

Essay

REMOTE COURT: PRINCIPLES FOR VIRTUAL PROCEEDINGS DURING THE COVID-19 PANDEMIC AND BEYOND

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ABSTRACT—Across the country, courts at every level have relied on remote technology to adapt the justice system to a once-a-century global pandemic. This Essay describes and assesses this unprecedented journey into virtual justice, paying particular attention to eviction proceedings. While many judges have touted remote court as a revolutionary innovation, the reality is more complex. Remote court has brought substantial time savings and convenience to those who are able to access and use the required technology, but it has also posed hurdles to individuals on the other side of the digital divide, particularly self-represented litigants. The remote court experience has varied substantially depending on the nature of the proceedings, the rules and procedures courts put in place, and the relevant court users' resources and tech savvy. Critically, the challenges posed by remote court have often been less visible to judges than the efficiency benefits. Drawing on these lessons, this Essay identifies a series of principles that should inform future uses of remote technology. Ultimately, new technology should be embraced when—and only when—it is consistent with fair proceedings and access to justice for all.

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INTRODUCTION

Shortly before Justice of the Peace Nicholas Chu was set to hear opening arguments in the first fully virtual criminal trial in the United States, Judge Chu had to excuse Juror #5 for a reason familiar to anyone grappling with remote life during the COVID-19 pandemic—spotty Wi-Fi.¹ After

¹ Travis County, *JP5 Jury Trial Justice of the Peace, Pct. 5*, YOUTUBE, at 11:50:00–13:10:00 (Aug. 11, 2020), <https://www.youtube.com/watch?v=FEwnM615Xh8> (last visited Mar. 7, 2021).

seating an alternate juror for this misdemeanor trial in Travis County, Texas, which was conducted over the Zoom videoconference system, Judge Chu reminded the jurors to give their full attention and not be “on Facebook or checking email.”² The jurors heard from witnesses, viewed documents and videos (also made available to jurors in an e-folder),³ and deliberated in a Zoom breakout room for approximately twenty minutes, after which the foreperson delivered the jury’s verdict: the defendant was guilty of speeding. Each juror gave a muted thumbs-up to indicate the verdict was unanimous.⁴

Across the country, courts at every level have relied on remote technology to adapt the justice system to a once-a-century global pandemic, which shuttered courthouse doors beginning in March 2020 and has required limits on in-person proceedings for over a year. In June 2020, Bridget Mary McCormack, chief justice of the Michigan Supreme Court, told a congressional subcommittee that “in three months, [the courts] have changed more than in the past three decades.”⁵ Nathan Hecht, chief justice of the Supreme Court of Texas, has suggested that with the expansion of remote court proceedings, “the American justice system will never be the same.”⁶

In this Essay, we seek to describe and assess courts’ unprecedented journey into virtual justice, with a focus on trial-level courts. What has worked well, and what have been the challenges? What shortcomings must be resolved if, as seems likely, courts are going to continue using remote proceedings more frequently than they had prior to the pandemic? What institutional blind spots might be holding courts back from fully addressing those challenges? To answer these questions, this Essay builds on two reports we published at the Brennan Center for Justice in 2020 and incorporates new insights gleaned from interviews with legal-services attorneys grappling with these issues on a daily basis.⁷

² David Lee, *Texas Judge Holds First Virtual Jury Trial in Criminal Case*, COURTHOUSE NEWS SERV. (Aug. 11, 2020), <https://www.courthousenews.com/texas-judge-holds-first-virtual-jury-trial-in-criminal-case/> [<https://perma.cc/XJ9R-H3KG>].

³ Travis County, *supra* note 1, at 1:55:00.

⁴ *Id.* at 3:16:00–3:16:15.

⁵ *Federal Courts During the Covid-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 116th Cong. 1 (2020) (testimony of Bridget M. McCormack, chief justice, Michigan Supreme Court) [hereinafter *McCormack Testimony*].

⁶ Meera Gajjar, “*The American Justice System Will Never Be the Same, Says Texas Supreme Court Chief Justice Nathan Hecht*,” THOMSON REUTERS (Apr. 24, 2020), <https://www.thomsonreuters.com/en-us/posts/government/texas-supreme-court-chief-justice-nathan-hecht/> [<https://perma.cc/69JS-AG79>] (interviewing Nathan Hecht, chief justice, Supreme Court of Texas).

⁷ See ALICIA BANNON & JANNA ADELSTEIN, BRENNAN CTR. FOR JUST., *THE IMPACT OF VIDEO PROCEEDINGS ON FAIRNESS AND ACCESS TO JUSTICE IN COURT* (2020), <https://www.brennancenter.org>.

In Part I, we describe how courts have expanded the use of remote proceedings during the COVID-19 pandemic. In Part II, we draw on diverse sources—including interviews with civil legal-aid providers, media reports, surveys conducted during the pandemic, accounts from judges and others within the judicial system, and pre-pandemic scholarship—to detail some of the benefits and shortcomings of remote proceedings that have become apparent. In Part III, we look at some of the constitutional questions raised by remote court. In Part IV, we discuss potential institutional blind spots in courts’ responses to the pandemic that may have colored their view of remote proceedings. Finally, in Part V, we lay out a series of principles that we suggest should guide future policymaking.

At several points throughout this Essay we highlight eviction proceedings, which sit at the nexus of the public-health and economic crises flowing from the pandemic. Eviction proceedings are a useful lens for understanding the practical implications of remote proceedings on access to justice: they are high stakes, yet tenants enjoy fewer constitutional protections than do criminal defendants and are frequently unrepresented by counsel. Insights from the civil justice system are also important because much of the conversation about remote technology to date has focused on the criminal courts.

Despite a patchwork of state and federal eviction moratoria, courts have authorized hundreds of thousands of evictions during the pandemic.⁸ A

org/sites/default/files/2020-09/The%20Impact%20of%20Video%20Proceedings%20on%20Fairness%20and%20Access%20to%20Justice%20in%20Court.pdf [https://perma.cc/C4TH-S72N]; DOUGLAS KEITH & ALICIA BANNON, BRENNAN CTR. FOR JUST., PRINCIPLES FOR CONTINUED USE OF REMOTE COURT PROCEEDINGS (2020), https://www.brennancenter.org/sites/default/files/2020-09/Principles%20for%20Continued%20Use%20of%20Remote%20Court%20Proceedings%20final_0.pdf [https://perma.cc/69WY-6XHD].

⁸ As of April 11, 2021, <http://www.evictionlab.org/eviction-tracking/> reported 291,368 evictions in just the five states and twenty-seven cities it tracks. *The Eviction Tracking System*, EVICTION LAB, <http://www.evictionlab.org/eviction-tracking/> [https://perma.cc/S8GS-K4MN]. For state policies, see *COVID-19 Housing Policy Scorecard*, EVICTION LAB, <https://evictionlab.org/covid-policy-scorecard/> [https://perma.cc/GGZ6-J56T]. At the federal level, in addition to a short-lived moratorium in the CARES Act, in September, the Centers for Disease Control and Prevention (CDC) ordered a halt on evictions and foreclosures due to nonpayment through January 31, 2021, which has since been extended to June 30, 2021. CARES Act, Pub. L. No. 116-136, § 4024, 134 Stat. 281, 492 (2020); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID–19, 85 Fed. Reg. 55292 (Sept. 4, 2020); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID–19, 86 Fed. Reg. 8020 (Feb. 3, 2021); Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID–19, 86 Fed. Reg. 16731 (Mar. 31, 2021). To take advantage, tenants and residents only have to submit a two-page declaration confirming that they met the CDC’s requirements, such as qualifying annual income and substantial loss of income or increased medical expenses. See *Declaration Under Penalty of Perjury for the Centers for Disease Control and Prevention’s Temporary Halt in Evictions to Prevent Further Spread of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019->

recent study found that lifting eviction moratoria contributed to increased COVID-19 incidence and mortality rates, likely due to transience, increased crowding in homes and shelters, and reduced access to health care.⁹ As the pandemic drags on and moratoria expire, an estimated 8.8 million renters are behind on their rental payments, placing them at risk of eviction.¹⁰ Among renters with annual incomes below \$25,000, more than one in four reported that they were behind on their rent.¹¹ Throughout this Essay, we include examples of how remote proceedings have been used in the eviction context, drawing on surveys, court cases, and interviews with legal-services providers and tenant advocates in five states: Florida, Michigan, Missouri, Ohio, and Texas.¹²

Remote court has brought benefits to many court users, most notably in time savings and convenience for those who are able to access and use the required technology. Yet remote court has also posed real challenges, including to the attorney–client relationship and to the ability of self-represented litigants to access resources and fully participate in court proceedings. It has worked better in some kinds of proceedings than others. And it has raised difficult questions about whether key functions—such as credibility assessments—can be fulfilled virtually.

Importantly, many of the disadvantages of remote proceedings are likely to be less visible to judges and other court officials than the efficiency benefits many have described as revelatory. And remote court’s long-term desirability is likely highly dependent on the nature of the proceedings at

ncov/downloads/declaration-form.pdf [https://perma.cc/A4DR-9ZZT]. But some states have not interpreted the CDC’s moratorium strictly. *See, e.g.*, Email from Nicole N. Brinkley, Assistant Couns., N.C. Admin. Off. of the Cts. Off. of Gen. Couns., to Clerks, Assistant Clerks, & Deputy Clerks of Superior Ct., N.C. Jud. Branch, & Other Ct. Offs. (Sept. 9, 2020, 5:12 PM) (on file with journal) (instructing clerks throughout North Carolina that the CDC order changed nothing about the clerks’ process for filing and scheduling eviction proceedings and issuing writs of possession, the final eviction order in the state); Annie Nova, *The CDC Banned Evictions. Tens of Thousands Have Still Occurred*, CNBC (Dec. 5, 2020), <https://www.cnbc.com/2020/12/05/why-home-evictions-are-still-happening-despite-cdc-ban.html> [https://perma.cc/N4AN-8KWJ] (reporting that seven states never stopped evictions despite the CDC moratorium).

⁹ Emily A. Benfer, David Vlahov, Marissa Y. Long, Evan Walker-Wells, J. L. Pottenger Jr., Gregg Gonsalves & Danya E. Keene, *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. URB. PUB. HEALTH 1, 7 (2021) (finding that lifting eviction moratoria was associated with 2.1 times higher incidence and 5.4 times higher mortality after sixteen weeks, leading to more than 10,000 excess deaths).

¹⁰ CONSUMER FIN. PROT. BUREAU, HOUSING INSECURITY AND THE COVID-19 PANDEMIC 6 (2021), https://files.consumerfinance.gov/f/documents/cfpb_Housing_insecurity_and_the_COVID-19_pandemic.pdf [https://perma.cc/PA6E-JYE2] (providing estimates as of December 2020).

¹¹ *Id.*

¹² To protect confidentiality and encourage frank feedback about the judiciary’s performance, all interviews cited in this Essay are referenced by state and organization type.

issue. All of these considerations underscore the importance of broad consultation with stakeholders both inside and outside the judicial system in setting court policies. Yet on this measure, there are concerning indications that courts in many jurisdictions have been falling short.

The COVID-19 pandemic has forced innovation, but the next step is to make sure we take the right lessons from the experience, so that technology is embraced when—and only when—it is consistent with fair proceedings and access to justice for all.

I. COURTS' ADOPTION OF REMOTE PROCEEDINGS IN RESPONSE TO THE COVID-19 PANDEMIC

When state and federal officials began responding to the COVID-19 crisis in March 2020 by mandating social-distancing measures, court systems acted swiftly.¹³ In many state and federal jurisdictions, early court orders expressed at least a preference for using remote technology when possible. For example, on March 13, the Florida Supreme Court suspended all court rules limiting or prohibiting the use of remote proceedings, while noting that defendants' confrontation clause rights must still be met in criminal cases.¹⁴ On the same day, the Supreme Court of Texas authorized the state's courts to "[a]llow or require anyone involved in any hearing . . . to participate remotely, such as by teleconferencing, videoconferencing, or other means."¹⁵

By April 2020, every state judicial branch, and many local court systems, had issued an order or guidance seeking to reduce the number of people entering courthouses.¹⁶ While some jurisdictions were more aggressive than others in their initial responses, in a matter of weeks court systems had largely coalesced around a similar set of measures for trial courts: suspension of jury trials and in-person proceedings save for categories of cases the jurisdiction deemed essential.

¹³ Janna Adelstein & Douglas Keith, *Initial Court Responses to Covid-19 Leave a Patchwork of Policies*, BRENNAN CTR. FOR JUST. (Apr. 14, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/initial-court-responses-covid-19-leave-patchwork-policies> [https://perma.cc/FMV9-A7PG].

¹⁴ Administrative Order at 3–4, *In re* COVID-19 Emergency Procs. in the Fla. State Cts., No. AOSC20-13 (Fla. Mar. 13, 2020), <https://www.floridasupremecourt.org/content/download/631744/file/AOSC20-13.pdf> [https://perma.cc/AY6P-JP23] (discussing COVID-19 emergency procedures in the Florida state courts).

¹⁵ First Emergency Order Regarding the COVID-19 State of Disaster at 1, Misc. Docket No. 20-9042 (Tex. Mar. 13, 2020), <https://www.txcourts.gov/media/1446056/209042.pdf> [https://perma.cc/C475-NE3V].

¹⁶ Adelstein & Keith, *supra* note 13.

At the same time, as weeks passed and court leaders recognized the enduring nature of the crisis, court systems increasingly turned to remote technologies to reopen and expand their dockets. Since March 2020, at least thirty-eight states have issued statewide orders during the pandemic either mandating or urging the use of remote proceedings, and in the remaining states many local jurisdictions have adopted similar orders.¹⁷ In May 2020, for example, Connecticut's judicial branch announced that it would resume its suspended civil docket by video and telephone.¹⁸ The CARES Act federal stimulus package likewise authorized the use of video and phone for key aspects of federal criminal proceedings, including arraignments, preliminary hearings, initial appearances, detention hearings, probation hearings, and more.¹⁹ Congress allocated \$6 million to the federal judiciary to adapt to the new environment.²⁰ While many jurisdictions subsequently took steps to reopen or expand in-person operations in a limited capacity during the pandemic,²¹ reopening plans have waxed and waned with the prevalence of the virus. In November 2020, for example, approximately one-quarter of

¹⁷ *Courts' Responses to the Covid-19 Crisis*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis> [<https://perma.cc/CHS4-ZNFM>].

¹⁸ *See Judicial Branch Continues to Expand Types of Cases Handled Remotely*, STATE OF CONN. JUD. BRANCH (May 7, 2020), <https://jud.ct.gov/HomePDFs/RemotelyHandledCases.pdf> [<https://perma.cc/3UD6-BH25>].

¹⁹ CARES Act, Pub. L. No. 116-136, § 15002(b), 134 Stat. 281, 528 (2020).

²⁰ *Id.* § 15001. Some states also allocated funds to support technology updates—the Supreme Court of Ohio gave \$6 million to local courts for this purpose. *See* Anne Yeager, *Chief Justice's Program Funds \$6 Million in Technology Grants for Local Courts*, CT. NEWS OHIO (May 1, 2020), http://www.courtnewsoriohio.gov/happening/2020/remotetechgrants_050120.asp#.YAdgDuhKg2w [<https://perma.cc/74S2-HKCN>].

²¹ For example, as COVID-19 rates decreased in many places over the summer and early fall in 2020, judicial systems in many states reopened some physical aspects of courthouses, albeit with measures in place to meet public-health guidance. *See, e.g.*, Administrative Order Related to Appellate & District Courts Operations at 3, No. 2020-PR-054 (Kan. May 27, 2020), <https://www.kscourts.org/KSCourts/media/KsCourts/Orders/2020-PR-054.pdf> [<https://perma.cc/W4KJ-9ACV>] (requiring, among other measures, remote hearings when possible and social distancing). Courts that resumed in-person trials employed a range of techniques, from scattering jurors around the courtroom, to requiring witnesses wear masks while testifying, to providing attorneys with walkie-talkies so that they could sidebar with the judge without having to physically approach the bench. Michael Gordon, *Place Your Hand on the Bible: Federal Jury Trials Resume After Weeks of COVID Planning*, CHARLOTTE OBSERVER (June 13, 2020), <https://www.charlotteobserver.com/news/coronavirus/article243514632.html> [<https://perma.cc/4XF3-VW7B>]; Nicole Hong & Jan Ransom, *Only 9 Trials in 9 Months: Virus Wreaks Havoc on N.Y.C. Courts*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/12/02/nyregion/courts-covid.html> [<https://perma.cc/3NER-CKNE>].

federal district courts ordered reduced operations in response to worsening health indicators.²²

Courts' pivot to remote court was unprecedented in its scope and scale, but the use of video and phone to hold remote proceedings has been part of the legal landscape for decades, most often in cases involving incarcerated or detained individuals.²³ In criminal cases, for example, most jurisdictions have permitted the use of remote videoconferencing for initial appearances and felony arraignments, with some jurisdictions requiring the defendant's consent.²⁴ Some jurisdictions have further permitted the use of video for other criminal proceedings, such as pretrial release hearings (typically requiring consent).²⁵ In immigration court, videoconferencing (without consent) is authorized by statute for removal proceedings²⁶ and has been used regularly since the 1990s.²⁷ During the last quarter of 2019, one out of every six final hearings that concluded an immigrant's case was held by video.²⁸ In state court, videoconferences were widely used for certain criminal and civil proceedings prior to the pandemic, including criminal arraignments and first appearances, as well as child-support enforcement.²⁹

²² *Courts Suspending Jury Trials as COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), <https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge> [https://perma.cc/4R4L-K4HP].

²³ See, e.g., MIKE L. BRIDENBACK, STATE JUST. INST., STUDY OF STATE TRIAL COURTS USE OF REMOTE TECHNOLOGY 12–15 (2016), <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf> [https://perma.cc/9A8V-8ZH5]; Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 877–78 (2010); Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 934 (2015).

²⁴ See Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. (forthcoming 2021) (manuscript at 6), <https://papers.ssrn.com/a=3699045> [https://perma.cc/TP3Z-FWRC]. Videoconferencing had been widely used for these proceedings. See BRIDENBACK, *supra* note 23, at 13–14. With respect to consent, Arizona, for example, does not require consent for videoconferencing for a defendant's initial appearances, misdemeanor arraignments, and not-guilty felony arraignments. ARIZ. R. CRIM. P. 1.5(c)(1). By contrast, the Federal Rules of Criminal Procedure permit video teleconferencing for a defendant's initial appearance or arraignment only with consent. FED. R. CRIM. P. 5(f), 10(c).

²⁵ Turner, *supra* note 24, at 6.

²⁶ See 8 U.S.C. § 1229a(b)(2)(A)(iii); see also 8 C.F.R. § 1003.25(c) (“An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person.”).

²⁷ *Video Hearings in Immigration Court FOIA*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/content/video-hearings-immigration-court-foia> [https://perma.cc/3H9Q-MNFD].

²⁸ *Use of Video in Place of In-Person Immigration Court Hearings*, TRAC IMMIGR. (Jan. 28, 2020), <https://trac.syr.edu/immigration/reports/593/> [https://perma.cc/9B7L-MKN7].

²⁹ BRIDENBACK, *supra* note 23, at 12–15.

But the COVID-19 pandemic prompted courts to turn to remote proceedings to an unprecedented degree³⁰: expanding the use of video and phone in proceedings for which they were already authorized;³¹ allowing remote proceedings in matters that previously had been required to be in person;³² and, in some jurisdictions, removing requirements that parties consent prior to the use of remote proceedings.³³ Similarly unprecedented was that courtrooms themselves were often entirely empty, particularly in the early months of the pandemic, with judges, staff, lawyers, litigants, witnesses, and the public all appearing via video or phone.

During the pandemic, many jurisdictions have used remote proceedings extensively for bail, plea, and sentencing hearings,³⁴ as well as for eviction proceedings³⁵ and family court.³⁶ Though virtual criminal jury trials have been unusual, Texas saw its first online misdemeanor jury trial in August 2020,³⁷ and one Texas city began holding regular virtual trials in its

³⁰ See the “Virtual Hearings” map at *Coronavirus and the Courts*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency> [<https://perma.cc/4KUR-N89Z>] (click the “NEW — Virtual Hearing Resources and Guides” tab on the interactive map).

³¹ *Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm’n*, 470 F. Supp. 3d 735, 738 (E.D. Mich. 2020) (authorizing remote bench trial pursuant to Federal Rules of Civil Procedure 77(b) and 43(a)).

³² See, e.g., CARES Act, Pub. L. No. 116-136, § 15002, 134 Stat. 281, 527–29 (2020) (authorizing courts to conduct remote hearings in a variety of criminal proceedings).

³³ See, e.g., Eighteenth Emergency Order Regarding the COVID-19 State of Disaster at 1–2, No. 20-9080 (Tex. June 29, 2020), <https://www.txcourts.gov/media/1448109/209080.pdf> [<https://perma.cc/JTB9-V4SL>] (authorizing, “[s]ubject only to constitutional limitations” and without consent, all Texas courts to “allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court reporter, grand juror, or petit juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means”).

³⁴ Turner, *supra* note 24, at 36; see also OHIO CRIM. SENT’G COMM’N, COVID-19 AND THE COURTS 2020: A SURVEY OF OHIO JUDGES, COURT ADMINISTRATORS AND ATTORNEYS 46–48 (2020), <http://www.sc.ohio.gov/coronavirus/resources/CSC-COVIDReport.pdf> [<https://perma.cc/QBQ3-RZ8R>] (surveying courts about the pandemic’s impact on plea, bond, and sentencing hearings in criminal cases).

³⁵ See, e.g., Admin. Order 2020-1, *In re* Procs. for Landlord/Tenant Matters (Del. J.P. Ct. Sept. 11, 2020), <https://courts.delaware.gov/rules/pdf/Justice-of-the-Peace-Court-Administrative-Order-2020-1.pdf> [<https://perma.cc/SK6R-JF9R>] (instructing that all landlord–tenant matters “will be set for a virtual pretrial conference and then a subsequent virtual trial,” and noting that “[w]hile in-person hearings are available where there are technological barriers or complications determined on a case-by-case basis, the default position will be for a virtual hearing”); see also Chris Arnold, *Zoom Call Eviction Hearings: ‘They’ll Throw Everything I Have out on the Street,’* NPR (June 19, 2020), <https://www.npr.org/2020/06/19/880859109/zoom-call-eviction-hearings-they-ll-throw-everything-i-have-out-on-the-street> [<https://perma.cc/L4LP-JMXP>] (reporting on virtual eviction proceedings, including one in which a judge “granted landlords the right to evict five people who didn’t or couldn’t dial into the hearing”).

³⁶ See Allie Reed & Madison Alder, *Virtual Hearings Put Children, Abuse Victims at Ease in Court*, BLOOMBERG L. (June 23, 2020) [hereinafter Reed & Adler, *Virtual Hearings*], <https://news.bloomberglaw.com/us-law-week/virtual-hearings-put-children-abuse-victims-at-ease-in-court> [<https://perma.cc/2ZUY-LHP2>].

³⁷ Turner, *supra* note 24, at 29.

misdeemeanor court in November 2020,³⁸ which are livestreamed from its YouTube page (and subsequently deleted).³⁹ In February 2021, the Florida Supreme Court authorized remote criminal jury trials for felonies and misdemeanors with the defendant's consent.⁴⁰ Remote criminal bench trials have been more widely used, as have remote civil trials.⁴¹ Some jurisdictions have convened remote grand juries.⁴² Courts have also turned to hybrid proceedings, for example, providing for public access via video feed or phone,⁴³ relaxing requirements so as to allow witnesses to appear via videoconference,⁴⁴ and allowing remote jury selection.⁴⁵

For an institution where change is often incremental and technology use has often lagged behind other industries, courts' embrace of technology during the pandemic has been remarkable. In Michigan, for example, courts conducted more than 50,000 hearings on Zoom over the course of nearly 350,000 hours between April and the end of June in 2020.⁴⁶ Texas held

³⁸ Anna Caplan, *McKinney Is First City in Texas to Hold Virtual Jury Trials During COVID-19*, DALL. MORNING NEWS (Nov. 24, 2020), <https://www.dallasnews.com/news/2020/11/24/mckinney-is-first-city-in-texas-to-hold-virtual-jury-trials-during-covid-19/> [<https://perma.cc/4Z73-FGNB>].

³⁹ *Id.*; see City of McKinney Municipal Court, YOUTUBE, <https://www.youtube.com/channel/UChA5x5U5jhMNRU5bqHOjsg> [<https://perma.cc/F5UQ-Z4YF>].

⁴⁰ Administrative Order at 3, *In re Comprehensive COVID-19 Emergency Measures for Fla. Trial Cts.*, No. AOSC20-23 (Fla. Feb. 17, 2021), <https://www.floridasupremecourt.org/content/download/719444/file/AOSC20-23-Amendment-9.pdf> [<https://perma.cc/H7PA-8SNF>].

⁴¹ See Zack Needles, *Trendspotter: Virtual Civil Jury Trials Are Definitely Divisive—And Likely Inevitable*, LAW.COM (Sept. 13, 2020), <https://www.law.com/2020/09/13/law-com-trendspotter-virtual-jury-trials-remain-divisive-but-are-they-inevitable/> [<https://perma.cc/BHK6-7MLS>]; *Five Trial-Court Circuits Chosen for “Virtual” Civil Jury Trial Pilot Program Due to Pandemic*, FLA. SUP. CT. (June 3, 2020, 12:33 PM), <https://www.floridasupremecourt.org/News-Media/Court-News/Five-trial-court-circuits-chosen-for-virtual-civil-jury-trial-pilot-program-due-to-pandemic> [<https://perma.cc/5MCR-PERA>].

⁴² Marcus W. Reinkensmeyer, *Virtual Grand Jury Hearings: Response to the COVID-19 Emergency in Mohave County, Arizona*, AM. BAR ASS'N (June 29, 2020), https://www.americanbar.org/groups/judicial/publications/judicial_division_record_home/2020/vol23-4/technology/ [<https://perma.cc/4P9M-FSSJ>] (Arizona); Charles Toutant, *Is the Virtual Grand Jury Process Unconstitutional? Judge Weighs Challenge*, LAW.COM (Dec. 23, 2020), <https://www.law.com/njlawjournal/2020/12/23/is-the-virtual-grand-jury-process-unconstitutional-judge-weighs-challenge/> [<https://perma.cc/6AFE-L7TK>] (New Jersey).

⁴³ *United States v. Richards*, No. 2:19-cr-353-RAH, 2020 WL 5219537, at *1 (M.D. Ala. Sept. 1, 2020).

⁴⁴ *Sunoco Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC*, No. CV 17-1390-LPS-CJB, 2020 WL 3605623, at *2 (D. Del. July 2, 2020); OHIO CRIM. SENT'G COMM'N, *supra* note 34, at 51 (nearly half of surveyed judges had allowed witnesses to testify by video in criminal proceedings even though the trials were not fully remote).

⁴⁵ Order, *In re Ill. Cts. Response to COVID-19 Emergency/ Remote Jury Section in Civil Cases*, No. M.R. 30370 (Ill. Oct. 27, 2020), <https://courts.illinois.gov/SupremeCourt/Announce/2020/102720-1.pdf> [<https://perma.cc/ME3R-CAQA>].

⁴⁶ *McCormack Testimony*, *supra* note 5, at 2.

approximately 122,000 remote hearings between March 24 and June 1, 2020.⁴⁷ In 2020, Professor Jenia Iontcheva Turner surveyed state and federal judges, prosecutors, and defense attorneys in Texas as to their experience with remote court proceedings.⁴⁸ Professor Turner found that while just over one-quarter of respondents had participated in remote criminal proceedings before the pandemic, more than 92% had done so during the pandemic.⁴⁹ Likewise, 93% of Ohio judges surveyed by the state's criminal sentencing commission reported using some sort of remote technology to reduce face-to-face interactions during the pandemic.⁵⁰

To be clear, remote court has not exempted the justice system from the impact of COVID-19. In particular, more limited use of trials, both remote and in person, has led to overwhelming backlogs in many jurisdictions. In New York City, for example, state and federal courts conducted a combined 9 criminal trials between March and November 2020, compared to 800 criminal trials in 2019, leaving hundreds of people in limbo in pretrial detention.⁵¹ These delays have contributed to a humanitarian crisis in which the virus has worked its way through prisons and jails while many people await progress in their cases, disproportionately affecting minority defendants, who are both more likely to be subject to pretrial detention and more vulnerable to the virus.⁵²

Yet despite its limits, the expansion of remote proceedings has allowed courts to maintain many basic functions during the pandemic, and there are strong indications from many court leaders that expanded remote proceedings will continue even when the pandemic subsides. Texas's Chief

⁴⁷ Erika Rickard & Qudsiya Naqui, *Coronavirus Accelerates State Court Modernization Efforts*, PEW CHARITABLE TRS. (June 18, 2020), <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/06/18/coronavirus-accelerates-state-court-modernization-efforts> [<https://perma.cc/789G-9ZE4>].

⁴⁸ See Turner, *supra* note 24, at 35.

⁴⁹ See *id.* at 38–39.

⁵⁰ OHIO CRIM. SENT'G COMM'N, *supra* note 34, at 45.

⁵¹ Hong & Ransom, *supra* note 21. Maine and Texas experienced similar backlogs. See *Pandemic Causes 'Staggering' Court Backlog in Maine*, ASSOCIATED PRESS (Nov. 8, 2020), <https://apnews.com/article/virus-outbreak-pandemics-maine-5e056e9c004152929d614dd3f6c5ff82> [<https://perma.cc/3GAH-AVN4>] (reporting state court officials in Maine warning of a “staggering” backlog); Jenni Bergal, *Some States Halt Jury Trials Again, Leaving Staggering Backlogs and 'a Lot of People Sitting in Jail.'* USA TODAY (Dec. 8, 2020), <https://www.usatoday.com/story/news/nation/2020/12/08/jury-trials-stopped-some-states-backlogs-build-amid-covid-19/6491162002/> [<https://perma.cc/3ZZS-NBSG>] (reporting Texas's court administrator warned it may be “years” before the state gets through its trial backlog).

⁵² See Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 60, 70, 72–77 (2020); *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 12, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [<https://perma.cc/XY5F-BR6F>].

Justice Nathan Hecht told a reporter in July 2020, “We’re going to be doing court business remotely forever . . . This has changed the world.”⁵³ Ohio’s Chief Justice Maureen O’Connor similarly argued that “[w]e’ve got to embrace the changes and move[] this institution in that direction,”⁵⁴ a sentiment echoed by many of the state’s judges in a survey, where 82% said they are considering continuing some of their pandemic-era changes into “non-emergency” times, including virtual preliminary hearings.⁵⁵ In July 2020, Michigan Chief Justice McCormack put it simply: “Oh, you never go back. There’s no way we’re going back.”⁵⁶

II. THE PANDEMIC EXPERIENCE SHOWS REMOTE COURT’S SHORTCOMINGS AND POTENTIAL

Remote proceedings unquestionably served their primary purpose: courts have been able to continue operating while still heeding public-health guidance to limit the number of people physically present in courthouses.

⁵³ Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forces Seismic Change*, BLOOMBERG L. (July 30, 2020, 3:50 AM) [hereinafter Reed & Adler, *Zoom Courts*], <https://news.bloomberglaw.com/us-law-week/zoom-courts-will-stick-around-as-virus-forces-seismic-change> [<https://perma.cc/3Q65-RQ9Y>].

⁵⁴ Marc Kovac, *COVID, Sentencing Reform Among Focuses for Final Years of Chief Justice Maureen O’Connor’s Term*, COLUMBUS DISPATCH (Dec. 29, 2020), <https://www.dispatch.com/story/news/politics/state/2020/12/29/oconnor-heading-into-final-2-years-supreme-court-chief-justice/4006669001/> [<https://perma.cc/3484-5P79>]; see also Nathan B. Coats, *Chief Justice Introduction to COLO. CTS., COLORADO JUDICIAL BRANCH ANNUAL STATISTICAL REPORT: FISCAL YEAR 2020* (2020), https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2020/FY2020%20Annual%20Statistical%20Report-FINAL.pdf [<https://perma.cc/NZ4E-VP3S>] (“We will no doubt continue the use of virtual proceedings to the extent that it is consistent with our constitutional obligations.”); Turner, *supra* note 24, at 64 (noting that 66% of surveyed state judges and 48% percent of surveyed federal judges said they wanted to see remote videoconference proceedings used more frequently after the pandemic is over).

⁵⁵ OHIO CRIM. SENT’G COMM’N, *supra* note 34, at 53; see also OHIO CRIM. SENT’G COMM’N, *COVID-19 AND THE COURTS 2020: FOLLOW-UP INTERVIEWS ADDENDUM TO THE FULL REPORT 4-5* (2020) [hereinafter OHIO CRIM. SENT’G COMM’N FOLLOW-UP], <http://www.sc.ohio.gov/coronavirus/resources/CSC-COVIDReportAddendum.pdf> [<https://perma.cc/Y9FF-YXQE>] (recounting respondents’ opinions that pandemic-era changes will continue).

⁵⁶ Karen J. Bannan, *The Wheels of Justice Supercharged — And on Zoom*, COMMONS (July 30, 2020), <https://wearecommons.us/2020/07/30/the-wheels-of-justice> [<https://perma.cc/2ZPF-TWPM>]; see also Brandon Birmingham, *Three Ways COVID-19 Makes the Criminal Courts Better*, DALL. EXAMINER (May 8, 2020), <https://dallasexaminer.com/editorial/local-commentaries/three-ways-covid-19-makes-the-criminal-courts-better> [<https://perma.cc/6YCD-H23U>] (noting a Texas criminal court judge expressed hope that remote proceedings become permanent); Lyle Moran, *How Hosting a National Pandemic Summit Aided the Nebraska Courts System with Its COVID-19 Response*, AM. BAR ASS’N LEGAL REBELS PODCAST (May 13, 2020, 6:00 AM), https://www.abajournal.com/legalrebels/article/rebels_podcast_episode_052 [<https://perma.cc/MG9G-QW5W>] (reporting that the Nebraska Supreme Court chief justice expects “courts will continue to use video technology for many hearings” after the pandemic).

But has the forced innovation posed by the pandemic served, in the words of Michigan Chief Justice McCormack, as “the disruption our industry[, the courts,] needed”?⁵⁷

The answer to this question is emphatically, “It depends.” This Part looks at how the use of remote technology has affected the experience of “going to” court, with a particular (but not exclusive) focus on tenants facing eviction. We suggest that remote court has been at times a boon to access to justice, at others an instrument of unfairness, and sometimes a bit of both—often depending on the nature of the proceedings, the rules and procedures courts put in place, and the resources and tech savvy of the relevant court users. These equivocal experiences should inform future policymaking and encourage caution as many judges look to expand and make permanent remote innovations.

A. *Convenience for Many, Exclusion for Some*

Going to court frequently requires a substantial time commitment from both lawyers and litigants. Lawyers can sit in court for hours to appear before a judge for a few minutes—often charging fees to their clients the whole time. Litigants and witnesses themselves often must take off work or line up childcare in order to wait for their cases to be called. All participants must travel to and from the courthouse.

On the basic measures of time saving and convenience, remote court has been a sea change for many court users. At the same time, the expansion of remote court during the pandemic has also laid bare the so-called digital divide. For individuals without access to or comfort with technology, remote court can functionally close the courthouse door to meaningful participation.

1. *Time Savings*

The time-saving dimension of remote court has been widely observed across many sources and many kinds of proceedings. Professor Turner’s survey of Texas judges, prosecutors, and defense lawyers found that large majorities across all three groups thought the online proceedings used during the pandemic saved time or resources for prosecutors, the court, defense attorneys, and defendants.⁵⁸ An organization representing domestic violence survivors in New York recounted to a reporter that prior to the pandemic, her clients “would often wait around the courthouse for hours,” or even all day,

⁵⁷ *Expanding Court Operations II: Outside the Box Strategies: Administering the Courts While the COVID-19 Curve Is Flattened*, NAT’L CTR. FOR STATE CTS. (May 19, 2020), <https://cdm16501.contentdm.oclc.org/digital/collection/facilities/id/242> (last visited Apr. 2, 2021).

⁵⁸ Turner, *supra* note 24, at 35, 41–43.

waiting for their cases to be called.⁵⁹ With remote court, the organization “files the petition electronically, the litigant appears before a judge by phone within roughly an hour, and the order of protection is emailed to them in 30 minutes to an hour.”⁶⁰ Similarly, a corporate lawyer emphasized the benefits to lawyers, clients, and witnesses: “[It] is ‘beneficial for everyone’s schedules, efficiency and cost. You don’t have to have an expert sit for weeks in a courtroom and wait to be called.’”⁶¹ A defense attorney surveyed by Professor Turner suggested that the convenience associated with allowing defendants not in custody to appear in court over video reduced prosecutors’ leverage in plea negotiations.⁶²

These benefits were echoed in several of our interviews about eviction proceedings as well. One housing and consumer legal-aid attorney in Florida noted that the jurisdiction’s remote hearings were “on-time,” “quick,” and “efficient,” in a way that the courthouse had never been previously. “[You] don’t have to wait forty-five minutes in a hallway to be called into a hearing room,” the attorney added.⁶³ A legal-services lawyer in Missouri and a court observer in Texas both noted that remote hearings had made it possible for many tenants to appear in court despite childcare and work obligations that otherwise would have prevented them from making a physical appearance.⁶⁴ The court watcher in Texas recounted a tenant who had three children and a job and who said she would not have been able to make it to court if the proceedings had been in person. “For tenants who are tech savvy,” the court watcher added, “remote proceedings are great.”⁶⁵ A pre-pandemic report by the Self-Represented Litigation Network similarly observed that videoconferencing technology can reduce the time and expenses associated with going to court, including travel time, transportation costs, childcare, lost wages, and other day-to-day costs.⁶⁶

⁵⁹ Reed & Alder, *Virtual Hearings*, *supra* note 36.

⁶⁰ *Id.*

⁶¹ Reed & Alder, *Zoom Courts*, *supra* note 53.

⁶² Turner, *supra* note 24, at 45.

⁶³ Telephone Interview with legal-services provider in Florida (Dec. 16, 2020) (on file with journal).

⁶⁴ *See* Telephone Interview with court watcher in Texas (Nov. 12, 2020) (on file with journal); Telephone Interview with legal-services provider in Missouri (Nov. 11, 2020) (on file with journal) [hereinafter Nov. 11 Telephone Interview with legal-services provider in Missouri].

⁶⁵ Telephone Interview with court watcher in Texas, *supra* note 64.

⁶⁶ *See* JOHN GREACEN, SELF-REPRESENTED LITIG. NETWORK, REMOTE APPEARANCES OF PARTIES, ATTORNEYS AND WITNESSES 2–3 (2017); *see also* CAMILLE GOURDET, AMANDA R. WITWER, LYNN LANGTON, DUREN BANKS, MICHAEL G. PLANTY, DULANI WOODS & BRIAN A. JACKSON, RAND CORP., COURT APPEARANCES IN CRIMINAL PROCEEDINGS THROUGH TELEPRESENCE 4–6 (2020), https://www.rand.org/pubs/research_reports/RR3222.html [<https://perma.cc/Y7D8-E6BJ>] (discussing advantages and disadvantages of remote proceedings in criminal cases).

In some instances, time savings have also meant expanded access to legal services for low-income tenants. For example, in one jurisdiction, a housing attorney noted that the added convenience of remote proceedings resulted in the legal-aid office being able to serve many more clients than it had prior to the pandemic.⁶⁷ Pre-pandemic research on remote proceedings in Montana similarly found that video court appearances in both civil and criminal hearings enabled legal-aid organizations to serve previously underserved parts of the state.⁶⁸

Early data indicate that remote court has also corresponded with increased appearance rates in some categories of cases, suggesting that added convenience has a concrete impact.⁶⁹ For example, in a survey conducted by the Ohio Criminal Sentencing Commission, juvenile judges reported that appearance rates slightly increased because parents no longer needed to miss work and defendants no longer struggled to secure transportation to the courthouse.⁷⁰

2. *The Digital Divide*

While these benefits are meaningful and important, they are only available to parties with access to and comfort with the required remote technologies. The other side of the remote court experience is that it has generated substantial hurdles for individuals on the wrong side of the digital divide.

While computers and broadband internet have extensive coverage in the United States,⁷¹ these technologies are not equally accessible to all communities. In 2019, 29% of adults with household incomes below \$30,000 did not own a smartphone, 44% did not have home broadband services, and

⁶⁷ Telephone Interview with legal-services provider in Florida, *supra* note 63.

⁶⁸ Turner, *supra* note 24, at 45.

⁶⁹ *Will Remote Hearings Improve Appearance Rates?*, NAT'L CTR. FOR STATE CTS. (May 13, 2020), <https://www.ncsc.org/newsroom/at-the-center/2020/may-13> [<https://perma.cc/3TVM-VJVT>] (noting that some reports suggest more litigants were showing up for remote hearings than had for in-person hearings pre-pandemic); *see also* Elizabeth Thornburg, *Observing Online Courts: Lessons from the Pandemic* (Sept. 21, 2020) (unpublished manuscript), <https://ssrn.com/a=3696594> [<https://perma.cc/QJC3-UHX8>] (reporting that family court judges and child-advocate staff saw a higher level of parent participation in remote proceedings as compared to in-person proceedings).

⁷⁰ *See* OHIO CRIM. SENT'G COMM'N FOLLOW-UP, *supra* note 55, at 2–3 (finding, however, that outside of juvenile proceedings, virtual hearings had no impact on appearance rates).

⁷¹ In 2016, for instance, 81% of households had a broadband connection and 89% had a computer. CAMILLE RYAN, U.S. CENSUS BUREAU, *COMPUTER AND INTERNET USE IN THE UNITED STATES: 2016*, at 1 (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf> [<https://perma.cc/2GJW-XM37>].

46% did not own a traditional computer.⁷² There are substantial disparities in access to broadband internet and computers according to income and race.⁷³ Americans who live in rural areas are also less likely to have access to broadband internet,⁷⁴ as are people with disabilities, who may also require special technology in order to engage in online activities such as remote court proceedings.⁷⁵ Access issues have been exacerbated during the pandemic as libraries and other public access points for computer and internet use have frequently closed their doors.⁷⁶

In the eviction context, the housing attorneys and court watchers we interviewed reported that many tenants lack the stable high-speed internet access that most video platforms require and are generally new to navigating such platforms, as are many of the witnesses that tenants may seek to call.⁷⁷ For these individuals, remote proceedings create obstacles, not convenience. As a housing attorney in Florida observed, many low-income individuals who might have been able to get a ride to the courthouse are struggling to

⁷² See Monica Anderson & Madhumitha Kumar, *Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption*, PEW RSCH. CTR. (May 7, 2019), <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption> [https://perma.cc/K8L2-UNCN].

⁷³ Households with incomes of \$100,000 almost universally had access to these technologies. *Id.* Only 66% and 61% of Black and Latino Americans, respectively, had access to broadband internet at home, compared to 79% of white Americans. Andrew Perrin & Erica Turner, *Smartphones Help Blacks, Hispanics Bridge Some – But Not All – Digital Gaps with Whites*, PEW RSCH. CTR. (Aug. 20, 2019), <https://www.pewresearch.org/fact-tank/2019/08/20/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/> [https://perma.cc/4ZEZ-T5VC].

⁷⁴ Andrew Perrin, *Digital Gap Between Rural and Nonrural America Persists*, PEW RSCH. CTR. (May 31, 2019), <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/> [https://perma.cc/J4PH-NXPY].

⁷⁵ Monica Anderson & Andrew Perrin, *Disabled Americans are Less Likely to Use Technology*, PEW RSCH. CTR. (April 7, 2017), <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/> [https://perma.cc/6ABT-9PKT]. Disabled Americans are about twenty percentage points less likely than those without a disability to say that they have access to home broadband internet or own a computer, smartphone, or tablet. *Id.* With respect to special technology, the American Bar Association (ABA) has noted that hearing-impaired litigants may require real-time court transcription or captioning, which certain online platforms may not be able to provide. AM. BAR ASS'N, REPORT IN SUPPORT OF ABA RESOLUTION 117, at 6 (2020), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/117-annual-2020.pdf> [https://perma.cc/8F5V-WKUC].

⁷⁶ See, e.g., Elizabeth Owens-Schiele, *COVID-19 Restrictions Force Area Public Libraries to Revert to Reduced Offerings and Curbside Service*, CHI. TRIB. (Dec. 1, 2020, 9:57 AM), <https://www.chicagotribune.com/suburbs/barrington/ct-aph-library-services-covid-tl-1203-20201202-4pvxncqzffqzffezxqhtc4dmi-story.html> [https://perma.cc/GX44-4JYU] (documenting library closures due to the pandemic).

⁷⁷ See Telephone Interview with legal-services provider in Michigan (Oct. 22, 2020) (on file with journal); Telephone Interview with legal-services provider in Ohio (Nov. 20, 2020) (on file with journal); Telephone Interview with legal-services provider in Florida, *supra* note 63.

access technology.⁷⁸ Among other challenges, tenants who are facing eviction may stop paying phone bills in an effort to keep up with rental payments, leaving them without an active device to use for an eviction hearing.⁷⁹

One way the digital divide has manifested is through technological challenges during the proceedings. Poor audio or video quality and poorly positioned cameras have often made it difficult for participants to follow proceedings.⁸⁰ In Missouri, a self-represented tenant sought to access a video hearing on both his phone and his wife's phone but was unable to do so, and he was therefore forced to appear over audio while the judge, the plaintiff's lawyer, and the plaintiff's witness all appeared via video.⁸¹ Among other disadvantages, the tenant was unable to share documents over video with the court.⁸² In Massachusetts, a tenant won a new trial after the court concluded she had been prejudiced by her inability to present evidence due to technological issues at her trial over the Zoom video platform.⁸³ The tenant, who was self-represented during the trial but represented by legal services on appeal, had been unable to send in documents electronically to the court or to share her screen over Zoom during the trial.⁸⁴ Additionally, while courts frequently assume tenants are accessing remote platforms on a computer, our interviews suggest they are often doing so on a phone for which the remote platform may not be optimized, making it unlikely the tenant can see everything happening in the proceeding.⁸⁵ This has been a particular challenge for reviewing evidence.⁸⁶

Technology issues have also meant that some litigants have been unable to access proceedings altogether. Several legal-services attorneys reported to us that judges across jurisdictions have been willing to issue default

⁷⁸ Telephone Interview with legal-services provider in Florida, *supra* note 63.

⁷⁹ We are grateful to John Pollock, Coordinator of the National Coalition for a Civil Right to Counsel, for raising this point based on his conversations with tenant lawyers and advocates.

⁸⁰ An observation of fifty-nine online plea hearings in Texas found audio or connection problems in approximately 20% of cases. Turner, *supra* note 24, at 60; *see also* Telephone Interview with court watcher in Texas, *supra* note 64 (noting that judges are impatient with tenants experiencing technology issues).

⁸¹ Petition for Writ of Prohibition at 4–5, Missouri *ex rel.* Logan v. Neill, No. 2022-AC05861 (Mo. Aug. 25, 2020).

⁸² *Id.* at 6.

⁸³ Decision on Defendant's Motion for a New Trial at 6–7, Jamar Acquisitions LLC v. Avila, No. 20SP582 (Mass. Hous. Ct. Jan. 14, 2021).

⁸⁴ *Id.* at 6.

⁸⁵ *See, e.g.*, Telephone Interview with legal-services provider in Texas (Oct. 30, 2020) (on file with journal) (explaining that tenants frequently use their phones for proceedings on Zoom).

⁸⁶ *See id.*

judgments against tenants who fail to appear for remote hearings without inquiring into whether they had difficulty accessing the remote system.⁸⁷ This corresponds with concerns raised in a June 2020 survey of legal-aid attorneys by the National Housing Law Project. Eighty-eight percent of respondents raised due process concerns about remote eviction proceedings, including the impact of the digital divide, racial disparities in access to technology, and the use of default judgments against tenants who face technology challenges.⁸⁸ Remote court can pose additional hurdles for non-English speakers. Court administrators have reported that non-English speakers have a more difficult time understanding and communicating with remote interpreters.⁸⁹

Courts and legal-aid offices have gone to varying lengths to bridge this digital divide. Some courts have spent considerable resources to expand access by creating computer kiosks in the courthouse where parties can access their remote hearings.⁹⁰ Others have simply provided a phone-in option for remote hearings without appreciating that tenants may also lack access to phones or the necessary phone-plan minutes to wait on the line for hours until the court calls their case.⁹¹ Legal-aid providers have purchased routers to turn their parking lots into digital hot spots⁹² and microphones to turn conference rooms into remote-hearing access points.⁹³ In Texas, one judge insisted on moving a case forward remotely, which required the legal-services attorney to drive a tablet to the client's house so the client could

⁸⁷ See Telephone Interview with legal-services provider in Michigan, *supra* note 77; Telephone Interview with legal-services provider in Missouri (Nov. 13, 2020) [hereinafter Nov. 13 Telephone Interview with legal-services provider in Missouri] (on file with journal); see also Telephone Interview with Tanaya Srin, Nat'l Hous. L. Project (Mar. 23, 2021) (recounting anecdotes from legal-services attorneys that tenants had default judgments entered against them after being unable to access remote eviction proceeding due to technology issues).

⁸⁸ NAT'L HOUS. L. PROJECT, STOPPING COVID-19 EVICTIONS: SURVEY RESULTS 2 (2020), <https://www.nhlp.org/wp-content/uploads/Evictions-Survey-Results-2020.pdf> [https://perma.cc/MB9H-Q5XZ].

⁸⁹ ROBIN DAVIS, BILLIE JO MATELEVICH-HOANG, ALEXANDRA BARTON, SARA DEBUS-SHERRILL & EMILY NIEDZWIECKI, RESEARCH ON VIDEOCONFERENCING AT POST-ARRAIGNMENT RELEASE HEARINGS 20 (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248902.pdf> [https://perma.cc/Q58A-T2WS].

⁹⁰ See Telephone Interview with legal-services provider in Florida, *supra* note 77.

⁹¹ See Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87; see also Tony Romm, *Lacking a Lifeline: How a Federal Effort to Help Low-Income Americans Pay Their Phone Bills Failed Amid the Pandemic*, WASH. POST (Feb. 9, 2021, 6:00 AM), <https://www.washingtonpost.com/technology/2021/02/09/lifeline-broadband-internet-fcc-coronavirus/> [https://perma.cc/Z8ZR-KB CY] (discussing shortcomings in the federal Lifeline program to provide low-income families with access to mobile phones).

⁹² Telephone Interview with legal-services provider in Michigan, *supra* note 77.

⁹³ Telephone Interview with legal-services provider in Ohio, *supra* note 77.

participate.⁹⁴ However, even when courts have taken affirmative steps to expand access, implementation has had mixed success. In one jurisdiction in Florida, for example, the court created access points within the courthouse but failed to include notice of the option in its summonses.⁹⁵

B. *A Day in Court Without a Courtroom*

In-person court proceedings involve countless interactions between judges, litigants, attorneys, jurors, and witnesses. Replacing these in-person interactions with ones undertaken via technology has had decidedly mixed results. This Section details the areas that have raised the most challenges.

1. *Attorney–Client Communication*

One of the most commonly cited concerns with remote court is its impact on attorney–client communications. In our interviews about eviction proceedings, for example, attorneys reported that they have had very limited ability to speak with their clients during remote proceedings. Without being able to whisper or pass notes easily, it can be difficult to adjust strategy based on what the opposing parties have said.⁹⁶ For example, a legal-services attorney in Florida recounted one case in which his client wished to speak in response to a contested issue in an eviction proceeding. In normal circumstances, the attorney would have whispered with his client to get more information and assisted her in responding in a way that served her interests. In this remote hearing, however, when the judge asked the attorney if he wanted the client to speak, the attorney declined, as he could not be certain that the opportunity would benefit the client.⁹⁷ Similar concerns have been raised in the context of criminal cases.⁹⁸

Differences in court resources and individual judges' comfort with technology have also affected the degree to which remote technologies undermine attorney–client communication.⁹⁹ Some courts are making virtual

⁹⁴ Telephone Interview with legal-services provider in Texas, *supra* note 86.

⁹⁵ Telephone Interview with legal-services provider in Florida, *supra* note 77.

⁹⁶ For example, a 2010 survey by the National Center for State Courts found that 37% of courts using videoconferencing had no provisions to enable private communications between attorneys and their clients when they were in separate locations. Eric T. Bellone, *Private Attorney- Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. INT'L COM. L. & TECH. 24, 44–45 (2013).

⁹⁷ Telephone Interview with legal-services provider in Florida, *supra* note 77.

⁹⁸ Turner, *supra* note 24, at 21, 57–58 (discussing the disadvantages of remote proceedings for defense attorneys to communicate with clients before, during, and after court appearances due to limitations on videoconferencing in some jails).

⁹⁹ One legal-services attorney recounted that a judge told them they were holding in-person hearings because they did not have the IT staff necessary to operate breakout rooms. Telephone Interview with legal-services provider in Michigan, *supra* note 77. In Ohio, one judge reported that he managed without

breakout rooms available for attorneys and clients to access in the middle of proceedings,¹⁰⁰ while other courts are instructing attorneys to simply send text messages to their clients if they need to communicate.¹⁰¹ While one eviction attorney we interviewed said text messages are often sufficient,¹⁰² another explained that she would never willingly conduct a full trial without being next to the client.¹⁰³ Where courts do provide breakout rooms, some attorneys report being reluctant to interrupt the court proceeding to access them.¹⁰⁴

There is also an indication that judges may not be fully aware of the extent to which videoconferencing is impacting attorney–client interactions. In Professor Turner’s Texas survey, for example, 63% of defense attorneys said that remote court interfered with attorney–client confidentiality, but only 21% of judges agreed.¹⁰⁵

2. *Assessing Documentary Evidence and Witnesses*

Many judicial proceedings involve evidence—documents as well as witness testimony. Remote court has changed how courts engage with evidence, posing logistical challenges and, in the case of testimony, raising deeper questions about whether video is an adequate substitute for in-person interactions.

With respect to documentary evidence, our interviews with legal-services providers representing tenants suggest that courts have struggled with the transition to remote proceedings.¹⁰⁶ In some jurisdictions, courts have allowed parties to submit documentary evidence in a video hearing by holding papers up to the camera, making it difficult for other participants to review the documents.¹⁰⁷ Elsewhere, courts have required parties to share evidence electronically with all other participants, a process that has been confusing to many self-represented tenants.¹⁰⁸ In Missouri, a self-represented

dedicated IT staff because his court reporter happened to be proficient with technology. OHIO CRIM. SENT’G COMM’N FOLLOW-UP, *supra* note 55, at 9.

¹⁰⁰ Telephone Interview with legal-services provider in Michigan, *supra* note 77.

¹⁰¹ Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

¹⁰² Telephone Interview with legal-services provider in Texas, *supra* note 64.

¹⁰³ See Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

¹⁰⁴ See Telephone Interview with legal-services provider in Michigan, *supra* note 77 (describing some judges’ frustration when asked to pause a proceeding to allow attorneys and clients to speak in breakout rooms).

¹⁰⁵ Turner, *supra* note 24, at 51.

¹⁰⁶ See Telephone Interview with legal-services provider in Ohio, *supra* note 77 (discussing a court missing exhibits after implementing new email requirements).

¹⁰⁷ Telephone Interview with court watcher in Texas, *supra* note 64.

¹⁰⁸ Telephone Interview with legal-services provider in Ohio, *supra* note 77.

tenant won a new trial after he had been unable to physically deliver exhibits to the court (he mailed exhibits to the court that arrived after his trial date) and lacked video capability to share evidence during the remote trial.¹⁰⁹ Further complicating matters, in many cases evidence—such as text communication between tenants and landlords—is generated just before a hearing, making it difficult for parties to share exhibits in advance.¹¹⁰

Remote court has posed even greater challenges with respect to witness testimony, where both civil and criminal attorneys report that interactions with witnesses—assessing credibility, cross-examining, impeaching—are made more difficult by remote court.¹¹¹ Indeed, a substantial body of pre-pandemic research suggests that the use of remote court can have subtle effects on credibility assessments.¹¹² For example, in a 2017 U.S. Government Accountability Office report on immigration courts, judges in three of the six surveyed courts identified instances where they had changed credibility assessments made during a video hearing after holding a subsequent in-person hearing.¹¹³ In one instance, an “immigration judge reported being unable to identify a respondent’s cognitive disability over [video teleconference], but that the disability was clearly evident when the respondent appeared in person at a subsequent hearing, which affected the judge’s interpretation of the respondent’s credibility.”¹¹⁴ Several psychology studies have specifically looked at the impact of video testimony by children in the context of sexual-abuse cases and found that video testimony had an impact on jurors’ perceptions of the child’s believability.¹¹⁵

¹⁰⁹ See Order Granting Motion for a New Trial, *E. Wright Inv. Strategies LLC v. Logan*, No. 2022-AC05861 (Mo. Sept. 28, 2020); Petition for Writ of Prohibition, *supra* note 81, at 4–6; Rebecca Rivas, *Many Missouri Tenants Lack Legal Counsel During Eviction Proceedings*, MO. INDEP. (Nov. 23, 2020), <https://missouriindependent.com/2020/11/23/many-missouri-tenants-lack-legal-counsel-during-eviction-proceedings/> [<https://perma.cc/HK59-MQRR>].

¹¹⁰ Telephone Interview with legal-services provider in Florida, *supra* note 77.

¹¹¹ Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87 (discussing testimony difficulties in the context of tenant cases); see also Turner, *supra* note 24, at 55 (discussing a 2020 survey of judges, prosecutors, and defense attorneys that found wide agreement that “the online setting makes it difficult for the parties to assess” and, where necessary, “challenge witness accounts or credibility”).

¹¹² For a discussion how social psychology and communications research should inform the use of videoconferencing in court, see Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1114 (2004).

¹¹³ U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 55 (2017), <https://www.gao.gov/assets/690/685022.pdf> [<https://perma.cc/ESA8-GSZ7>].

¹¹⁴ *Id.*

¹¹⁵ Holly K. Orcutt, Gail S. Goodman, Ann E. Tobey, Jennifer M. Batterman-Faunce & Sherry Thomas, *Detecting Deception in Children’s Testimony: Factfinders’ Abilities to Reach the Truth in Open*

In some jurisdictions, concerns about assessing witness credibility have led judges to delay trials during the pandemic. A federal district court judge in Connecticut, for example, continued a civil bench trial in June 2020 because “[t]he very purpose of trials as distinguished from pre-trial motions is to assess the credibility of witnesses, especially the credibility of fact witnesses” and “[t]he credibility of a witness is best assessed when the witness’s face is fully visible and the witness appears in person or is recorded being examined in person.”¹¹⁶ On the other hand, some judges have suggested that it is actually easier for them to assess credibility over a videoconference because they can see the witnesses’ full faces rather than “someone’s left ear” peering from the bench.¹¹⁷ Others have argued that while in-person testimony is generally preferable, masking and other safety requirements during the pandemic undercut the benefits, such as the ability to evaluate “the testimony of a witness’ facial expression and diction.”¹¹⁸

3. Courtroom Management

Remote court has also posed challenges for judges’ ability to manage their courtrooms and ensure fair proceedings. Remote technology offers new opportunities for distraction and inappropriate conduct during court proceedings, and it can be difficult for judges to identify such conduct and intervene. For example, a legal-services attorney in Ohio reported that he observed housing managers being coached off camera when they testified remotely.¹¹⁹ Professor Elizabeth Thornburg echoed a similar concern in her

Court and Closed-Circuit Trials, 25 LAW & HUM. BEHAV. 339, 357, 358, 363 (2001) (using a simulated crime and trial to assess the impact of remote testimony by children in sexual-abuse cases, and finding mock jurors rated children who testified via closed-circuit television as less honest, intelligent, and attractive as compared to children who testified in person, and concluded that their testimony was less accurate); see also Sara Landström, Pär Anders Granhag & Maria Hartwig, *Children’s Live and Videotaped Testimonies: How Presentation Mode Affects Observers’ Perception, Assessment and Memory*, 12 LEGAL & CRIMINOLOGICAL PSYCH. 333, 344 (2007) (finding mock jurors perceived children’s live testimony in more positive terms and rated the children’s statements as more convincing than video testimony). However, not every study has found harmful effects from video proceedings. A series of studies from the 1970s and 1980s based on reenacted trials, for example, generally found that videotaped trials had no impact on outcomes. See, e.g., Gerald Miller, *Televised Trials: How Do Juries React?*, 58 JUDICATURE 242, 246 (1974) (describing study that found no impact); Gerald R. Miller, Norma E. Fontes & Gordon L. Dahnke, *Using Videotape in the Courtroom: A Four-Year Test Pattern*, 55 U. DET. J. URB. L. 655, 668–69 (1978) (making a similar observation as Miller’s *Televised Trials*).

¹¹⁶ Order, *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, No. 3:18-cv-00705-VLB (D. Conn. June 26, 2020) (No. 190).

¹¹⁷ Video: Connecticut Judicial Branch Virtual Courts CLE, at 01:08:00–01:09:40 [hereinafter *Virtual Courts Video*] (statement of Judge James Abrams) (on file with journal).

¹¹⁸ *Lynch v. State*, No. HHDCV166067438, 2020 WL 5984790, at *3 (Conn. Super. Ct. Sept. 11, 2020).

¹¹⁹ Telephone Interview with legal-services provider in Ohio, *supra* note 77.

study of Texas family court proceedings.¹²⁰ And after a remote voir dire in a civil trial in California, a defendant sought a mistrial due to prospective jurors being distracted by children or electronics, using home exercise equipment, and even lying in bed, “possibly asleep.”¹²¹ In a traffic court hearing, a plastic surgeon logged in while in the middle of surgery, prompting the judge to reschedule.¹²²

At the same time, remote technology has also given judges new tools to control their courtrooms. During a webinar, for example, a family court judge in Connecticut suggested that when “emotional scenes” occur during remote court, “the mute button is a great tool.”¹²³ While muting disruptive individuals may be appropriate under some circumstances, it is also a shift in courtroom dynamics that could open the door to abuses of power. Given the speed with which courts have had to adopt remote technology, many questions about how courtroom norms should evolve have been left unanswered.

C. Special Challenges for Self-Represented Litigants

Remote court raises unique concerns for self-represented litigants, who have had to navigate new and changing remote systems without the resources often available inside physical courthouses. This is no footnote: States report that in some categories of cases, 70% to 98% of all cases involve at least one litigant appearing without a lawyer.¹²⁴ Even under normal circumstances, self-represented litigants face substantial obstacles in navigating the court system, from parsing “legalese” on forms to following often-cumbersome procedural steps.¹²⁵ And there is also vast unmet need for legal assistance; the State Bar of California reports, for example, that there are more than

¹²⁰ Thornburg, *supra* note 69, at 25.

¹²¹ Debra Cassens Weiss, *Potential Jurors Exercised, Curled Up on Bed During Virtual Voir Dire, Motion Says in Asbestos Case*, ABA J. (July 22, 2020, 2:41 PM), <https://www.abajournal.com/news/article/potential-jurors-exercised-curling-up-on-bed-during-virtual-voir-dire-motion-says> [https://perma.cc/6GWY-FAUN]. The defendant settled the case before the court ruled on the mistrial motion. *Id.*

¹²² Salvador Hernandez, *So, Uh, a Plastic Surgeon Logged into Traffic Court via Zoom While Operating on a Patient*, BUZZFEED NEWS (Feb. 26, 2021, 7:23 PM), <https://www.buzzfeednews.com/article/salvadorhernandez/surgeon-operating-table-zoom-court-hearing> [https://perma.cc/D699-C4GA].

¹²³ Virtual Courts Video, *supra* note 117, at 01:13:38–01:14:10 (statement of Judge Michael A. Albis).

¹²⁴ Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 743 (2015).

¹²⁵ JUD. COUNCIL OF CAL., HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS 1-4–1-10 (2019), https://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf [https://perma.cc/CDM6-WQ3Q].

7,500 potential low-income clients for every legal-aid attorney in the state.¹²⁶ Remote court has exacerbated many of these challenges.

First, some jurisdictions have confusing instructions for participating in remote proceedings or lack clear guidance for individuals who do not have the required technology.¹²⁷ These can be traps for the unwary. In Washington State, for example, the Northwest Justice Project sued and ultimately settled with a court that was requiring tenants facing eviction to call the day before a hearing to schedule their remote appearance without providing clear notice of the requirements.¹²⁸ In Ohio, a legal-services lawyer reported that many self-represented litigants found the log-in process for remote court confusing and missed hearings as a result.¹²⁹

A second challenge stems from the loss of access to the physical courthouse, which is often a site where self-represented litigants are connected with resources or legal services. For example, the director of a legal-services organization in Missouri observed that prior to the pandemic, legal-services attorneys “roamed the halls, offered informal advice, provided helpful forms, built relationships. Some of these tenants would become clients, others just got on-the-spot help with their cases.”¹³⁰ By contrast, during the pandemic, the only outreach they were able to do was to give out their phone numbers at the beginning of the day’s docket.¹³¹ Troublingly, in one Ohio jurisdiction, the court refused to distribute fliers from legal services during remote eviction cases out of concern that the court would appear to be picking a side.¹³²

Pre-pandemic research from the immigration court context suggests that litigants’ disconnect from the physical courthouse can have broad implications for case outcomes. A study by Professor Ingrid Eagly, which looked at the use of video technology to adjudicate immigration proceedings remotely, found that detained respondents were more likely to be deported

¹²⁶ *Id.* at 1-2-1-3.

¹²⁷ Eileen Guo, *Logging In to Get Kicked Out: Inside America’s Virtual Eviction Crisis*, MIT TECH. REV. (Dec. 2, 2020), <https://www.technologyreview.com/2020/12/02/1012810/video-evictions-zoom-webex/> [<https://perma.cc/UL3Z-HLAX>].

¹²⁸ Zoe Tillman, *Landlords Are Illegally Evicting Tenants During the Coronavirus Pandemic. Lawyers Fear a “Tsunami” of Evictions When State Moratoriums End*, BUZZFEED NEWS (Apr. 22, 2020, 5:26 PM), <https://www.buzzfeednews.com/article/zoetillman/coronavirus-illegal-evictions-moratorium-rent-lawyer-aid> [<https://perma.cc/T5HC-7VPM>].

¹²⁹ Telephone Interview with legal-services provider in Ohio, *supra* note 77.

¹³⁰ Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

¹³¹ *Id.*; *see also* Telephone Interview with court watcher in Texas, *supra* note 64 (highlighting difficulties of making people aware of legal services remotely).

¹³² Telephone Interview with legal-services provider in Ohio, *supra* note 77.

when their proceedings occurred over videoconference as compared to in person.¹³³ She found what she described as a “paradoxical result”: detained immigrants whose proceedings occurred over video were more likely to be deported, but *not* because judges denied their claims at higher rates.¹³⁴ Rather, they were less likely to take advantage of procedures that might help them.¹³⁵ Detained individuals who appeared in person were 90% more likely to apply for relief, 35% more likely to obtain counsel, and 6% more likely to apply for voluntary departure, as compared to similarly situated individuals who appeared by video.¹³⁶ These results were statistically significant, even when controlling for other factors that could have influenced case outcomes.¹³⁷

Notably, among those individuals who actually applied for various forms of relief, there was no statistically significant difference in outcome after controlling for other factors.¹³⁸ However, because video participants were *less likely* to seek relief or retain counsel, video cases were still significantly more likely to end in removal.¹³⁹ Relying on interviews and court observations, Professor Eagly suggested several potential reasons for this dynamic, including logistical hurdles, challenges in communicating with counsel, and difficulties in following what was happening over video.¹⁴⁰

D. Differing Forms of Public Access

Remote court has also changed what it means to attend court as a member of the public, although states’ approaches to public access have varied widely. Some jurisdictions have provided for broad public access to remote court, providing livestreams on their websites or YouTube; others

¹³³ Professor Eagly used a nationwide sample of nearly 154,000 cases in which immigration judges reached a decision on the merits during fiscal years 2011 and 2012. Eagly, *supra* note 23, at 966.

¹³⁴ *Id.* at 937.

¹³⁵ *Id.* at 937–38.

¹³⁶ *Id.* at 938.

¹³⁷ Among other things, Professor Eagly controlled for the type of proceeding and charge, the respondent’s nationality, whether the respondent is represented by counsel, the judge, and the year the proceedings took place. *Id.*

¹³⁸ *Id.*

¹³⁹ Professor Eagly looked at two samples, a national sample and a subset of locations that she called the Active Base City Sample. She found that “[i]n the National Sample, 80% of in-person respondents were ordered removed, compared to 83% of televideo respondents. In the Active Base City Sample, 83% of in-person respondents were ordered removed, compared to 88% of televideo respondents.” The disparities in outcomes were statistically significant. *Id.* at 960, 964, 966.

¹⁴⁰ *Id.* at 978, 984, 989–90.

have permitted public access by phone or video by request; and some have not provided for any form of public access.¹⁴¹

Remote court offers at least the potential for greater transparency in court proceedings. In jurisdictions that livestream court proceedings, court-watching programs have reported being able to recruit and deploy many more volunteers now that they can observe from home.¹⁴² Such livestreams can also make it easier for family and friends to observe. One family court judge in Texas tweeted that she had granted an adoption that “was witnessed by a community of over 75 people from all over the world. There was much joy and many tears.”¹⁴³

Yet this greater transparency also comes with a privacy cost. While in-person proceedings are open to the public, broadcasting court hearings over the internet introduces “a loss of practical obscurity.”¹⁴⁴ For example, for some individuals an eviction is a source of embarrassment or even shame.¹⁴⁵ It could be painful to know that anyone could view and potentially disseminate images from such proceedings. Further, if public access to proceedings is too unrestrained, courts also risk undermining laws that allow for certain criminal cases to be sealed and records to be expunged—after all, it is difficult to prohibit recording a court proceeding from the comfort of one’s home.¹⁴⁶

This is challenging terrain to navigate. In her article describing family court observations, Professor Thornburg detailed measures some judges took to preserve privacy, including removing broadcasts from YouTube when the hearing ended, using breakout rooms to have sensitive conversations with

¹⁴¹ See, e.g., Turner, *supra* note 24, at 39–40 (noting that Texas makes live broadcasts available to the public); ALBERT FOX CAHN & MELISSA GIDDINGS, VIRTUAL JUSTICE: ONLINE COURTS DURING COVID-19, at 4 (2020) <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f1b23e97ab8874a35236b67/1595614187464/Final+white+paper+pdf.pdf> [<https://perma.cc/R9KY-F4R5>] (explaining that New York has no provisions for public or press access to remote proceedings).

¹⁴² Telephone Interview with court watcher in Texas, *supra* note 64. Public access within courthouses varies as well, with some judges streaming while others do not. *Id.*

¹⁴³ Justice Dennise Garcia (@kdgarci), TWITTER (May 14, 2020, 9:38 PM), <https://twitter.com/kdgarci/status/1261123727410020355> [<https://perma.cc/LQQ4-NWQ4>].

¹⁴⁴ CAHN & GIDDINGS, *supra* note 141, at 3–4.

¹⁴⁵ See, e.g., Casey Morris, *Eviction in North Carolina as Pandemic Wears On*, CAROLINA PUB. PRES (Jan. 14, 2021), <https://carolinapublicpress.org/41424/eviction-in-north-carolina-as-pandemic-wears-on/> [<https://perma.cc/JE6R-ZUKJ>] (discussing embarrassment associated with being evicted).

¹⁴⁶ For example, New York prohibits televising court proceedings and permits sealing criminal records for some types of offenses. See N.Y. CIV. RIGHTS LAW § 52 (McKinney 2021); N.Y. CRIM. PROC. LAW § 160.59 (McKinney 2021). Note that there is no First Amendment right to a televised trial. *Courtroom Television Network LLC v. New York*, 833 N.E.2d 1197, 1200–01 (N.Y. 2005) (citing *Estes v. Texas*, 381 U.S. 532, 549 (1965)).

minors, and going offline for some sensitive testimony.¹⁴⁷ But there is little guidance yet for exactly how judges should draw these lines.

E. Inconsistent Implementation

Finally, another striking aspect of our interviews was that system-wide directives obscured substantial variation in court operations that arose as courts within jurisdictions interpreted and used their authority differently, reflecting at least in part an institutional culture in many court systems resistant to centralized oversight.¹⁴⁸

For example, legal-aid providers confirmed there is substantial inconsistency regarding remote eviction proceedings, even within courthouses, often as a result of a judge's individual preference for video or phone.¹⁴⁹ In one large Texas county, nearly one-third of justices of the peace were declining to use video despite having been provided with Zoom licenses, according to one service provider.¹⁵⁰ In one Michigan jurisdiction, the vast majority of courts were operating remotely, but two courts were requiring physical presence in the courtroom, or in a tent constructed in the court's parking lot.¹⁵¹ In Kansas City, one judge who was previously conducting remote hearings transitioned to in-person to avoid anti-eviction protests that had become common on the remote platform.¹⁵² Meanwhile, some judges, so dissatisfied with the choice between remote and socially distanced in-person proceedings, opted to simply delay trials for as long as possible.¹⁵³ In some courts, eviction dockets effectively shut down as judges

¹⁴⁷ Thornburg, *supra* note 69, at 26–27.

¹⁴⁸ Gordon M. Griller, *Governing Loosely Coupled Courts in Times of Economic Stress*, in *FUTURE TRENDS IN STATE COURTS* 48, 48 (2010) (“It is no secret that some judges believe the traditional definitions of judicial independence—freedom from control by other branches of government and freedom from interference in case-related decisions—should include freedom from control by leadership judges and managers responsible for the day-to-day operations of the court system.”). Such “independence” is encouraged by a selection system where judges are generally selected by third parties, either through elections or appointments, rather than by institutional actors within the judiciary itself, giving them an independent source of legitimacy that can be in tension with court-administration hierarchy. CHRISTINE M. DURHAM & DANIEL J. BECKER, *A CASE FOR COURT GOVERNANCE PRINCIPLES* 2–3 (2011), <https://www.sji.gov/wp/wp-content/uploads/Becker-Durham-A-Case-for-Court-Governance-Principles.pdf> [<https://perma.cc/6XPL-8A39>].

¹⁴⁹ Telephone Interview with legal-services provider in Florida, *supra* note 77; Telephone Interview with court watcher in Texas, *supra* note 64.

¹⁵⁰ Telephone Interview with court watcher in Texas, *supra* note 64.

¹⁵¹ Telephone Interview with legal-services provider in Michigan, *supra* note 77.

¹⁵² Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

¹⁵³ Nov. 11 Telephone Interview with legal-services provider in Missouri, *supra* note 64.

attempted to wait out the storm, while in others, judges have been moving along as normal.¹⁵⁴

Importantly, while the legal-services providers we interviewed had many critiques of remote court, they all wanted and appreciated the ability to participate remotely during the pandemic.¹⁵⁵

III. CONSTITUTIONAL ISSUES RAISED BY REMOTE COURT

At their most extreme, the shortcomings of remote court also raise a host of constitutional questions that are only beginning to wind their way through the legal system—questions that will take on added salience as courts emerge from crisis and develop long-term plans for remote proceedings. We detail here both how courts have begun to address these questions as well as constitutional values that should inform future policymaking around the use of remote court. This discussion focuses on federal constitutional rights, but it is worth noting that remote court proceedings may raise additional questions under state constitutions.¹⁵⁶

The most acute constitutional questions arise in the criminal context—and, for this very reason, courts have shown a greater reluctance to advance criminal trials remotely as compared to their civil counterparts.¹⁵⁷ Take, for example, the Sixth Amendment’s Confrontation Clause, which functions “to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing.”¹⁵⁸ Proper testing requires that witnesses appreciate the gravity of the proceedings, defendants have an opportunity to cross-examine witnesses, and jurors have an opportunity to evaluate witness credibility.¹⁵⁹ Still, the Supreme Court has said the Confrontation Clause’s preference for face-to-face confrontation “must occasionally give way to considerations of public policy and the necessities of the case.”¹⁶⁰

Confrontation rights are waivable, and a court may further dispense with face-to-face confrontation over a defendant’s objections but only based

¹⁵⁴ Telephone Interview with court watcher in Texas, *supra* note 64.

¹⁵⁵ *E.g.*, Telephone Interview with legal-services provider in Ohio, *supra* note 77 (expressing gratitude for the ability to participate remotely rather than in person); Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87 (discussing health and safety benefits of remote hearings).

¹⁵⁶ For example, thirty-nine states have “open courts” or “right-to-remedy” clauses in their constitutions. Robert F. Williams, *State Constitutional Protection of Civil Litigation*, 70 RUTGERS U. L. REV. 905, 911 (2018).

¹⁵⁷ See *supra* Part I.

¹⁵⁸ *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

¹⁵⁹ See *Mattox v. United States*, 156 U.S. 237, 259 (1895).

¹⁶⁰ *Craig*, 497 U.S. at 849 (quoting *Mattox*, 156 U.S. at 243).

upon a case-specific determination that doing so is necessary and that there are other guarantees that the testimony is reliable. Reviewing courts have set high bars for these determinations.¹⁶¹

Indeed, because of “serious concerns under the Confrontation Clause,” a divided Supreme Court rejected a proposed 2002 change to the Federal Rules of Criminal Procedure that would have allowed video testimony when a witness is unavailable to appear in person, when “appropriate safeguards” ensure the reliability and technical quality of the testimony, and when “exceptional circumstances” are present that necessitate remote testimony.¹⁶² “Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones,” wrote Justice Antonin Scalia in opposition to the proposed rule amendment.¹⁶³ In 2020, a unanimous Michigan Supreme Court ruled that two-way, interactive video testimony (provided at trial prior to the pandemic) violated a defendant’s right to confront witnesses under both the state and federal constitutions.¹⁶⁴ Some courts have also applied confrontation rights to limit the use of video in parole-revocation hearings.¹⁶⁵

Recognizing the limits of video testimony, courts have struggled to apply the Confrontation Clause amid a global pandemic.¹⁶⁶ Courts that have allowed remote testimony over a defendant’s objections have relied on the unique necessity of the pandemic and the protections provided by modern video platforms, including two-way communication.¹⁶⁷ But other courts have

¹⁶¹ *Id.* at 850. Indicia of reliability included the physical presence of the witness, whether the testimony was under oath, the opportunity for cross-examination, and the jury’s ability to observe the witness’s reactions and demeanor. *Id.* at 846.

¹⁶² SUP. CT. OF THE U.S., AMENDMENTS TO RULE 26(B) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 4 (Apr. 29, 2002) (dissenting statement of Breyer, J.), <https://web.archive.org/web/20100409232731/http://www.uscourts.gov/rules/CR-26b.pdf>.

¹⁶³ *Id.* at 2 (statement of Scalia, J.).

¹⁶⁴ *People v. Jemison*, 952 N.W.2d 394, 396 (Mich. 2020).

¹⁶⁵ *See, e.g., Wilkins v. Wilkinson*, No. 01AP-468, 2002 WL 47051, at *3 (Ohio Ct. App. Jan. 15, 2002). Courts have generally found no confrontation rights in pretrial proceedings but have not completely foreclosed that such rights could apply in some circumstances. *See, e.g., United States v. Karmue*, 841 F.3d 24, 26–27 (1st Cir. 2016).

¹⁶⁶ In addition to considering how video hearings interact with the Confrontation Clause, courts have considered whether masked witnesses violate the Clause. *See, e.g., United States v. Crittenden*, No. 4:20-CR-7 (CDL), 2020 WL 4917733, at *7 (M.D. Ga. Aug. 21, 2020) (“The Confrontation Clause does not guarantee the right to see the witness’s lips move or nose sniff, any more than it requires the jurors to subject the back of a witness’s neck to a magnifying glass to see if the hair raised during particularly probative questioning.”).

¹⁶⁷ *Commonwealth v. Masa*, No. 1981CR0307, 2020 WL 4743019, at *5 (Mass. Super. Ct. Aug. 10, 2020); *United States v. Dozinger*, No. 19-CR-561 (LAP), 2020 WL 5152162, at *3 (S.D.N.Y. Aug. 31, 2020).

determined that the Confrontation Clause poses a high bar to video testimony even in a global health crisis, going so far as to examine the comorbidities of individual witnesses before determining whether it is reasonable to make them travel to the court.¹⁶⁸ In denying the government's request for a witness to provide video testimony, one court cited an earlier hearing which had taken place by video where participants did not know who was speaking at any given moment.¹⁶⁹ When the urgency of the pandemic fades, confrontation rights will be an even greater bar to remote testimony, absent consent.

Other Sixth Amendment guarantees have not yet been thoroughly examined by courts in the context of the pandemic. For example, remote court can implicate the right to a fair jury, most notably with respect to the difficulty in ensuring jurors are free of improper influence during trials.¹⁷⁰ Remote proceedings make it harder to monitor jurors and make measures like sequester impossible, posing further hurdles to the due process dictate that a trial judge is "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."¹⁷¹

Likewise, while the Sixth Amendment does not guarantee defendants a petit jury that is perfectly representative of the community, it requires at least a representative pool of jurors that presents a "fair possibility for obtaining a representative cross-section of the community" on the petit jury.¹⁷² If a court conducts voir dire remotely, as some jurisdictions have done, the digital divide—which disproportionately leaves some communities without access to high-speed internet—may distort the jury pool.¹⁷³

Further, if remote systems impair attorney–client communications,¹⁷⁴ courts risk systematically violating the guarantee of effective assistance of counsel in criminal cases. While the most common claims of ineffective assistance arise based on alleged poor decision-making by defense counsel, the guarantee is also violated when a court creates circumstances that make it impossible for even the deftest attorney to provide effective

¹⁶⁸ *United States v. Casher*, No. CR 19-65-BLG-SPW, 2020 WL 3270541 (D. Mont. June 17, 2020); *United States v. Pangelinan*, No. 19-10077-JWB, 2020 WL 5118550 (D. Kan. Aug. 31, 2020).

¹⁶⁹ *Pangelinan*, 2020 WL 5118550, at *4.

¹⁷⁰ *See supra* Section II.B.3.

¹⁷¹ *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

¹⁷² *Williams v. Florida*, 399 U.S. 78, 100 (1970). To identify violations of the fair-cross-section doctrine, courts look to whether the group excluded is distinctive, the group is underrepresented in the pool of prospective jurors, and whether that underrepresentation is "inherent in the particular jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364–66 (1979).

¹⁷³ *See supra* Section II.A.2.

¹⁷⁴ *See supra* Section II.B.1.

representation.¹⁷⁵ When such constructive denial of assistance of counsel exists—because, for example, the trial court prohibited a defendant from speaking with his lawyer during an extended recess—a defendant need not even prove the circumstances prejudiced his case.¹⁷⁶

If a court’s chosen remote system makes it difficult for attorneys and clients to strategize or exchange information immediately prior to or in the middle of a remote hearing, that court may violate defendants’ constitutional rights by constructively denying them access to their attorneys. However, early cases suggest courts will likely be skeptical of such arguments, at least barring unusual circumstances. For example, in rejecting a criminal defendant’s objections to conducting a suppression hearing remotely over videoconference, including a claim that it would violate the right to effective assistance of counsel, a federal district court judge noted, “[The court] has conducted many hearings and even a bench trial via videoconference, and it is confident in defense counsel’s ability to see, hear, assess, and cross examine witnesses in an effective manner in that format.”¹⁷⁷

Courts have been less cautious in proceeding with civil matters remotely. In many instances, existing rules already provided courts with greater flexibility to use remote technology. For example, Federal Rule of Civil Procedure 43(a) provides that “[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.”¹⁷⁸ Applying this rule, numerous courts found that the COVID-19

¹⁷⁵ *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Perry v. Leeke*, 488 U.S. 272, 279–80 (1989).

¹⁷⁶ *Perry*, 488 U.S. at 278–80 (holding that no showing of prejudice is necessary); *Geders v. United States*, 425 U.S. 80, 92 (1976) (holding that no showing is necessary in an overnight-recess context).

¹⁷⁷ *United States v. Rosenschein*, 474 F. Supp. 3d 1203, 1209 (D.N.M. 2020); *see also* *United States v. Willis*, No. 1:19-cr-102, 2020 WL 3866853, at *3–5 (S.D. Ohio July 9, 2020) (concluding in the context of a detention hearing that a temperamental video link that served as the only means for a detained defendant to communicate with his attorney during the pandemic did not violate the Sixth Amendment or otherwise justify the defendant’s temporary release (citing *Benjamin v. Fraser*, 264 F.3d 175, 187 (2d Cir. 2001))).

¹⁷⁸ FED. R. CIV. P. 43(a); *see also* *Parkhurst v. Belt*, 567 F.3d 995, 1002 (8th Cir. 2009) (“[A] district court is afforded wide latitude in determining the manner in which evidence is to be presented.”).

pandemic was a compelling circumstance to authorize remote bench trials,¹⁷⁹ and even jury trials,¹⁸⁰ via videoconference over parties' objections.

But in civil cases as well, judges must ensure that remote proceedings do not interfere with the right to a fair jury under the Seventh Amendment¹⁸¹ or constitutional guarantees of due process.¹⁸² In part, procedural due process requires notice and a meaningful opportunity to be heard, and courts identify constitutional infringements by balancing the importance of the interests at stake in the proceeding, the risk that the procedures at issue will result in erroneous harm to those interests, the value of additional safeguards, and the government's interests in the current procedures.¹⁸³

Notice of a proceeding, for instance, must be more than a "mere gesture" and should be "reasonably calculated, under all the circumstances, to apprise interested parties . . . and afford them an opportunity to present their objections."¹⁸⁴ But what if a summons provides little guidance on how to use the court's chosen platform, be it Zoom, GoToMeeting, or another tool, or fails to give clear guidance on alternatives for litigants who lack access to the necessary technology?¹⁸⁵

With respect to what constitutes a sufficient hearing, due process requirements can vary widely depending on the interests at stake and may be a very low bar.¹⁸⁶ Numerous courts have rejected due process objections to remote civil trials during the pandemic, including ruling that remote cross-

¹⁷⁹ Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm'n, 470 F. Supp. 3d 735, 741 (E.D. Mich. 2020); Argonaut Ins. Co. v. Manetta Enters., Inc., No. 19-CV-00482 (PKC) (RLM), 2020 WL 3104033, at *2–3 (E.D.N.Y. June 11, 2020); Aoki v. Gilbert, No. 2:11-cv-0297-TLN-CKD, 2019 WL 1243719, at *2 (E.D. Cal. Mar. 18, 2019); see also *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967, 971 (D. Minn. 2020) (allowing two witnesses to testify remotely when COVID-19 interrupted an ongoing bench trial).

¹⁸⁰ Liu v. State Farm Mut. Auto. Ins. Co., No. 2:18-1862-BJR, 2020 WL 8465987, at *3 (W.D. Wash. Dec. 17, 2020).

¹⁸¹ Skaggs v. Otis Elevator Co., 164 F.3d 511, 514 (10th Cir. 1998) (citing U.S. CONST. amend. VII).

¹⁸² See, e.g., Lindsey v. Normet, 405 U.S. 56, 64–69 (1972) (applying procedural due process protections to state eviction proceedings). For a review of potential procedural due process challenges to summary eviction proceedings during the pandemic, see *Procedural Due Process Challenges to Evictions During the Covid-19 Pandemic*, NAT'L HOUS. L. PROJECT (May 22, 2020), <https://www.nhlp.org/wp-content/uploads/procedural-due-process-covid-evictions.pdf> [<https://perma.cc/A9KW-P5DS>].

¹⁸³ Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

¹⁸⁴ Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314–15 (1950).

¹⁸⁵ See Tillman, *supra* note 128.

¹⁸⁶ See, e.g., Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978) (holding that when a public utility seeks to discontinue service to a customer due to overdue payments, the utility must provide merely "some administrative procedure for entertaining customer complaints").

examinations meet the requirements of due process.¹⁸⁷ In Iowa, for example, a court ruled that a termination-of-parental-rights hearing could take place over the telephone.¹⁸⁸

Yet, for at least a decade, courts have recognized that faulty technology can trigger a due process violation in immigration proceedings if “the outcome of [a] hearing ‘may have been affected’ by the fact that [the] hearing was conducted by video conference.”¹⁸⁹ Particularly in the civil context, where many litigants are pro se, a remote hearing may not provide a meaningful opportunity to be heard for any number of reasons: poor access to or discomfort with technology, insufficient accommodations on the remote system for persons with disabilities, or a system for submitting evidence that affords little opportunity for review by either opposing parties or the court. As a New York court noted in an eviction matter, “[T]he presumption that the modern practice of law should readily include a computer and internet access does not hold for litigants, especially those of limited financial means.”¹⁹⁰ Thus, while due process objections are unlikely to be a general bar to remote proceedings, they may have teeth for certain categories of issues or litigants.

Finally, remote court raises challenging questions about what kind of public access is required by the First and Sixth Amendments.¹⁹¹ The guarantee of public access is supposed to result in a two-way exchange of information. On one side, the right exists to ensure the public can see what is happening in their courtrooms.¹⁹² But the guarantee of a public trial also benefits the accused: “[T]he presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of

¹⁸⁷ *Lynch v. State*, No. HHDCV166067438, 2020 WL 5984790, at *1 (Conn. Super. Ct. Sept. 11, 2020); *see also Ciccone v. One W. 64th St., Inc.*, 132 N.Y.S.3d 261, 261 (Sup. Ct. 2020) (rejecting objection to holding attorney-fee hearing via videoconference).

¹⁸⁸ *In re A.H.*, 950 N.W.2d 27, 39–40 (Iowa Ct. App. 2020); *see also A.S. v. N.S.*, 128 N.Y.S.3d 435, 435 (Sup. Ct. 2020) (authorizing virtual child-custody trial over objections).

¹⁸⁹ *See Vilchez v. Holder*, 682 F.3d 1195, 1200 (9th Cir. 2012) (quoting *Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009)).

¹⁹⁰ *Wyona Apartments LLC v. Ramirez*, 137 N.Y.S.3d 653, 657 (Civ. Ct. 2020).

¹⁹¹ *See Waller v. Georgia*, 467 U.S. 39, 40–41 (1984) (considering whether the Sixth Amendment requires a public hearing on a motion to suppress evidence); *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 503, 509 n.8 (1984) (determining how much publicity the First Amendment requires in voir dire proceedings). Several federal courts have found a right to public access to civil proceedings, but the Supreme Court has not spoken on this question. *See Courthouse News Serv. v. Planet*, 947 F.3d 581, 590 (9th Cir. 2020).

¹⁹² “The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Press-Enter.*, 464 U.S. at 508.

their functions’ [i]n addition to ensuring that judge and prosecutor carry out their duties responsibly.”¹⁹³ A one-way streaming link may serve the goal of getting information out but fail to serve the interest in enabling family members, neighbors, and the general public to keep courtroom participants in check in the way the Constitution intends.

Nevertheless, courts may close court proceedings to the public so long as doing so is narrowly tailored to forward an overriding interest.¹⁹⁴ Courts have recognized that public safety, juror and witness privacy, and national security all may support court closure at times.¹⁹⁵ Amid the 1918–1919 flu pandemic, an Ohio appellate court ruled that a trial court properly exercised its authority when, “acting for the general public welfare,” it excluded the public from a trial at a time when “schools and churches were closed, the right of public assemblage was prohibited[,] . . . and these were all necessary police regulations designed to stamp out the further extension of the then existing epidemic.”¹⁹⁶

During the COVID-19 pandemic, several courts have determined that partial courtroom closures undertaken to protect the “health and safety of trial participants and the public” did not violate public-access rights because the public was able to view the proceedings by streaming video in another location.¹⁹⁷ But at least one court determined that the Constitution requires more than just public viewing and ordered that a corresponding video display of the public and press watching in another room be installed in the courtroom itself.¹⁹⁸ In its ruling, the court stated that this two-way video feature serves a vital purpose: it reminds “those in the courtroom that the

¹⁹³ *Waller*, 467 U.S. at 46 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)).

¹⁹⁴ *Id.* at 48.

¹⁹⁵ See *Presley v. Georgia*, 558 U.S. 209, 213, 215 (2010) (per curiam) (holding that while there are some circumstances which merit closure of voir dire to the public in order to inhibit improper communications with jurors and ensure juror safety, the threat must be specifically articulated to overcome the presumption that voir dire should otherwise be open to the public per the Sixth Amendment); *Sixth Amendment at Trial*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 653, 657 (2010) (collecting cases); JOSEPH G. COOK, 3 CONSTITUTIONAL RIGHTS OF THE ACCUSED § 18:1 (3d ed. 2020) (collecting cases).

¹⁹⁶ *Colletti v. State*, 12 Ohio App. 104, 122 (1919).

¹⁹⁷ *United States v. Richards*, No. 2:19-cr-353-RAH, 2020 WL 5219537, at *2–3 (M.D. Ala. Sept. 1, 2020); see also *Strommen v. Mont. Seventh Jud. Dist. Ct.*, No. OP 20-0327, 2020 WL 3791665, at *1, 3 (Mont. July 7, 2020) (finding that the petitioner’s Sixth Amendment rights were not violated when the court limited the number of persons who could attend his trial in person due to the COVID-19 pandemic but allowed the public to view the remote proceedings live); *Gomes v. U.S. Dep’t of Homeland Sec., Acting Sec’y*, 460 F. Supp. 3d 129, 130–31 (D.N.H. 2020) (holding that the “goals of public access will be achieved” through the use of video recordings of hearings that may be viewed live).

¹⁹⁸ *United States v. Babichenko*, No. 18-cr-00258-BLW, 2020 WL 7502456, at *1 (D. Idaho Dec. 21, 2020).

proceedings are indeed public and that members of the public are watching the proceedings.”¹⁹⁹

IV. INSTITUTIONAL BLIND SPOTS AND LESSONS FOR THE COURTS

Remote court has undoubtedly brought tangible benefits to many court users as well as to judges and lawyers. Yet one striking element of the move to remote court is that the benefits are often more visible than the costs, particularly for judges, who are trained lawyers firmly on one side of the digital divide. For example, Professor Turner’s survey of judges, prosecutors, and defense attorneys in Texas found that 72% of defense attorneys believed that online proceedings tended to lead to less favorable outcomes for the defense, whereas only about 5% of prosecutors and judges agreed.²⁰⁰

There is thus strong reason to bring a critical eye to the embrace of remote court by many judges. Judges and other court leaders are frequently in the position of setting court policy while also being participants in the institution they are regulating. This gives them a valuable perspective, but it also creates the risk of blind spots and warped incentives. For example, courts, as well as individual judges, can face pressure to overemphasize values such as speed, cost savings, and reduced workloads at the cost of fair proceedings.²⁰¹ Indeed, courts’ pandemic response occurred under the backdrop of an institutional culture where critics have suggested that “the focus on efficiency has tended to overshadow other important values, undercutting judicial oversight over, and commitment to, the realization of other competing values, notably, the fair, equitable, and just conclusion of disputes.”²⁰²

In addition to courts’ own incentives at times being at odds with the pursuit of justice, court leaders may also overestimate their understanding of the interests of other stakeholders. For example, by early summer, several judicial branches and state bar associations had set up committees to make

¹⁹⁹ *Id.*

²⁰⁰ Turner, *supra* note 24, at 62; *see also id.* at 57 (“With respect to all but one of the statements about the disadvantages of video proceedings, there were statistically significant differences between the responses of defense attorneys and the responses of judges and prosecutors.”).

²⁰¹ Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 615 (1985) (criticizing an overemphasis on efficiency and arguing that “[e]conomy is not the sole purpose of a court system, nor is it the hallmark of court systems as contrasted with other forms of decisionmaking,” that “[c]oin flipping (or lotteries) would, after all, provide final and inexpensive solutions, but would also be an offensive mechanism by which to make many decisions in this society”).

²⁰² Orna Rabinovich-Einy & Yair Sagy, *Courts as Organizations: The Drive for Efficiency and the Regulation of Class Action Settlements*, 4 STAN. J. COMPLEX LITIG. 1, 11 (2016).

recommendations about reopening generally or, more specifically, about their civil dockets or criminal trials. In August, the American Bar Association (ABA) urged states that had not already done so to form “committees to conduct evidence-based reviews of the use of virtual or remote court proceedings . . . to ensure that they are guaranteeing all applicable constitutional rights and ensure that attorneys can comply with their professional ethical obligations.”²⁰³ The ABA further urged that “[s]uch committees should include representatives of all constituencies involved in or affected by the type of court or proceeding under consideration.”²⁰⁴

A review of these reopening committees, however, makes evident that they did not include representatives from all affected constituencies. At least sixteen state courts have convened committees to guide court policy on addressing the COVID-19 crisis or the reopening process, of which fourteen have publicly available membership lists.²⁰⁵ Several other state bar associations have also convened task forces.²⁰⁶ Most committees have consisted exclusively of judges, attorneys, and court staff; the few nonattorney members have been either public-health experts or law enforcement.²⁰⁷ No nonattorney representatives of affected communities have been included,²⁰⁸ and most attorney commissioners have been sitting or retired judges or attorneys in private practice.²⁰⁹

Of the fourteen committees established by a judicial branch that we reviewed, only two had a civil legal-aid representative.²¹⁰ Three commissions also lacked any public-defender representation.²¹¹ This experience gap is particularly significant because judges themselves rarely come from legal-services or defender backgrounds, making representation of these

²⁰³ AM. BAR ASS’N, RESOLUTION 117 (Aug. 3–4, 2020), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/117-annual-2020.pdf> [<https://perma.cc/N6VM-TEV4>].

²⁰⁴ *Id.*

²⁰⁵ Task forces were created by the courts in Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, New Hampshire, North Carolina, Ohio, Vermont, Virginia, Washington, and Wisconsin. Membership lists were not available for New Hampshire or Indiana. Alicia Bannon & Douglas Keith, Analysis of COVID-19 Commission Membership (unpublished data) (on file with journal).

²⁰⁶ State bar task forces were created in Alabama, Connecticut, Florida, Maryland, Missouri, New Jersey, New York, Pennsylvania, Vermont, and Washington. *Id.*

²⁰⁷ Out of twenty-six committees, five included public-health representatives and five included representatives from law enforcement (excluding prosecutors). *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

perspectives even more important during policy making.²¹² To be sure, many courts likely have sought the counsel of other bodies in the course of their deliberations, such as state access-to-justice commissions, which include public defenders and civil legal-aid representatives.²¹³ But it is nevertheless troubling that the committees driving the development of court policy included few of the perspectives of the people most likely to suffer if remote proceedings result in unfairness.

Similarly, the National Center for State Courts, which works collaboratively with court associations like the Conference of Chief Justices and the Conference of State Court Administrators, created a panoply of resources for courts during the pandemic, including producing thirty-four webinars between March and November 2020. The webinars covered everything from managing jury trials during COVID-19, to the use of remote interpretation services, to administering criminal court dockets.²¹⁴ Strikingly, only four of these webinars included any representatives from civil legal-services or public-defender offices.²¹⁵ In half of them, the only participants were judges, court administrators, or a combination of the two.²¹⁶

Our interviews further suggested that even when stakeholder consultation was valued at the top of the court hierarchy, it did not always trickle down to the local level, where ordinary people are most likely to interact with courts. In Missouri, for example, the state supreme court directed local court leaders to consult with “members of the local bar, prosecutors and public defenders, law enforcement and probation and parole.”²¹⁷ Yet when advocates in Kansas City wrote to court leadership to express concerns that tenants would be unable to access the court’s remote platform,²¹⁸ advocates reported that local leadership did not engage with

²¹² ALICIA BANNON & JANNA ADELSTEIN, STATE SUPREME COURT DIVERSITY UPDATE (forthcoming 2021).

²¹³ For example, the Massachusetts Access to Justice Commission created a COVID-19 Task Force, with an Access to Courts Committee that provided recommendations to the courts. Mass. Access to Just. Comm’n, *Update*, MASS. A2J (Apr. 9, 2020), <https://massa2j.org/?p=1170> [<https://perma.cc/XX62-E5UW>].

²¹⁴ *Webinars*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency/webinars> [<https://perma.cc/E3N6-FMGU>].

²¹⁵ *See id.*

²¹⁶ *See id.*

²¹⁷ SUP. CT. OF MO., OPERATIONAL DIRECTIVES 3 (May 4, 2020), <https://www.courts.mo.gov/file.jsp?id=156093> [<https://perma.cc/MN5A-XVT3>].

²¹⁸ *See e.g.*, Letter from Gina Chiala, Exec. Dir., Heartland Ctr. for Jobs & Freedom et al., to Hon. David M. Byrn & Hon. Janette K. Rodecap 2–4 (Apr. 23, 2020), <https://fox4kc.com/wp-content/uploads/sites/16/2020/04/20200423-Ltr-to-J-Bryn-and-Rodecap-re-Remote-Hearings-copy->

legal aid or address their concerns.²¹⁹ In Ohio, the managing director of a legal-services organization described legal aid as having good communication with the state supreme court but said that at the local level it was “hit or miss and mostly miss.”²²⁰ That said, some courts have taken the time to engage with their communities, including in Michigan, where a leader of a legal-services group reported that legal aid developed a constructive relationship with its district court during the pandemic. This occurred after the Michigan Supreme Court issued a directive that each chief district court judge should hold a meeting to evaluate remote proceedings and include legal aid in that meeting.²²¹

If courts did engage more with lawyers representing low-income community members, they might find substantial agreement about the need for remote proceedings and ideas for maximizing their utility and minimizing their shortcomings. For example, the legal-services attorneys we interviewed generally supported holding many preliminary hearings remotely and focused their concerns on evidentiary hearings and trials.²²² Among the recommendations we heard from attorneys were expanding access kiosks and doing more to let tenants know about their existence,²²³ more formal efforts to connect pro se parties to legal services,²²⁴ and prioritizing technological solutions to overcome the problems involving documentary evidence and attorney–client communication.²²⁵

V. PRINCIPLES FOR MOVING FORWARD

States’ experiences with remote court suggest several principles that should inform future policymaking, both in responding to COVID-19 and other emergencies and in developing long-term policies regarding remote

1.pdf [https://perma.cc/NS38-VQST] (expressing concerns regarding due process and other constitutional issues with respect to remote court proceedings).

²¹⁹ Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

²²⁰ Telephone Interview with legal-services provider in Ohio, *supra* note 77; *see also* Telephone Interview with legal-services provider in Florida, *supra* note 77 (noting there is a lack of collaboration between the court system and the public with respect to legal aid).

²²¹ Priority Treatment and New Procedure for Landlord/Tenant Cases, Admin. Order No. 2020-17, (Mich. Jan. 30, 2021), https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/Documents/HTML/AOs/AOsResponsive%20HTML5/AOs/Group1/Administrative_Orders/AO_No_2020-17_%E2%80%94Priority_Treatment_and_New_Procedure_for.htm [https://perma.cc/SQ33-Y6VZ].

²²² Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

²²³ Telephone Interview with legal-services provider in Florida, *supra* note 77; Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

²²⁴ Nov. 13 Telephone Interview with legal-services provider in Missouri, *supra* note 87.

²²⁵ Telephone Interview with legal-services provider in Florida, *supra* note 77; Telephone Interview with legal-services provider in Michigan, *supra* note 77.

court. This list of principles adapts and builds on our earlier work,²²⁶ supplemented with the lessons laid out in this Essay.

A. Engage a Diverse Array of Justice-System Stakeholders

Courts must engage and listen to stakeholders both inside and outside the judicial system in developing remote court policies, including integrating diverse perspectives into committees and other policymaking bodies. As this Essay discusses, remote court has transformed the experience of going to court. But it can pose widely disparate challenges and benefits for different kinds of litigants in different types of cases, which span from evictions to multimillion-dollar commercial disputes, from traffic violations to felony criminal cases. At the same time, judges and court administrators have their own institutional incentives and blind spots that can obscure some of the challenges posed by remote court policies.

For all these reasons, court leaders must engage broadly with affected constituencies, including members of the communities most likely to suffer if remote proceedings go poorly, such as communities of color, immigrant communities, and communities of people with disabilities. As discussed in Part IV, there are worrying indications that many states' consultations to date have largely been limited to the perspectives of court staff and lawyers and that civil legal services in particular have not consistently had a seat at the table. Courts should prioritize incorporating the insights of community advocates, public defenders and prosecutors, civil legal-services providers, tenant representatives, survivors of domestic violence, public-health experts, disability-rights advocates, court employees, and more.

B. Tailor Plans to the Type of Proceeding

There is no one-size-fits-all approach to remote proceedings. Courts hear a broad range of cases, both civil and criminal, for which remote proceedings are likely to pose very different challenges, benefits, and trade-offs. Among other things, cases vary in complexity and time sensitivity, the stakes of a win or loss, the kind of fact-finding that is required, and whether they involve detained individuals or self-represented litigants. Courts should target their policies accordingly. For example, the Michigan Supreme Court issued an order pertaining exclusively to procedures for landlord–tenant cases during the pandemic, including the use of remote proceedings.²²⁷

Similarly, courts should consider how trade-offs may vary depending on the nature of the proceeding. For example, holding a status conference by

²²⁶ See KEITH & BANNON, *supra* note 7.

²²⁷ Priority Treatment and New Procedure for Landlord/Tenant Cases, *supra* note 221.

video or phone, or a hearing where purely legal questions are at issue, raises different considerations than using the same technology for an evidentiary hearing. Existing research suggests reason for caution in using videoconferencing in instances where a fact finder must make credibility assessments.²²⁸ The Florida Supreme Court's COVID-19 workgroup, for example, determined that the state's mandate for remote hearings should only apply to status and pretrial conferences, nonevidentiary hearings, and other categories of proceedings the workgroup deemed "amenable" to being conducted remotely.²²⁹

Going forward, the contours of future policies should also be informed by experience. In Texas, for example, surveyed judges, prosecutors, and defense attorneys "identified initial appearances, bond hearings, status hearings, and certain other uncontested pretrial hearings as suitable for videoconference" in the future.²³⁰ In the eviction context, experience shows that the digital divide is a salient issue, underscoring the need for procedures to ensure access for individuals who lack the required technology.²³¹ By crafting policies that respond to the nature of the proceeding at issue, courts may be able to advance a large portion of their docket remotely while being cautious around the types of hearings stakeholders know are most impacted by the use of remote technology.

C. Bolster the Attorney–Client Relationship

Remote proceedings also pose challenges to the attorney–client relationship. Most fundamentally, remote court reduces the opportunity for communication between attorneys and clients prior to, during, and after court proceedings. This can manifest in small ways. For example, an attorney may be unable to whisper a reminder to a client to maintain courtroom decorum. It can also manifest in large ways. For instance, a client might be precluded from asking a question or sharing information in a way that prejudices her case.

Courts have varied widely in the kinds of technological solutions they have developed to bolster attorney–client communication, from Zoom breakout rooms to instructions that attorneys send text messages to their clients. Reports by practitioners suggest communication has posed numerous

²²⁸ See *supra* Section II.B.2.

²²⁹ Administrative Order at 8–9, *In re* Comprehensive COVID-19 Emergency Measures for the Fla. State Cts., No. AOSC20-23 (May 21, 2020), <https://www.floridasupremecourt.org/content/download/633282/file/AOSC20-23.pdf> [<https://perma.cc/8X79-KWPC>].

²³⁰ Turner, *supra* note 24, at 67.

²³¹ See *supra* Section II.A.2.

practical and logistical problems, even when the court has provided a formal communication mechanism.²³²

Courts should prioritize adopting technology that allows for confidential attorney–client communication during court proceedings. Just as important, they should create procedures to facilitate such communication so that it is easy to pause proceedings for a client consult.

Even with these safeguards, courts should also recognize that clients separated from their attorneys are at a disadvantage. A failed experiment with remote juvenile detention hearings in Florida from 1999–2001 is a cautionary tale. In repealing the interim rule authorizing these remote proceedings, the Florida Supreme Court observed that “[a]t the conclusion of far too many hearings, the child had no comprehension as to what had occurred and was forced to ask the public defender whether he or she was being released or detained.”²³³ Judges may need to take extra steps during remote proceedings to ensure that the parties appreciate the significance of the proceedings they are involved in and that they are made aware of their options for relief. This is particularly important when cases involve individuals who are likely to be unfamiliar with the legal system. And in some kinds of proceedings, the risk of prejudice from being remote may simply be too high.

D. Provide Extra Support for Self-Represented Litigants

Remote court offers both challenges and opportunities for serving self-represented litigants. The physical courthouse often plays a central role in connecting self-represented litigants with resources, including representation. Courts across the country have narrowed the justice gap through innovations like legal help desks, which give advice to unrepresented parties, and programs that station pro bono counsel in courthouses to provide on-the-spot limited representation.

Remote court interrupts these connections and makes it harder to connect unrepresented individuals with resources.²³⁴ At the same time, expanded remote proceedings also have the potential to extend representation to underserved and hard-to-reach communities by extending the capacity of legal-services providers.²³⁵

²³² See *supra* Section II.B.1.

²³³ Amend. to Fla. Rule of Juvenile Proc. 8.100(A), 796 So. 2d 470, 473 (Fla. 2001).

²³⁴ See *supra* Section II.C.

²³⁵ See *supra* Section II.A.1.

Courts must take extra steps to ensure that self-represented litigants can navigate the system during remote court, whether by providing additional supports, appointing counsel, publicizing resources, or prioritizing opportunities for in-person services.²³⁶ And it is crucial that courts provide clear notice in advance of remote court. For example, guidance from the National Consumer Law Center urges courts to provide clear information, in multiple languages, about a consumer's options to participate remotely or appear in person in debt-collection hearings, including detailed instructions about how the hearing will proceed, and to have a process to reach out to consumers who fail to appear and make it easy for them to vacate defaults and reschedule.²³⁷ Courts should also consider special rules for self-represented litigants, particularly during the pandemic.²³⁸

E. Provide Technical Support and Adopt Technology Standards to Ensure Quality

Seemingly mundane technological glitches can have a substantial impact on litigants' rights and the fairness of court proceedings. Courts should develop policies to protect litigants when they cannot be heard, or cannot hear, at a critical juncture in their case, ensuring that they are not penalized for technological difficulties. Courts also need technical support on call for court staff and for members of the public, some of whom may be using the court's chosen remote platform for the first time.

And as our interviews highlighted, courts need clear policies for how to submit evidence remotely, recognizing that litigants may face hurdles submitting or reviewing documents or other materials on a screen. For example, the Joint Technology Committee of the Conference of State Court Administrators, National Association for Court Management, and National

²³⁶ *Reaching SRLs During COVID: Outreach Campaigns Leverage Social Media, Ad Spots, and Traditional Print to Ensure SRLs Know Self-Help Support Is Still Available (News 2021)*, SELF-REPRESENTED LITIG. NETWORK (Apr. 2, 2021), <https://www.srln.org/node/1433> [<https://perma.cc/FR27-TRTK>] (providing some examples of outreach).

²³⁷ NAT'L CONSUMER L. CTR., REMOTE COURT APPEARANCES IN THE COVID-19 ERA: PROTECTING CONSUMERS IN COLLECTION LAWSUITS (2020), https://www.nclc.org/images/pdf/special_projects/covid-19/IB_Remote_Court_Appearances.pdf [<https://perma.cc/P57V-6364>].

²³⁸ For example, an April 2020 letter from a coalition of New York-based legal-services organizations called on the Office of Court Administration to exclude cases involving pro se litigants from virtual appearances for nonessential matters, unless the parties specifically requested otherwise. For time-sensitive matters, the letter recommended that pro se litigants be given the option to participate by telephone conference call rather than video. Email from New Yorkers for Responsible Lending to The Hon. Lawrence K. Marks, Chief Admin. Judge, N.Y. State Unified Ct. Sys. (Apr. 15, 2020) [hereinafter Email from New Yorkers for Responsible Lending], <http://www.nyrl.org/wp-content/uploads/2019/01/2020.4.15-NYRL-Ltr-re-virtual-appearances.pdf> [<https://perma.cc/75CT-FZ7D>].

Center for State Courts has developed recommendations for courts' use of evidence during remote hearings, including special support for self-represented litigants.²³⁹

Beyond disruption, the technological aspects of remote proceedings—how defendants, witnesses, and parties appear on screen, including their backdrop, lighting, and sound—may affect credibility determinations and other fact-finding. As Professor Anne Bowen Poulin has noted in the context of criminal proceedings, “[E]very technological choice will influence the way the defendant is perceived, often in ways that cannot be precisely predicted or reliably controlled.”²⁴⁰ Professor Poulin highlights, among other things, screen size, the use of close-up shots, and camera angle as all potentially affecting the ability to assess credibility as well as other relevant information such as a defendant's age and size.²⁴¹ Courts should develop evidence-based metrics to standardize the use of technology, while also recognizing that technological hurdles may make remote court inappropriate for certain kinds of proceedings or litigants.

F. Appreciate the Persistent Digital Divide and Ensure Meaningful Participation by Marginalized Populations

In adopting remote policies, courts must also address the persistence of a digital divide with respect to technology access.

Court policies should reflect the fact that substantial portions of the populations courts serve, and in particular historically marginalized communities, may not easily transition to remote proceedings or may have more difficulty using resource-intensive technologies like video.²⁴²

Our interviews suggest that in many instances, legal aid has stepped in to help bridge the digital divide by creating internet hot spots for clients or making conference rooms available to use during remote court. To the extent legal-services providers are filling the justice gap, they should be fully funded to do so. But legal services should not be a substitute for courts establishing other safe access points within the community for people without quality technology at home.

²³⁹ JOINT TECH. COMM., MANAGING EVIDENCE FOR VIRTUAL HEARINGS 1 (2020), https://www.ncsc.org/__data/assets/pdf_file/0019/42814/2020-07-27-Managing-Evidence-for-Virtual-Hearings-002.pdf [<https://perma.cc/MC69-CSSK>].

²⁴⁰ Poulin, *supra* note 112, at 1120.

²⁴¹ *Id.* at 1120–22, 1120 n.120, 1121 n.123.

²⁴² Email from New Yorkers for Responsible Lending, *supra* note 238.

G. Seek the Consent of Parties Before Proceeding Remotely

Remote proceedings involve sometimes-complex costs and benefits, and the parties and attorneys involved in a case will often be best situated to understand these tradeoffs, which are rooted both in the nature of the proceedings as well as individual-level factors. For example, individuals with substantial childcare commitments may prefer proceeding with remote court rather than traveling to a courthouse. Others may have privacy concerns about appearing via video, recognizing that their images could be easily recorded. Attorneys may recognize that certain aspects of a case are too crucial or sensitive to conduct remotely.

As a general matter, courts should address these competing pressures by giving participants a choice and prohibiting judges from moving a case forward remotely without consent from all parties, as some court systems have already done for certain cases. New Jersey, for example, requires consent for criminal sentencing hearings as well as hearings related to juvenile delinquency, termination of parental rights, and other proceedings for which the court system has determined greater care is necessary.²⁴³ Any consent requirement must be meaningful, however, with an option for timely in-person proceedings not so far in the future as to harm the interests of the parties.

At the same time, our interviews also highlighted numerous examples of local courts and individual judges who have insisted on in-person proceedings, even in the face of guidance encouraging the use of remote court. Just as individuals should have a choice in whether to proceed remotely, they should not be forced to appear in person in nonessential cases when public-health guidance suggests such proceedings could be unsafe. As the ABA has noted, “[B]ecause virtual or remote court proceedings have the potential to ease and expand access to the courts, and indeed may be the only access available during this pandemic, optional use of these procedures, governed by consent, should be as widely available as possible.”²⁴⁴

H. Study Remote Proceedings to Better Understand Their Impact

Courts expanded the use of remote court with unprecedented speed and scope, and there is much that we simply do not know about its impact on

²⁴³ Notice from Glenn A. Grant, Acting Admin. Dir. of the N.J. Cts., to the N.J. Bar, COVID-19 – Updated Guidance on Remote Proceedings in the Trial Courts; Options for Observing Court Events and Obtaining Video and Audio Recordings; Court Authority to Suspend the Commencement of Certain Custodial Terms (Apr. 20, 2020), <https://njcourts.gov/notices/2020/n200420a.pdf?c=nHy> [<https://perma.cc/FRR4-P33H>].

²⁴⁴ AM. BAR ASS’N, *supra* note 75, at 11.

fairness and access to justice, as well as on the “user experience” of litigants, lawyers, and other stakeholders. Pre-pandemic research has generally focused on specific contexts, such as immigration court²⁴⁵ or bond hearings,²⁴⁶ leaving many unanswered questions about the implications of remote court for different litigants or proceedings.

If court systems are going to continue to rely on expanded remote proceedings, they need data on what works, with particular attention paid to the impact on marginalized communities. The pandemic experiment with remote court is an opportunity for data collection, surveys, and empirical research on impact and is a call to action for court systems and scholars alike.

I. Embrace the Benefits of Remote Proceedings

Even recognizing their shortcomings and with the caveat that there is much that we still do not know about their impact, it is clear that remote proceedings can bring substantial benefits in some circumstances. Foremost, they have allowed courts to continue operating during the COVID-19 pandemic, reducing risks to court staff and court users alike, while providing essential services.

But in more normal times as well, courts can use remote tools to strengthen the justice system. Remote court can make it easier for litigants to access the courthouse, enable legal providers to reach difficult-to-serve communities, allow attorneys to spend more time serving clients and less time in transit to the courthouse, and provide services to self-represented litigants, among other benefits.²⁴⁷

While courts must recognize the documented shortcomings of remote proceedings, they should also embrace using remote proceedings when the benefits are clear. Many courts have invested substantially to develop remote court infrastructure. These investments should be built upon, and courts and legislatures should take this opportunity to further invest in expanding remote services and resource hubs that promote access to justice.

²⁴⁵ *E.g.*, Eagly, *supra* note 23, at 934.

²⁴⁶ *E.g.*, Diamond et al., *supra* note 23, at 897 (noting that after proceedings via closed-circuit television were introduced for most bail hearings in Cook County, the average bond amount for impacted cases rose by 51% and increased by as much as 90% for some offenses, and noting that for those cases that continued to have live bail hearings, there were no statistically significant changes in bond amounts).

²⁴⁷ SELF-REPRESENTED LITIG. NETWORK, SERVING SELF-REPRESENTED LITIGANTS REMOTELY: A RESOURCE GUIDE 11–13 (2016), https://www.srln.org/system/files/attachments/Remote%20Guide%20Final%208-16-16_0.pdf [<https://perma.cc/LM7N-BGD6>].

CONCLUSION

Courts are often slow to innovate. The COVID-19 pandemic has forced unprecedented agility and creativity, including the embrace of remote court in many contexts. Courts should not go backwards. But just as courts should resist the temptation to return to a broken status quo, they should also avoid embracing change without fully reckoning with the costs. This Essay is part of an initial effort to detail some of the factors that should guide this longer-term policymaking.