherwise, there is a great risk that jurors will speed through deliberations to escape the courthouse as soon as possible.

While it remains to be seen whether hasty deliberations skew against defendants, it is clear that justice cannot be done with inadequate consideration. Unfortunately, as noted above, most jurors in DRC's study indicated high levels of anxiety about serving *even if the court is following all advised safety guidelines*. Such unease could greatly impact jurors' ability to concentrate on the case before them.

Thus, courts must take steps to make sure that jurors feel absolutely comfortable and safe at all times. Clerks must set up a system with adequate social distancing — during selection, trial, and deliberation.

C. The Pandemic Will Make It Difficult to Ensure a Speedy Trial

Just as the Sixth Amendment guarantees the right to confrontation, it also ensures the right to a speedy trial. An insistence on in-person confrontation, thus, may delay the defendant's trial to ensure public safety. There is no doubt that the pandemic shutdown is causing a logjam in courts that is piling on top of the normal holdups — trials and hearings are significantly delayed even in better days. The Administrative Office of the U.S. Courts and the U.S. Judicial Conference recently asked Congress for an additional $36.6 million and more judge positions in the wake of the COVID-19 outbreak[156] — in part, to handle the backlog of cases that will be delayed until after it is safe to restart regular court operations.[157]

Two districts, the Eastern District of California and the District of Arizona, even declared judicial emergencies because of the COVID-19 outbreak, the AO's letter states. The calendars there are so congested that judges are unable to meet certain statutory time limits to hear cases, and those time limits are suspended due to the anticipated backlog of cases. Thus, when judges, lawyers, and juries return to courtrooms, their caseloads will likely be full.

While the scale of disruption caused by the coronavirus is novel, precedents suggest that its resulting delays could be excluded under the Speedy Trial Act. Courts have routinely continued trials when states of emergency have closed courthouse facilities, or when disease has rendered individuals unavailable to appear at trial. On a broader scale, the coronavirus has disrupted government operations, either because of diverted resources, sick or quarantined personnel, or a backlog of continued matters. The Speedy Trial Act does not explicitly exclude time associated with such delays, but parties are likely to request, and courts are likely to grant, exclusions on these grounds. On this basis, a plethora of federal courts have responded by entering blanket orders tolling compliance with speedy trial deadlines. The current situation with coronavirus resembles the operation of the courts immediately following Hurricane Sandy and 9/11. Courts have held that the closure of courts due to Hurricane Sandy stopped the speedy trial clock.[158]

This compromise, however, may be acceptable when the defendant is granted bail — because elongated pretrial detention could trigger habeas corpus protections. To address the latter cases, prosecutors must take steps to mitigate harm to defendants. Indeed, prosecutors have always had to make policy decisions to prioritize cases — the practice is nothing new. They are the entry points into the criminal justice system. They decide whether a case that begins with an arrest is prosecuted and what charges are brought, and they have significant influence over how a case progresses from there. This considerable discretion can be used to respond proactively to a crisis, like COVID-19, by diverting people away from crowded courtrooms, jails, and prisons, or postponing cases and hearings that are not urgent.

Most obviously, prosecutors should grant bail liberally during this crisis,

both to limit the use of virtual confrontation and to prevent the spread of COVID-19. Along these lines, many states' attorney's offices have declined to seek pretrial detention (or impose cash bail) on nonviolent offenders. For instance, the State's Attorney's Office for the Fourth Judicial Circuit of Florida ordered that defendants charged with nonviolent misdemeanors or felony offenses, whose cases are not resolved on first appearance and who do not pose a public safety or flight risk, should be released on their own recognizance, other nonmonetary conditions of release, or minimal monetary bond.

Similarly, prosecutors should release people charged with nonviolent offenses who are at high risk of contracting COVID-19. San Francisco District Attorney Chesa Boudin ordered his assistant district attorneys to not oppose any motions for the release of pretrial detainees charged with misdemeanors or drug-related felonies who do not pose a threat to public safety. And Salt Lake County District Attorney Sim Gill in Utah is releasing at least 90 nonviolent individuals incarcerated for technical violations, with further releases forthcoming to free 150-200 beds to fight COVID-19 by making space for possible quarantining. A coalition of at least 30 prosecuting attorneys, organized by Fair and Just Prosecution, further called for their peers to release people deemed nonthreatening to society.

Prosecutors should also decline to initiate new prosecutions for low-level offenses that do not implicate public safety. This practice has already been implemented in certain busy jurisdictions. For instance, Baltimore State's Attorney Marilyn Mosby announced that, to curb the spread of coronavirus in the local jail, her office would dismiss pending charges against anyone arrested for drug possession, prostitution, trespassing, minor traffic offenses, open container, and urinating in public.[159] Brooklyn's District Attorney announced on March 17 that his office would immediately decline to prosecute low-level offenses that do not jeopardize public safety.[160]

Accordingly, in nonviolent cases, a defendant's confrontation rights need not be sacrificed in the interests of a speedy trial. But for more serious crimes, it remains to be seen how significant the backlog of cases will be and whether courts are able to afford defendants their constitutionally guaranteed right to a speedy trial.

D. The Pandemic Will Make It Difficult to Ensure a Public Trial

i. Interested Spectators Keep Courts Alive to Their Sense of Responsibility

In *Waller v. Georgia*, the Supreme Court declared public trials to be "essential" for the people accused because "the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions."[161]

None may be more interested than the defendant's friends and relatives. In fact, the Supreme Court has held that the right to a public trial enshrined in the Sixth Amendment entitles a criminal defendant "at the very least … to have his friends, relatives and counsel present, no matter with what offense he may be charged."[162] Several jurisdictions have interpreted the Supreme Court's holding to give "special concern for assuring the attendance of family members of the accused."[163] The Ninth Circuit in *United States v. Rivera* held that the Sixth Amendment right to a public trial serves to uphold certain values throughout the proceedings, including "ensuring fair proceedings; reminding the prosecutor and judge of their grave responsibilities; discouraging perjury; and encouraging witnesses to come forward."[164] In particular, with regard to sentencing, the *Rivera* Court stated that "[t]he presence of the public at sentencing reminds the participants, especially the judge, that the consequences of their actions extend to the broader community. Friends and family members, especially a defendant's young children, are particularly effective in this regard, because they are the individuals most likely to be affected by the defendant's incarceration."[165]

Thus, to the extent that reopening proposals limit the presence of a defendant's friends, relatives, and counsel in the courtroom, they may violate the defendant's right to a public trial.

ii. Public Access

Defendants are afforded a right to a public trial under the Sixth Amendment to the Constitution. In addition, the public and the press have a concomitant, qualified First Amendment right of access to criminal proceedings. Although the First Amendment does not explicitly mention the right of access, the Supreme Court has held that the right to attend criminal proceedings is implicit in freedom of speech and serves an important function in a democratic society by enhancing trial fairness and its appearance.[166]

In addition, courts have qualified this right of access and found certain conditions to warrant restricting access to criminal trials. Among the interests courts have found sufficient to justify full or partial closure are the defendant's right to a fair trial,[167] the privacy rights of alleged victims, jurors, informants, and witnesses,[168] the privacy interests of juvenile defendants,[169] the continued effectiveness of government investigations,[170] and the security of government buildings.[171] Likewise, neither the Sixth Amendment right to a public trial nor the First Amendment right of access to judicial proceedings grants the defendant or the press the right to broadcast proceedings, either live or recorded.[172] This is usually enforced by courtroom procedures.

As courthouses begin opening, it is likely the public will be kept from attending to reduce the number of individuals in each courtroom. Thus, in the absence of a particular showing of a need for closure to the public, courts will need to make provisions for public access outside of the courthouse.

E. The Pandemic Will Impair the Effectiveness of Counsel

The pandemic's impact is not limited to trial itself. The Sixth Amendment also guarantees criminal defendants the "right to effective assistance of counsel."[173] Attorneys and clients must have a collaborative relationship *at all times* to ensure this right, including when selecting counsel of choice; coordinating client meetings; conducting a diligent investigation; and assessing plea deals. COVID-19 has wreaked havoc on each of these pretrial processes.

i. Selecting Counsel

The right to assistance of counsel includes the defendant's right to choose who represents him.[174] Indeed, the Supreme Court held in *Gonzalez-Lopez* that a defendant whose choice of counsel has been denied can demonstrate a Sixth Amendment violation on its face — without a *Strickland* showing of ineffective assistance in the performance of the substitute counsel.[175] In other words, the right to choice of counsel holds even if a defendant could have received effective representation from another lawyer.

The current circumstances may impair this basic right to choice of counsel. The virus is disrupting the practice of trial lawyers who, by age or underlying condition, face a higher risk of becoming

seriously ill from contracting COVID-19. Defendants who choose attorneys in these high-risk (and often unseen) categories face a high probability that their counsel will be forced to request withdrawal from the case — in order to avoid exposure to the virus by coming to court. In other words, defendants will have to weigh the quality of an attorney's services against his or her vulnerability to the virus or risk finding themselves without any counsel if their chosen representative seeks to be relieved from a case due to health concerns. This would improperly reduce the pool of attorneys available to such defendants.

ii. Client Meetings

Attorneys have a basic obligation to establish trust and confidence with their clients. This relationship is necessary to ensure that the defendant shares critical information with counsel. It also helps counsel evaluate the client's capacity to understand the proceedings.[176] In-person meetings are a critical element of building this interpersonal trust.

Face-to-face communication trumps the digital variety for several reasons. Most obviously, speaking on the phone does not permit the attorney or client to identify nonverbal cues. Albert Mehrabian, a prominent figure in the study of nonverbal communication, introduced an equation about contradictory feedback: "Total feeling = 7 percent verbal feeling + 38 percent vocal feeling + ***55*** *percent facial feeling*."[177] In other words, "the degree of liking conveyed by the facial expression will dominate and determine the impact of the total message."[178] This means face-to-face meetings "are best when you feel someone is being too guarded, and you'd like to know the truth."[179] That is exactly the temperament of many criminal defendants at first meeting.

While videoconferencing may be a closer proxy, it is still no substitute for a face-to-face meeting. First, many defendants may not have the resources to videoconference with their attorneys. Second, studies show that, when it comes to promoting a sense of trust, physical contact helps promote a powerful sense of trust. Thus, a handshake — or more appropriately in the current environment, a fist bump — has an important effect. Numerous studies show that people who shake hands are more honest with each other and typically reach better outcomes.[180] One such study found that "handshakes are uniquely relevant to producing cooperative motives. …"[181] There is a psychological reason for this: Shaking hands causes the center of the brain associated with rewards, the nucleus accumbens, to activate.[182] While handshaking may no longer be wise in this environment, it goes to show that, when it comes to instilling trust, videoconferencing cannot replace face-to-face interactions.

In-person meetings are also the best way of jointly reviewing critical evidence with clients and preparing them for potential testimony. In particular, reviewing voluminous paper discovery remotely is simply not practical, especially for defendants without access to a computer. In-person meetings are necessary to discuss strategy and to review documents that may shape case strategy.

The coronavirus has made it extremely difficult for attorneys to even talk with their detained clients — never mind meet with them in-person. To mitigate the spread of COVID-19, the Federal Bureau of Prisons suspended legal visits and has yet to announce a plan for their restoration.[183] In New York, the Metropolitan Detention Center (MDC) and Metropolitan Correctional Center (MCC) have arranged confidential attorney-client telephone calls of up to 30 minutes. Each facility will also purportedly arrange a limited number of videoconferences of the same duration.[184] However, as cases move forward, the demand for telephone and video calls will far exceed the number of available slots. Thus, any attorney-client contact will be in short supply.

Detained people and their counsel who wish to meet in-person must be given the opportunity to do so. This requires the prison system to develop a plan for opening up at least limited in-person legal visits and providing a safe environment to do so. Moreover, video conferencing technology should be available on a preferential basis to any client who would prefer not to wait until safety guidelines for in-person meetings can be established, *e.g.*, due to speedy trial concerns.

iii. Investigations

Effective investigation is also critical to the effective assistance of counsel. Defense counsel has a professional obligation to diligently investigate the facts of each case.[185] However, the pandemic has undermined many traditional means of investigation. Shelter-in-place orders limit the ability of attorneys and investigators to visit certain places and travel at certain times of day. Potential witnesses may also be reluctant to meet

with defense attorneys, given concerns about social distancing.

As a result, the defense's investigation may be severely delayed, which has real consequences. For instance, witnesses' memories may deteriorate during the pendency of any delay in meeting with them. Likewise, time-sensitive evidence may be lost or destroyed. For example, "security camera footage may automatically have been erased during the period for which investigation was precluded."[186] Moreover, these obstacles to an efficient investigation are completely one-sided. Law enforcement personnel are far less restricted by shelter-in-place orders and remain free to conduct field investigations. Thus, COVID-19 disproportionately impairs the defense's ability to build its case, placing defendants at an even starker disadvantage.

To address this inherent bias, defendants should be afforded additional time for investigation without requiring counsel to reveal confidential client information. By contrast, the courts should require prosecutors to disclose exculpatory materials at an earlier date. The pandemic cannot be used as a pretext to promote trial by ambush.

iv. Plea Bargains

The Constitution specifically requires effective assistance during plea negotiations as well. This makes sense as the vast majority of criminal cases in the United States are resolved through plea bargains. For instance, a 2018 NACDL study found that fewer than 3 percent of federal criminal cases resulted in a trial, with more than 97 percent of criminal cases being resolved by plea.[187] The COVID-19 outbreak, however, skews the incentives for defendants and prosecutors during plea negotiations. Imagine being arrested for a crime for which bail is not an option — either because the defendant's request was denied or the defendant lacked the financial resources. Such a defendant may face two choices: (1) stay in jail during a pandemic, an environment that may more quickly spread the virus, and wait for trial;[188] or (2) agree to a plea deal.[189] A defendant could weigh the risk of staying in jail against accepting a sentence that may not involve additional incarceration and rush to agree to a plea bargain.

Effective counsel is especially important in this circumstance. Defendants should not be pushed into plea deals just to get through the court system. This is especially true given COVID-19's disastrous impact on the world economy. A person with a criminal record may struggle to find a job in the post-COVID marketplace.[190]

F. Even Minor Safety Precautions Can Have Outsized Effects

Because the coronavirus requires the balancing of public safety and personal liberty, even the most modest safety measure must be scrutinized. Courts must carefully weigh the likely benefit to public health against any impact on criminal defendants. This requires confirming that the proposed safety measures *actually work*, based on the best data available. An encroachment upon defendants' rights cannot be justified based on the mere *possibility* of protecting participants.

The Southern District of New York's plexiglass scheme is a prime example. At first glance, this proposal appears to be minimally intrusive and unlikely to drastically curtail defendants' constitutional rights. For example, it appears unlikely that a transparent divider would significantly impact defendants' ability to observe jurors/witnesses. But would such a minor change *actually* mitigate the risk of transmitting COVID-19? That remains to be seen.

There is little quantitative research addressing the efficacy of plexiglass barriers. However, anecdotal evidence does little to instill confidence. For instance, the CDC recommends that employers "[i]nstall transparent shields or other physical barriers where possible to separate employees and visitors where social distancing is not an option."[191] Food workers, in particular, are required to "use physical barriers, such as … plexiglass or similar materials, or other impermeable dividers or partitions, to separate [them] from each other, if feasible."[192] Yet despite the use of plexiglass, there continues to be massive COVID-19 outbreaks at food processing plants. Likewise, the use of plexiglass in many schools around the world may be comforting.[193] But American jurors require much stricter safeguards than school-age children; they include much higher-risk individuals.

If anything, the manner in which COVID-19 is transmitted suggests that jurors may be *particularly* vulnerable. COVID-19 is typically transmitted through coughing and sneezing, through large droplets of oral fluid.[194] However, in dense settings, the virus can also be found in smaller droplets, including those emitted during *normal speech*. A recent study conducted by researchers at Stanford University used a laser-light scattering method to confirm that "there is a substantial probability that normal speaking causes airborne virus transmission in confined environments."[195] The study warned that the virus can remain suspended in normal speech droplets for tens of minutes or longer.[196] A jury trial is the classic example of a confined space requiring persons to speak ad nauseum. Witnesses, litigants, and jurors are speaking for hours on end — both in the courtroom and deliberation room — all while emitting small speech droplets.

In view of these risks, Dr. Michele Barry, MD, FACP, the Director of the Center for Innovation in Global Health in the Stanford School of Medicine, recommends taking additional precautions — above and beyond plexiglass. In an interview with the National Association of Criminal Defense Lawyers, Dr. Barry explained that plexiglass, while a "good start," cannot entirely eliminate the risk of transmission. In addition, she advocated distancing people six to nine feet away and requiring the use of protective masks. She further suggested testing people by nasal swab before trial to determine negativity, as point-of-care tests become affordable. This test could further be re-administered every four days, which is the mean incubation time for COVID-19.[197]

Thus, there is no doubt that plexiglass cannot eliminate the risk of infection entirely. By sending out a jury summons, a judge is necessarily asking members of the public to put their lives at risk in furtherance of their civic duty. The effectiveness of even modest protocols must then be rigorously analyzed before proceeding to the implementation phase. In fact, an ineffective change may even do more harm than good. If the courts cannot protect the health of jurors, they could get sick during trial. This would more than likely result in a mistrial, rendering the entire exercise pointless.[198]

Moreover, the *perception* of safety is just as important as the *reality* of safety. A precaution that is perceived as weak would do little to increase jury yields. Plexiglass may just fall into that category. Outbreaks have been widely reported despite such safety measures, and prospective jurors may be aware of these reports.[199] If so, plexiglass would do little to quell juror anxiety or resolve the self-selection bias described above.

In any event, it is difficult to truly gauge SDNY's proposal because details are sparse. For instance, how tall will the

plexiglass barriers be? Will there be any airflow between them? Will the court's ventilation systems push air down and not up? Will the windows be open for freer air flow? Employers around the country are grappling with these same implementations.[200] How the court handles such logistics will determine whether plexiglass is a worthwhile installation.

IV. Final Recommendations

As described above, the COVID-19 pandemic presents significant challenges to the fair administration of justice. While fear of infection naturally takes center stage, courts must be careful not to trample on the civil liberties of criminal defendants. Toward that end, we propose a set of core principles that we hope will guide courts walking that thin line. While there is no perfect solution to balancing public health and due process for those accused, the rights of criminal defendants deserve no less weight. The guidelines set forth below would help ensure a fair and constitutional process going forward.[201]

- The criminal justice system provides a number of rights to accused defendants. Each defendant may want to prioritize these interests differently, as is the defendant's constitutional right. For example, a defendant intent on pursuing a speedy trial may consent to video proceedings to accommodate that goal. A different defendant may place great value on face-to-face witness confrontation and reject the use of such technology. Defendants should not be required to abandon protections except on a voluntary basis — based on an informed prioritization. Any proceeding involving diminished procedural rights (*e.g.*, a virtual trial) should only occur with the defendant's intelligent and knowing consent.

- The court must review procedures for assembling venires to ensure that the jury pool adequately represents the community at large. The court should consider publishing its plan for ensuring a representative cross-section of the community. In doing so, it should assure transparency in the demographic data of the jury pool so that counsel may challenge its composition as necessary.

- Courts should develop standing plans to ensure the safe, socially distant gathering of witnesses, jurors, and staff. Social distancing should be conducted in a manner that will not dilute cross-examination, jury deliberation, and other hallmarks of due process. Courts must ensure that jurors, especially, feel safe during all phases of the proceeding — during selection, trial, and deliberation. We recommend sending safety guidelines to all prospective jurors, along with their respective summonses.

- Measures must naturally be taken to ensure that all participants are safe, including social distancing. However, these measures should not come at the expense of defendants' rights. For example, courts must ensure that defendants' and jurors' ability to see other participants — and pick up on nonverbal cues — remains uncompromised. For instance, any divider used to shield witnesses or jurors must be sufficiently transparent.

- Given the responses to DRC's survey, it is important to identify fears that prospective jurors may

have. Trial attorneys should request a confidential questionnaire to gauge pandemic-related concerns. For instance, attorneys may assess whether a prospective juror would have concerns about his or her health — even if the court adopts safety precautions. Likewise, attorneys may gauge whether a prospective juror, or any member of his or her household, is at higher risk for COVID-19 infection (*e.g.*, 65 years or older, hypertension, or diabetes). Should such anxieties go unaddressed, they may distort deliberations and give rise to unfair results or mistrials.

Courts should not allow new safety measures to impair the confrontation rights of criminal defendants. Even a great idea for safeguarding public health falls flat if it does not pass constitutional muster.

Notes

1. *See* P. Goldman & S. Smith, *Netanyahu Stands Trial on Charges of Bribery, Fraud and Breach of Trust*, NBC News (May 24, 2020), https://www.nbcnews.com/news/world/netanyahu-stands-trial-charges-bribery-fraud-breach-trust-n1212806.

2. *See id*.

3. *See* M. Crane-Newman, *NYC Sex Abuse Case Ends in Mistrial After Defense Lawyer Shows Up with Coronavirus Symptoms*, N.Y. Daily News (Mar. 16, 2020), https://www.nydailynews.com/new-york/manhattan/ny-manhattan-judge-mistrial-covid-20200316-e625abx3k5axfdki3tu5ou7xuu-story.html (declaring a mistrial when defense counsel exhibited COVID-19-type symptoms when struggling to examine a witness via speakerphone).

4. *See* R.D. O'Brien, *Is Anywhere Safe for a Jury Trial During the Covid-19 Pandemic? Try a School Gym*, Wall St. J. (May 20, 2020), https://www.wsj.com/articles/is-anywhere-safe-for-a-jury-trial-during-the-covid-19-pandemic-try-a-school-gym-11589893201(quoting Paula Hannaford-Agor, Director of the Center for Jury Studies at the National Center for State Courts).

5. *See* M. Hendrickson, *Man Awaiting Trial in Bar Fight 7th Cook County Jail Detainee to Die from Coronavirus Complications*, Chi. Sun Times (May 6, 2020), https://chicago.suntimes.com/coronavirus/2020/5/6/21249680/arlington-heights-charged-bar-fight-cook-county-jail-detainee-die-coronavirus-related-illness.

6. *See In the Matter of Authorizing Limitation of Court Operations During a Public Health Emergency and Transition to Resumption of Certain Operations*, Administrative Order No. 2020-79 (Ariz. May 20, 2020), http://www.azcourts.gov/Portals/22/admorder/Orders20/2020-79.pdf?ver=2020-05-21-120117-320.

7. *See* B. Murphy, *Concerns About Infections Post-Pandemic Could Impact Future Jury Trials, Experts Say*, Newsday (Apr. 19, 2020), https://www.newsday.com/news/health/coronavirus/coronavirus-jury-selection-long-island-1.43927317.

8. *See* R. Emery & D. Cooper, *COVID-19 Cannot Be the Death Knell for the American Jury Trial*, Law.com (Apr. 20, 2020), https://www.law.com/newyorklawjournal/2020/04/20/covid-19-cannot-be-the-death-knell-for-the-american-jury-trial/.

9. *See* N. Goldberg et al., *Coronavirus Leaves Trail of Illness and Death in NYC Courthouses as Slow-to-Change System Struggles to Cope with Pandemic*, N.Y. Daily News (May 25, 2020), https://www.nydailynews.com/coronavirus/ny-coronavirus-pandemic-unprepared-nyc-courts-20200526-fe2zknj7cbgutpjdn3vtfruiiq-story.html.

10. *See* Crane-Newman, *supra*.

11. *Id*.

12. *See* A. Denney, *3 New York Judges Died from Coronavirus, Almost 170 Court Workers Infected*, N.Y. Post (Apr. 28, 2020), https://nypost.com/2020/04/28/coronavirus-in-ny-3-judges-die-almost-170-court-workers-infected/.

13. *See* Associated Press, *Robert Durst Murder Trial May Move to New California Court*, N.Y. Times (May 24, 2020), https://www.nytimes.com/aponline/2020/05/24/us/ap-us-robert-durst-murder-trial.html; P. Vercammen & H. Silverman, *Robert Durst Murder Trial Is Suspended Because of Coronavirus Concerns*, CNN (Mar. 15, 2020), https://www.cnn.com/2020/03/15/us/california-jury-trials-suspended/index.html.

14. *See* O'Brien, *supra*.

15. *See* M. Dolan, *Some California Courts Start to Reopen as Coronavirus Restrictions Ease*, L.A. Times (May 21, 2020), https://www.latimes.com/california/story/2020-05-21/some-california-courts-start-to-reopen-as-coronavirus-restrictions-ease.

16. However, the trial will be moved from the courthouse near Los Angeles International Airport to the larger Inglewood courthouse — to better promote social distancing.

17. *See* Center for Diseases Control and Prevention, 1918 Pandemic, https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html (last accessed May 27, 2020).

18. *See* F. Aimone, *The 1918 Influenza Epidemic in New York City: A Review of the Public Health Response* (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2862336/#B49.

19. *See* K. Canales, *Photos Show the Precautions U.S. Cities Took to 'Flatten the Curve' During the 1918 Spanish Flu Pandemic*, Business Insider (Apr. 13, 2020, https://www.businessinsider.com/spanish-flu-pandemic-1918-precautions-us-cities-2020-4.

20. National Archives Catalogue, Medical Department - Influenza Epidemic 1918 - Police Court in open air - influenza prevention. Police Court Officials of San Francisco holding a session in the open, as a precaution against the spreading influenza epidemic, https://catalog.archives.gov/id/45499315.

21. *See* M. Walsh, *Outbreaks of Disease Have Shuttered the Supreme Court Going Back More Than 2 Centuries*, ABA J. (Mar. 19, 2020), https://www.abajournal.com/web/article/outbreaks-have-shuttered-the-supreme-court-going-back-more-than-two-centuries.

22. *See* C. Cushman, *Epidemics and the Supreme Court*, supremecourthistory.org, https://supremecourthistory.org/history-of-the-court/Epidemics%20and%20the%20Supreme%20Court/.

23. *See id.*

24. *See id.*

25. *See* United States Courts, Now Cherished, Bill of Rights Spent a Century in Obscurity, USCourts.gov, (Dec. 12, 2019), https://www.uscourts.gov/news/2019/12/12/now-cherished-bill-rights-spent-century-obscurity.

26. *Ruthenberg v. United States*, 245 U.S. 480, 481 (1918).

27. *See* A. Liptak, *Virus Pushes a Staid Supreme Court Into Revolutionary Changes*, N.Y. Times (May 3, 2020), https://www.nytimes.com/2020/05/03/us/politics/supreme-court-coronavirus.html.

28. *See* C. Villani, *Lori Loughlin, Husband Plead Guilty in 'Varsity Blues,'* Law360 (May 22, 2020), https://www.law360.com/california/articles/1276185.

29. *See* News Release, *Judiciary Launches Virtual Grand Jury Pilot Program*, New Jersey Courts (May 14, 2020), https://njcourts.gov/pressrel/2020/pr051420a.pdf.

30. *See* D. Atkins, *Fla. Courts Launch Remote Civil Jury Trial Pilot Program*, Law360 (May 22, 2020), https://www.law360.com/articles/1276219/fla-courts-launch-remote-civil-jury-trial-pilot-program?nl_pk=aefa4487-e20e-4ec1-afdc-6657aa5ecd1a&utm_source=newsletter&utm_medium=email&utm_campaign=special.

31. *See* D. Siegal, *Texas Court Pioneers Trial by Zoom in Atty Fee Dispute*, Law360 (April 22, 2020), https://www.law360.com/articles/12

65459/texas-court-pioneers-trial-by-zoom-in-atty-fee-dispute.

32. *See* K. Pohlman, *Texas Court Hold First Jury Trial Via Zoom in Insurance Feud*, Law360 (May 18, 2020), https://www.law360.com/articles/1274097/texas-court-holds-first-jury-trial-via-zoom-in-insurance-feud.

33. The summary jury trial was part of an alternative dispute resolution process.

34. *See* A. Morris, *Juror Walks Off to Take Phone Call as Texas Tests First Jury Trial Via Zoom*, Law.com (May 18, 2020), https://www.law.com/texaslawyer/2020/05/18/juror-walks-off-to-take-phone-call-as-texas-tests-first-jury-trial-via-zoom/.

35. *See* P. Brush, *The New Normal in SDNY Will Include 'Lots of Plexiglass,'* Law360 (May 20, 2020), https://www.law360.com/articles/1275480.

36. *See id*.

37. *See id*.

38. *See* S. Bishop, *SDNY Judge Lets Sick Juror Deliberate Via Videoconference*, Law360 (March 16, 2020), https://www.law360.com/articles/1253726/sdny-judge-lets-sick-juror-deliberate-via-videoconference.

39. *Id*.

40. *See* Transcript of Message From New York Chief Judge DiFiore (May 25, 2020), https://www.nycourts.gov/whatsnew/pdf/May25MessagefromCJ.pdf.

41. *See* Dolan, *supra*.

42. *See* Superior Court of California, County of Contra Costa, *Urgent Release: Court Reopening* (May 13, 2020). https://www.cc-courts.org/general/docs/PressRelease-COVID19-05-13-20.pdf.

43. *Id.* (emphasis in original).

44. In the Eastern District of Texas, Chief Judge Gilstrap told Law360 that the court anticipates beginning jury trials at the start of June, with health measures in place. This includes taking the temperature of potential jurors when they enter the courthouse, providing potential jurors with masks, adhering to social-distancing guidelines, and equipping the courtroom with multiple microphones during jury selection in order to disinfect between uses. Judge Gilstrap also noted that his district is largely rural and has not seen a high number of COVID-19 cases. *See* D. Siegal, *Why Gilstrap Is Getting Ready for Trial — And Not on Zoom*, Law360 (May 15, 2020), https://www.law360.com/ip/articles/1273188/why-gilstrap-is-getting-ready-for-trial-and-not-on-zoom.

45. CAPortal, County of Monterey, *Check Jury Duty Status*, https://portal.monterey.courts.ca.gov/jury (last accessed May 27, 2020).

46. *See* O'Brien, *supra*.

47. Administrative Order No. 2020-79, *In re Matter of: Authorizing the Limitation of Court Operations During a Public Health Emergency and Transition to Resumption of Certain Operations* (Ariz. May 20, 2020), http://www.azcourts.gov/Portals/22/admorder/Orders20/2020-79.pdf?ver=2020-05-21-120117-320.

48. *Id*.

49. A. Morris, *Jury Trials Are Back in Texas. Here's What You Should Know*, Law.com (Jun. 8, 2020), https://www.law.com/texaslawyer/2020/06/08/jury-trials-are-back-in-texas-heres-what-you-should-know/.

50. *Id*.

51. *United States v. Santos*, Case No. 1:19-CR-107-H-BU, slip op. (N.D. Tex. Jun. 8, 2020), Dkt. No. 57 at 1.

52. *Id*.

53. *Id*.

54. *Id*. at 2.

55. *See* Judicial Council of California, *Statewide Order by Hon. Tani G. Cantil-Sakauye* (Mar. 23, 2020), http://www.glenncourt.ca.gov/general-info/documents/Statewide%20Order%20by%20the%20Chief%20Justice-Chair%20of%20the%20Judicial%20Council%20(3-23-2020).pdf.

56. *See* P. Brush, *Grand Jurors in SDNY Get Video Option Amid Virus Outbreak*, Law360.com, https://www.law360.com/articles/1255774/grand-jurors-in-sdny-get-video-option-amid-virus-outbreak.

57. U.S. Const. amend. VI.

58. *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (citing *California* v. *Green*, 399 U.S. 149, 157 (1970)).

59. *See id*. at 1019-20.

60. *See* C.A. Chase, *The Five Faces of the Confrontation Clause*, 40 Hous. L. Rev. 1003, 1011 (2003).

61. *See id*.

62. *See* M. Pressman, *Bench Trial by Videoconference*, Civil Jury Project of NYU Law School (May. 6, 2020), https://civiljuryproject.law.nyu.edu/commentary/.

63. *Coy*, 487 U.S. at 1016.

64. *Id*. at 1020–21.

65. *Id*. at 1017 (citing *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

66. *Id*. at 1019 (citation omitted)

67. *Id*.

68. In *Coy*, four Justices wrote or joined in separate concurring or dissenting opinions to emphasize that any right conferred by the Confrontation Clause requiring the witness to physically face the defendant was not absolute. *Id*. at 1024.

69. *Maryland v. Craig*, 497 U.S. 836 (1990) (emphasis in original).

70. *See id*. at 855.

71. *Id*. at 847 (citations omitted).

72. *Id.* at 848-849 (internal citations omitted).

73. *Id*. at 850 (emphasis added).

74. *Id*. at 855-56 (emphasis added).

75. *Id*. According to Justice O'Connor, "in certain narrow circumstances, 'competing interests … may warrant dispensing with confrontation at trial.'" *Id*. at 848.

76. *See, e.g.*, M.C. McAllister, *Two-Way Video Trial Testimony and the Confrontation Clause: Fashioning a Better Craig Test in Light of Crawford,* 34 Fla. St. U. L. Rev. 836, 841–42 (2007).

77. *See, e.g., Yates*, 438 F.3d 1307, 1312–14 (11th Cir. 2006) (en banc) (holding that the accused has a right to physical face-to-face confrontation).

78. *United States v. Gigante*, 166 F.3d 75, 79–81 (2d Cir. 1999).

79. *See id.* at 79–81.

80. *Id*. at 80.

81. *Id*. at 81.

82. *See Yates*, 438 F.3d at 1309–10.

83. *Id*. at 1316.

84. *See id*.

85. *Yates*, 438 F.3d at 1314; *see also* Proposed Amendments to the Federal Rules of Criminal Procedure (Apr. 29, 2002) (appendix to statement of Breyer, J.) [hereinafter Proposed Rule 26(b)].

86. Proposed Rule 26(b) at 7.

87. *Yates*, 438 F.3d at 1314–15.

88. *See* Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.).

89. *People v. Fitzpatrick*, 158 Ill. 2d 360, 365 (1994); *see also Commonwealth v. Bergstrom,* 524 N.E.2d 366, 371-72 (1988) ("The plain meaning of assuring a defendant the right 'to meet the witnesses against him face to face' is that the accused shall not be tried without the presence … of both himself and the witnesses testifying against him.").

90. *Gigante*, 166 F.3d 75 at 79.

91. *Id.* at 79-80.

92. *Horn v. Quarterman*, 508 F.3d 306, 313–20 (5th Cir. 2007).

93. *See also Bush v. State*, 193 P.3d 203, 215, 214 (Wyo. 2008) (two-way testimony allowed when the witness suffered from a medical condition that was "serious and severe and not temporary"; the witness suffered from congestive heart failure and was hospitalized and in "profoundly poor" condition; his physician was adamant that traveling to testify would be detrimental to his health); *Kramer v. State*, 277 P.3d 88, 94 (Wyo. 2012) (two-way testimony allowed when the witness suffered a mental ailment; after a "rather severe suicide attempt," a court committed the witness to the state hospital, finding that he posed a substantial risk to himself and others; his condition was so severe that hospital staff checked on him every 15 minutes and his psychiatrist re-evaluated his medication on an ongoing basis; a psychiatrist expressly advised against having the witness travel to testify); *State v. Swindler*, 129 N.C. App. 1, 5, 497 S.E.2d 318, 321 (detective's testimony that a witness was unavailable because she was in

the hospital following a heart attack sufficient to establish unavailability), *aff'd per curiam*, 349 N.C. 347, 507 S.E.2d 284 (1998).

94. *Illinois v. Allen*, 397 U.S. 337, 338 (1970) (citing *Lewis v. United States*, 146 U.S. 370 (1892)) (the defendant has the right to be present during all stages of a trial).

95. *Coy,* 487 U.S. at 1015 (holding that the Sixth Amendment right of a criminal defendant "to be confronted with the witnesses against him" guarantees a face-to-face encounter between a witness and the accused).

96. *United States v. Gagnon*, 470 U.S. 522 (1985) (citing *Snyder v. Mass.*, 291 U. S. 97 (1934)).

97. New York Criminal Procedure Law Section 340.50 similarly proscribes that "a defendant must be personally present during the trial" unless certain exceptions are met.

98. R.L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?* 25 Rev. Litig. 633 at 676 (2006).

99. *Craig*, 497 U.S. at 849.

100. *See Pointer v. United States*, 151 U.S. 396, 408 (1894).

101. Fed. R. Civ. P. 43(a).

102. *United States v. Gordon*, 829 F.2d 119, 123 (D.C. Cir. 1987) (stating that Federal Rule of Criminal Procedure 43(a), affording a defendant the right to be present during jury empanelment, "embodies the protections afforded by the Sixth Amendment Confrontation Clause, the due process guarantee of the Fifth and Fourteenth Amendments, and the common law right of presence.").

103. *See, e.g., Hager v. United States*, 79 A.3d 296, 302-03 (D.C. 2013) ("[T]he right extends not only to the defendant's ability to hear the responses that jurors give, but also to reasonably view their demeanor during those responses in order to assess their various qualities as jurors and make decisions about whether to exercise challenges. Otherwise, the defendant's right to "observe" voir dire would be rendered meaningless," and noting that "it is reasonable for us to assume that from Davis's position while sitting at counsel table the jurors were turned away from him and his primary view during voir dire would have been of their backs.").

104. *People v. Antommarchi,* 80 N.Y.2d 247, 250 (N.Y. 1992).

105. *Id.* (internal citations omitted).

106. *See Melendez-Diaz v. Mass.*, 557 U.S. 305, 314 n.3 (2009), ("The right to confrontation may, of course, be waived.").

107. *Allen*, 397 U.S. at 343.

108. *See id*. at 339-40.

109. *See id*. at 341.

110. *Id*. at 343 (internal citations omitted).

111. *See id*. at 344 ("Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort.").

112. S. Milgram, *Behavioral Study of Obedience,* 67(4) J. Abnormal and Social Psychol. 371-378 (1963).

113. *See* J.S. Wolfe, *The Effect of Location in the Courtroom on Jury Perception of Lawyer Performance*, 21(3) Pepp. L. Rev. 731 (1994).

114. *See, e.g.*, L. Fosslien & M.W. Duffy, *How to Combat Zoom Fatigue,* Harv. Bus. Rev. (Apr. 29, 2020), https://hbr.org/2020/04/how-to-combat-zoom-fatigue; M. Jiang, *The Reason Zoom Calls Drain Your Energy*, BBC.com (Apr. 22, 2020), https://www.bbc.com/worklife/article/20200421-why-zoom-video-chats-are-so-exhausting.

115. Fosslien, *supra*.

116. *See* E.A. LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, 8 Law & Psychol. Rev. 83-104 (1984).

117. *See* P. Raj, *Body Language and Its Understanding*, Submitted to the Faculty of MBICEM (2019), https://www.academia.edu/40938632/Body_Language_and_its_understanding.

118. *See* H. Vandromme et al., *Indirectly Measured Self-Esteem Predicts Gaze Avoidance*, 10 Self and Identity, 1, 32-43 (2011).

119. *See* R.E. Kraut, *Verbal and Nonverbal Cues in the Perception of Lying*, 36 J. Personality and Soc. Psychol. 380-391 (1978).

120. *See* A. Mehrabian, *Nonverbal Betrayal of Feeling*, J. Experimental Res. in Personality, 1 (1971).

121. *See* U.S. Supreme Court Committee on Standard Jury Instructions. Florida Standard Jury Instructions. Tallahassee: The Florida Bar, 1977, Section 2.2. *See also United States v. Johnson*, 192 F. App'x 43, 44 (2d Cir. 2006) ("The main charge included a detailed (and sound) instruction on assessing the credibility of witnesses, including the need to evaluate demeanor and nonverbal language.").

122. *Yates*, 438 F.3d at 1315.

123. Some commentators argue face-to-face encounters with witnesses are not necessary and that "the role of demeanor evidence in American trials is seriously overstated" based on psychological research that shows "most people can do no better than chance in determining when a person is telling the truth from observing her in telling the story." Marcus, *supra* at 676. However, many jurors believe nonverbal cues are important in determining credibility, though the relative weight and impact of nonverbal communication will necessarily vary for each juror. LeVan, *supra* at 94-95.

124. *See, e.g.*, S. Gershman, *Stop Zoning Out in Zoom Meetings*, Harv. Bus. Rev. (May 4, 2020), https://hbr.org/2020/05/stop-zoning-out-in-zoom-meetings.

125. *See Morgan v. Illinois*, 504 U.S. 719 (1992), *Duncan v. Louisiana*, 391 U.S. 145 (1968).

126. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982).

127. *See, e.g.,* Sean Carter, *Hey, Juror-Juror!*, 38 A.B.A.J. 7, 1 (2005) (quoting a study in which 69 percent of state and federal judges had seen at least one juror sleeping during trial).

128. U.S. Const. amend. VI.

129. *Holland v. Illinois*, 493 U.S. 474, 480 (1990) ("The Sixth Amendment requirement of a fair cross-section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does).").

130. *Id.*

131. *See Duren v. Missouri*, 439 U.S. 357, 364 (1979).

132. *Id.* at 367-68.

133. *Administrative Order No. 2020-04*, District Court, City and County of Denver, Colorado, https://www.courts.state.co.us/userfiles/file/Court_Probation/02nd_Judicial_District/Denver_District_Court/Administrative%20Order%202020-04.pdf.

134. The National Center for State Courts conducted a survey, which collected information about the average jury yield before the pandemic and monthly jury yield since March 2020. Specifically, they asked courts to provide detailed information about summoning and qualification, including undeliverable, nonresponse/FTA, excusal, and deferral rates. However, its findings have not yet been published.

135. *See COVID-19 Guidance for Older Adults*, Centers for Disease Control and Prevention, https://www.cdc.gov/aging/covid19-guidance.html (last accessed May 28, 2020).

136. *See* Superior Court of California, County of Contra Costa, *Urgent Release: Court Reopening* (May 13, 2020). https://www.cc-courts.org/general/docs/PressRelease-COVID19-05-13-20.pdf.

137. W. Guan et al., *Comorbidity and Its Impact on 1590 Patients with COVID-19 in China: A Nationwide Analysis*, 55(5) Eur. Respir. J. (May 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7098485/#C19.

138. *See id.* (citing H.N. Gao et al., *Clinical Findings in 111 Cases of Influenza A (H7N9) Virus Infection*, 368 N. Engl. J. Med. 2277–2285 (2013), https://www.nejm.org/doi/pdf/10.1056/nejmoa1305584).

139. *See* R. Franki, *Comorbidities the Rule in New York's COVID-19 Deaths*, The

HOSPITALIST (Apr. 9, 2020), https://www.the-hospitalist.org/hospitalist/article/220457/coronavirus-updates/comorbidities-rule-new-yorks-covid-19-deaths.

140. *See Estimated Hypertension Prevalence, Treatment, and Control Among U.S. Adults*, Million Hearts, https://millionhearts.hhs.gov/data-reports/hypertension-prevalence.html (last accessed May 27, 2020).

141. *People Who Are at Higher Risk for Severe Illness*, CDC.gov, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last accessed May 28, 2020).

142. *See, e.g., United States v. Test*, 550 F.2d 577 (10th Cir. 1976); *Willis v. Zant*, 720 F.2d 1212, 1216 (11th Cit. 1983) (same).

143. *See Diabetes and African Americans*, U.S. Department of Health and Human Services, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=18 (last accessed May 28, 2020).

144. *See* D. Lackland, *Racial Differences in Hypertension: Implications for High Blood Pressure Management,* 348(2) AM. J. MED. SCI. 135-138 (Aug. 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4108512/ (last accessed May 28, 2020).

145. *COVID-19 in Racial and Ethnic Minority Groups*, CDC.gov (Apr. 22, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html.

146. *See Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019 — COVID-NET, 14 States, March 1–30, 2020*, CDC.gov (Apr. 17, 2020), available at https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm?s_cid=mm6915e3_w (33% of hospitalized patients were black compared to 18% in the community).

147. NYC Health, Age-adjusted rates of lab confirmed COVID-19 non-hospitalized cases, estimated non-fatal Hospitalized cases, and patients known to have died 100,000 by race/ethnicity group as of April16,2020, available at https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-deaths-race-ethnicity-04162020-1.pdf.

148. *See United States v. Biaggi*, 909 F.2d 662, 676-79 (2d Cir. 1990) (finding that both African Americans and Hispanics are distinctive groups for purposes of the *Duren* test).

149. *See* Pew Research Center, *Internet/Broadband Fact Sheet* (Jun. 12, 2019), available at https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.

150. *See Thiel v. Southern Pac. Co.*, 328 U.S. 217, 222-24 (1946) ("Although a federal judge may be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship, that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved.").

151. *See* Center for Public Integrity, Rich People Have Access to High-Speed Internet; Many Poor People Still Don't (May 12, 2016), available at https://publicintegrity.org/inequality-poverty-opportunity/rich-people-have-access-to-high-speed-internet-many-poor-people-still-dont.

152. *See* D. Robinson, *The Real Unemployment Rate Is Already Around 20 Percent*, NEWSWEEK (May 14, 2020), https://www.newsweek.com/real-unemployment-rate-already-around-20-percent-opinion-1503889.

153. J. Schwartz, *Call to Jury Duty Strikes Fear of Financial Ruin*, N.Y. TIMES (Sep. 1, 2009), https://www.nytimes.com/2009/09/02/us/02jury.html.

154. C. Williams, *Weighed Down by Recession Woes, Jurors Are Becoming Disgruntled,* L.A. TIMES (Feb. 15, 2010), https://www.latimes.com/archives/la-xpm-2010-feb-15-la-me-reluctant-jurors15-2010feb15-story.html.

155. *Id.*

156. The funding requests include $15.1 million for enhanced cleaning of courthouses and $15 million for eight weeks of health screenings at courthouse

entrances. The courts also requested $11.2 million for information technology costs, $9.4 million for public defender services, $7.5 million for videoconferencing equipment, $2.2 million for court security and $1.6 million for increased costs of supervising offenders released from prison or awaiting trial. The request also includes a proposal to add seven district judge positions, and make eight temporary district judge positions into permanent spots. "When the courts reconstitute after the COVID-19 pandemic, the strain will be even greater since there will be a backlog of cases that could not be adjudicated during the pandemic," the letter states.

157. *See* T. Ruger, *Federal Courts Seek More Money and Judges in Next COVID-19 Bill*, Roll Call (May 5, 2020), https://www.rollcall.com/2020/05/05/federal-courts-seek-more-money-and-judges-in-next-covid-19-bill/.

158. *See People v. Sheehan*, 39 Misc. 3d 695 (N.Y. Cnty. Crim. Ct. 2013) (30-day suspension was excepted from speedy trial deadline as an exceptional circumstance; defendant's right to a speedy trial was not violated).

159. *See* Brennan Center for Justice, *Prosecutors Responses to COVID-19* (May 27, 2020), https://www.brdennancenter.org/our-work/research-reports/prosecutors-responses-covid-19.

160. *See id*.

161. *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (Under the Sixth Amendment, any closure of a suppression hearing over the objections of the accused must meet the following tests: the 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 hearing; and it must make findings adequate to support the closure.).

162. *In re Oliver*, 333 U.S. 257, 272 (1948).

163. *Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir. 1994); *see also Guzman v. Scully*, 80 F.3d 772, 776 (2d Cir. 1996) ("The exclusion of courtroom observers, especially a defendant's family members and friends, even from part of a criminal trial, is not a step to be taken lightly.").

164. *United States v. Rivera*, 682 F.3d 1223, 1229 (9th Cir. 2012).

165. *Id.* at 1230.

166. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602-03, 610-11 (1982) (public and press have a First Amendment right to be present during testimony by 16-year-old rape victim, statute requiring exclusion without particularized determinations unconstitutional).

167. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-11 (1984) (right to fair trial can justify closure); *see also Presley v. Ga.*, 558 U.S. 209, 213-14 (2010) (right to fair trial may justify closing voir dire); *In re Providence Journal Co.*, 293 F.3d 1, 13-14 (1st Cir. 2002) (right to fair trial justified restricting public access to court materials in political corruption case because widespread publicity could have prejudiced defense); *United States v. Gerena*, 869 F.2d 82, 86 (2d Cir. 1989) (right to fair trial justified sealing of wire-tapped conversations if substantial probability that publicity would prejudice defendant); *United States v. Edwards*, 303 F.3d 606, 617 (5th Cir. 2002) (right to fair trial justified closure of hearings on whether to impanel anonymous jury).

168. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 555, 608-09 (1980) (protection of minor victims of sex crimes would justify sufficiently narrowly tailored closure); *see, e.g., Rodriguez v. Miller*, 537 F.3d 102, 110 (2d Cir. 2007) (protection of undercover agent's identity justified screening witness from defendant's family and general public); *Bell v. Jarvis*, 236 F.3d 149, 168 (4th Cir. 2000) (protection of adolescent rape victim justified closure during victim's testimony); *United States v. Jones*, 965 F.2d 1507, 1513 (8th Cir. 1992) (protection of witness from danger justified screening witness from general public); *In re Tribune Co.*, 784 F.2d 1518, 1522-23 (11th Cir. 1986) (protection of jurors' privacy interests justified closure of voir dire examination); *United States v. Brice*, 649 F.3d 793, 796-97 (D.C. Cir. 2011) (protection of victims from invasions of privacy justified sealing material witness proceedings).

169. *See, e.g., United States v. Three Juveniles*, 61 F.3d 86, 86-91 (1st Cir. 1995) (closure justified to protect juvenile defendants accused of hate crimes from stigma and public scrutiny).

170. *See, e.g., In re Tribune Co.*, 784 F.2d at 1522-23 (protection of ongoing criminal investigations and jurors' privacy interests justified closure of voir dire examination).

171. *See, e.g., United States v. Smith*, 426 F.3d 567, 572-74 (2d Cir. 2005) (security and prevention of terrorism justified identification check of public prior to granting entry to public trial).

172. *See, e.g., Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 610 (1978) (public access and trial requirements of First and Sixth Amendments satisfied by "opportunity of members of the public and the press to attend the trial and to report what they have observed"); Fed. R. Crim. P. 53 (prohibiting photographing or broadcasting judicial proceedings); *United States v. Lnu*, 575 F.3d 298, 306 (3d Cir. 2009) (public trial requirement of Sixth Amendment satisfied by public's opportunity to report on trial, does not require that audio evidence be simultaneously broadcast in courtroom); *United States v. Edwards*, 785 F.2d 1293, 1295-96 (5th Cir. 1986) (right of access does not give journalists First Amendment right to broadcast trial); *Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988) (right of access does not give journalists First Amendment right to broadcast, telecast, or photograph trial); *United States v. Kerley*, 753 F.2d 617, 620 (7th Cir. 1985) (public trial requirement does not give defendant Sixth Amendment right to videotape trial for later broadcast); *United States v. Hastings*, 695 F.2d 1278, 1283 (11th Cir. 1983) (right of access and public trial requirements of First and Sixth Amendments satisfied by public's opportunity to attend and report on trial and do not require that trial be broadcast live or on tape).

173. *McMann v. Richardson*, 397 U.S. 759, 771 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel. …").

174. *See, e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (holding that the Sixth Amendment right to counsel of choice "commands, not that a trial be fair, but that a particular guarantee of fairness be provided — to wit, that the accused be defended by the counsel he believes to be best."); *Powell v. Ala.*, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.").

175. *See Gonzalez-Lopez*, 548 U.S. at 146-48.

176. *See Criminal Justice Standards and Best Practices During the COVID-19 Pandemic*, Federal Defenders, CJA Panel Representatives for the SDNY and EDNY, and the New York Council of Defense Lawyers (May 2020).

177. A. Mehrabian, Silent Messages: Implicit Communication of Emotions and Attitudes 43 (2d ed. 1981) (emphasis added).

178. *Id*.

179. L. Vanderkam, *The Science of When You Need In-Person Communication*, Fast Company (Sept. 30, 2015), https://www.fastcompany.com/3051518/the-science-of-when-you-need-in-person-communication?key5sk1=d8b84d63a15a5376b726d3e22638f2fd4e85f789&af=13996

180. J. Schroeder & J. Risen, *Handshaking Promotes Cooperative Dealmaking*, University of Chicago and Harvard University (May 30, 2014), https://papers.ssrn.com/sol3/Delivery.cfm/ https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2443674_code698198.pdf?abstractid=2443674&mirid=1.

181. *Id*.

182. S. Kay, *The Power of a Handshake Confirmed by Hot Spots in Your Brain*, Everyday

Health (Oct. 23, 2012), https://www.everydayhealth.com/emotional-health/1023/the-power-of-handshake-confirmed-by-hot-spots-in-your-brain.aspx.

183. *See BOP Implementing Modified Operations*, Federal Bureau of Prisons, https://www.bop.gov/coronavirus/covid19_status.jsp (last accessed May 29, 2020) ("Although legal visits are generally suspended for 30-days, case-by-case accommodation will be made at the local level.").

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185. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 367 (2000) (discussing defense counsel's "obligation to conduct a thorough investigation of the accused's background" in the context of sentencing).

186. *Criminal Justice Standards and Best Practices During the COVID-19 Pandemic*, *supra*.

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188. T. Williams et al., *'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, N.Y. Times (Mar. 30, 2020), https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html.

189. *See* M. Chan, *'It Will Have Effects for Months and Years.' From Jury Duty to Trials, Coronavirus Is Wreaking Havoc on Courts*, Time (Mar. 16, 2020), https://time.com/5803037/coronavirus-courts-jury-duty/.

190. *See id*.

191. *COVID-19 Employer Information for Office Buildings*, Center for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html (last accessed May 28, 2020); *see also Rational Use of Protective Personal Equipment for Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 27, 2020), https://apps.who.int/iris/bitstream/handle/10665/331215/WHO-2019-nCov-IPCPPE_use-2020.1-eng.pdf (recommending "physical barriers to reduce exposure to the COVID-19 virus, such as glass or plastic windows" in "areas of the healthcare setting where patients will first present, such as triage areas").

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193. *See* M. John & L. Shumaker, *Lessons from Around the World: How Schools Are Opening Up After COVID-10 Lockdowns*, Reuters (May 13, 2020), https://www.reuters.com/article/us-health-coronavirus-schools/lessons-from-around-the-world-how-schools-are-opening-up-after-covid-19-lockdowns-idUSKBN22P2KC.

194. *See* N. van Doremalen et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, 382 N. Eng. J. Med. 1564-1567 (Apr. 16, 2020), https://www.nejm.org/doi/full/10.1056/NEJMc2004973.

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196. *Id*.

197. *See* A. Ragupathi, *Rutgers Researchers Develop 45-Minute Test Coronavirus*, Daily Telegram (Mar. 26, 2020), https://www.dailytargum.com/article/2020/03/rutgers-researchers-develop-45-minute-test-for-coronavirus (confirming the availability of a 45-minute test for COVID-19).

198. *See, e.g.*, *People v. Capellan*, 17 Misc. 3d 337, 341-342 (Sup. Ct. 2007) (finding a "manifest[] necessity" to declare a mistrial when a juror became ill).

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