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Courts Without Court

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Courts Without Court

*Andrew Guthrie Ferguson**

What role does the physical courthouse play in the administration of criminal justice? This Article uses recent experiments with virtual courts to reimagine a future without criminal courthouses at the center. The key insight of this Article is to reveal how integral physical courts are to carceral control and how the rise of virtual courts helps to decenter power away from judges. This Article examines the effects of online courts on defendants, lawyers, judges, witnesses, victims, and courthouse officials and offers a framework for a better and less court-centered future. By studying post-COVID-19 disruptions around traditional conceptions of place, time, equality, accountability, and trial practice, this Article identifies how legal power can be shifted away from the courts and into the community.

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I. DISRUPTING CRIMINAL COURTS

The criminal legal system in America is largely broken.¹ In big cities and rural counties, too many cases chase too few resources, resulting in a bureaucratic indifference to mass incarceration.² The result is a system of plea bargains, mandatory minimums, fines, fees, and punitive social control arising from misdemeanors and low-level felonies.³ Defense lawyers have little time to investigate, write motions,

1. See, e.g., Eric Holder, Att’y Gen. of the U.S., Remarks at the Annual Meeting of the American Bar Association House of Delegates (Aug. 12, 2013), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> [<https://perma.cc/7AA5-FPVM>] (“While I have the utmost faith in—and dedication to—America’s legal system, we must face the reality that, as it stands, our system is in too many respects broken.”); Sarah Gerwig-Moore, *Justice in the Deep South: Learning from History, Charting Our Future*, 67 MERCER L. REV. 483, 485 (2016) (“The criminal justice system is the part of our society that has been least affected by the Civil Rights Movement, and the only bipartisan agreement that we seem to have have [sic] in the United States today is that the criminal justice system is broken.”).

2. John F. Pfaff, *Why the Policy Failures of Mass Incarceration Are Really Political Failures*, 104 MINN. L. REV. 2673, 2689 (2020) (“Mass incarceration has not been immune to the urban-rural fragmentation that runs through so many different aspects of life and policy these days.”); see also ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2019); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 127–59 (2017); JONATHAN SIMON, MASS INCARCERATION ON TRIAL A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 3 (2014); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13 (rev. ed. 2012); PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 18 (2009).

3. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 282 (2011):

and vet experts, let alone advise clients.⁴ Trials are rare.⁵ Defendants have little faith in the system.⁶ And almost everyone toiling in the trenches knows that criminal courts have failed to live up to the promise of equal justice for all.⁷

In the midst of this broken criminal legal system, what happens when the courts just shut down?⁸ The COVID-19 pandemic physically closed courts, locked down jails, incapacitated lawyers, killed judges, and scared jurors away from service.⁹ Most fundamentally, court systems turned into virtual courts, conducting proceedings on Zoom or other commercial online platforms.¹⁰ Lawyers adapted to an online

The high-volume misdemeanor system is clearly in crisis. Misdemeanor defenders handle caseloads far above nationally recommended standards, yet have few resources to investigate and perform the core tasks for their clients' cases. They practice in overcrowded courts where defendants are pressured to enter quick guilty pleas without adequate time to consult with the attorney they may have just met. Their potential clients often face pressure to waive the right to counsel in order to enter a guilty plea;

Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314–15 (2012) (“An estimated ten million misdemeanor cases are filed annually, flooding lower courts, jails, probation offices, and public defender offices.”).

4. See generally Norman Lefstein, *Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate?*, 38 HASTINGS CONST. L.Q. 949, 949 (2011) (“There is undeniable evidence that throughout much of the country defense lawyers who furnish legal representation in criminal and juvenile cases for the indigent have excessive workloads.”); Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 394–95 (2016) (describing the costs of defenders with too many cases).

5. *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”).

6. Daniel J. DeRienzo, *A Gideon Moment: ‘What A Country!’*, CHAMPION, Aug. 2003, at 65 (“Defendants have little trust in the criminal justice system and often resign themselves to the inevitable, swift and harsh punishment.”).

7. This Article is informed by nine years of trial experience representing poor people in criminal court as an attorney at the Public Defender Service for the District of Columbia and clinical fellow at the Georgetown University Law Center Criminal Justice Clinic.

8. Jason Tashea, *The Legal and Technical Danger in Moving Criminal Courts Online*, BROOKINGS: TECHSTREAM (Aug. 6, 2020), <https://www.brookings.edu/techstream/the-legal-and-technical-danger-in-moving-criminal-courts-online/> [https://perma.cc/24H6-YLXR] (“Since the COVID-19 pandemic struck the United States, online court hearings have proliferated widely. States as diverse as Alaska, California, Florida, and New York are using virtual hearings in an attempt to balance social distancing and the administration of justice.”).

9. See, e.g., *Coronavirus and the Courts*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency> (last visited July 7, 2022) [https://perma.cc/SN94-NQS8]; Camille Gourdet, Amanda R. Witwer, Lynn Langton, Duren Banks, Michael G. Planty, Dulani Woods & Brian A. Jackson, *Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology*, RAND CORP., (2020), https://www.rand.org/pubs/research_reports/RR3222.html [https://perma.cc/TS8D-8FSV].

10. Veronica Combs, *Judges and Lawyers Learn Zoom Rules in Real Time During Coronavirus Crisis*, TECHREPUBLIC (Apr. 23, 2020), <https://www.techrepublic.com/article/judges-and-lawyers-learn-zoom-rules-in-real-time-during-coronavirus-crisis/> [https://perma.cc/G5LH-3SVX]; Erik De la Garza, *Texas Courts Zoom Forward with Virtual Hearings*, COURTHOUSE NEWS SERV. (Apr. 24, 2020), <https://www.courthousenews.com/texas-courts-zoom-forward-with-virtual-hearings/> [https://perma.cc/JJ66-CTTZ]; Shelly Banjo, *Digital Courtrooms Put Justice on YouTube*,

practice, conducting motions hearings, bail hearings, pleas, and sentencing mediated by a screen in their homes, miles away from the physical courthouse.¹¹

A radical disruption occurred. Court-centered factfinding processes dating back centuries were threatened.¹² In the place of the familiar criminal justice system taught in law school and portrayed in the media, a new video streaming system emerged (and began expanding).¹³ Based largely on available consumer-oriented technology and born out of a public health emergency, this virtual system of online criminal courts sprung into being.¹⁴ With little planning, less academic debate, and almost no input from impacted communities, what the public used to think of as criminal court started becoming a virtual proxy of the real thing.¹⁵

Zoom, BLOOMBERG (Apr. 7, 2020), <https://www.bloomberg.com/news/newsletters/2020-04-07/digital-courtrooms-put-justice-on-youtube-zoom> [<https://perma.cc/3GL6-7S3Y>].

11. Nicole Black, *COVID-19 Forces the Legal Profession's Hand and Technology Adoption Increases Exponentially*, ABOVE THE L. (Apr. 16, 2020), <https://abovethelaw.com/2020/04/covid-19-forces-the-legal-professions-hand-and-technologyadoption-increases-exponentially/> [<https://perma.cc/H2VS-TUV5>]; Deniz Ariturk, William E. Crozier & Brandon L. Garrett, *Virtual Criminal Courts*, U. CHI. L. REV. ONLINE (Nov. 16, 2020), <https://lawreviewblog.uchicago.edu/2020/11/16/covid-ariturk/> [<https://perma.cc/E275-FXRG>] (“In 38 states, as well as the District of Columbia and Puerto Rico, courts have either mandated or encouraged the use of virtual hearings when appropriate.”).

12. *People v. Lockridge*, 870 N.W.2d 502, 508 (Mich. 2015) (“The right to a jury trial is a fundamental one, with a long history that dates back to the founding of this country and beyond.” (citing *Duncan v. Louisiana*, 391 U.S. 145, 148–154 (1968))).

13. Cara Salvatore, *May It Please the Camera: Zoom Trials Demand New Skills*, LAW360 (June 20, 2020), <https://www.law360.com/articles/1278361/may-it-please-the-camera-zoom-trials-demand-new-skills> [<https://perma.cc/X9S5-E6W6>]; see also Michele Pistone, *Law Schools and Technology: Where We Are and Where We Are Heading*, 64 J. LEGAL EDUC. 586, 589 (2015) (“Technological innovations are also influencing the practice of law. Consequently, lawyers and law students will need to develop new skill sets in order to thrive professionally.”).

14. Richard Susskind, *The Future of Courts*, PRACTICE (July/Aug. 2020), <https://thepractice.law.harvard.edu/article/the-future-of-courts/> [<https://perma.cc/A9SP-BEA5>] (“The current systems that have been cobbled together are still examples of automation rather than transformation. Almost all the remote courts that have been set up in response to the virus are variations on the theme of traditional courts.”); Alfred Fox Cahn & Melissa Giddings, *Virtual Justice: Online Courts During COVID-19*, SURVEILLANCE TECH. OVERSIGHT PROJECT 2 (July 23, 2020), <https://www.stopspying.org/virtual-justice> [<https://perma.cc/7YU5-YJ2C>]:

In the first weeks of moving proceedings online, many courts across the country have turned to videoconferencing platforms already in wide use. As of the end of April, Iowa is using GoToMeeting; New York, Oregon, and Puerto Rico are using Skype for Business; Oregon and Wyoming are using Microsoft Teams; Colorado, New Hampshire, Oregon, Pennsylvania, Tennessee, Utah, and Virginia are using WebEx; and Alabama, Michigan, New Jersey, Tennessee, and Texas are using Zoom.

15. TAYLOR BENNINGER, COURTNEY COLWELL, DEBBIE MUKAMAL & LEAH PLACHINSKI, STAN. CRIM. JUST. CTR., *VIRTUAL JUSTICE? A NATIONAL STUDY ANALYZING THE TRANSITION TO REMOTE CRIMINAL COURT* 14 (2021) <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/08/Virtual-Justice-Final-Aug-2021.pdf> [<https://perma.cc/6QSZ-T2U8>] (“Because the pandemic hit so suddenly, there was no time to study the effects of virtual court—to review the literature, plan, pilot, and so on—before its implementation.”); Scott Dodson, Lee H. Rosenthal & Christopher L.

And, as with many innovations, many of these virtual measures will outlast the immediate crisis, reshaping traditional practices and creating a new normal.¹⁶ Arguments for efficiency and convenience will enshrine some online innovations as the preferred way of running criminal dockets.¹⁷ Online hearings—connecting judges, lawyers, and defendants in virtual courtrooms—will become part of ordinary criminal practice.

This Article uses the disruptive effect of online courts to rethink traditional criminal justice practices. The Article asks whether disrupting a broken system might reveal the underlying structural power dynamics that have disadvantaged defendants and empowered

Dodson, *The Zooming of Federal Civil Litigation*, JUDICATURE, Fall/Winter 2020–21, at 13 (“The pandemic has pushed lawyers and judges toward videoconferencing on a scale and at a speed never before seen, without the deliberation and care that usually has attended the legal community’s acceptance and incorporation of technological innovation.”); Tashea, *supra* note 8 (“In Texas, the courts opened 3,000 Zoom channels almost overnight. In Michigan, the courts clocked more than 100,000 hours of hearings between April 1 and May 18.”); Judy Harrison, *Pandemic Forces Maine’s 20th-Century Courts to Adopt Modern Technology*, BANGOR DAILY NEWS (Mar. 6, 2021), <https://www.bangordailynews.com/2021/03/06/news/pandemic-forces-maines-20th-century-courts-to-adopt-modern-technology/> [<https://perma.cc/6P2L-Z5LT>] (“In September, courts conducted more than 500 proceedings and meetings over Zoom, up from just three in May. That number has continued to rise, surpassing 1,600 each in January and February.”).

16. Aebra Coe, *Remote Courtrooms Here to Stay as Judges Tackle Backlogs*, LAW360 (May 11, 2020), <https://www.law360.com/articles/1271812/remote-courtrooms-here-to-stay-as-judges-tackle-backlogs> [<https://perma.cc/3KL4-TFCF>] (“Federal and state court judges say they are likely to rely heavily on remote courtrooms, including virtual trials, as the prospect of fully reopening the justice system to its former capacity remains a distant goal for many, and case backlogs and delays continue to mount.”); Dodson et al., *supra* note 15, at 13 (“Although we expect pandemic constraints to be temporary, we think the technology will persist and continue to develop.”); Susskind, *supra* note 14:

On the strength of several months of remote courts, many lawyers and judges are now insisting we will never go back, that the transition to technology-based justice has been achieved. This is an overstatement. The leap from physical courts to remote hearings has, of course, been remarkable, but it is very early days and no one can sensibly claim that they are suitable for all cases and issues;

Harrison, *supra* note 15 (“[J]udges and lawyers expect remote court appearances, conferences and hearings to become routine even after the pandemic is over.”); Alyssa Bethencourt, *El Paso Judge Says Virtual Court Hearings Could Be Permanent Post-Pandemic*, KFOX14 (Mar. 3, 2021) <https://kfoxtv.com/news/local/el-paso-judge-says-virtual-court-hearings-could-be-permanent-post-pandemic> [<https://perma.cc/4Y9N-CSEA>] (“Judge Morales explained that pre-pandemic, only one in-person hearing could happen at a time. Now, using virtual platforms, up to 20 hearings could happen simultaneously. ‘It’s been working so well that I think we’re going to continue to use that even past this whole pandemic.’”).

17. Brandon Birmingham, *Three Ways COVID-19 Makes the Criminal Courts Better*, DALL. EXAM’R (May 8, 2020), <https://dallasexaminer.com/three-ways-covid-19-makes-the-criminal-courts-better/> [<https://perma.cc/38E6-4PTP>] (“[T]he new systems are way too efficient and cost-effective to be temporary.”); Tashea, *supra* note 8 (“Court administrators and chief judges appear bullish on video hearings and are urging for greater adoption—or at least acquiescing to the fact that this technology isn’t going away.”).

courts as engines of carceral control.¹⁸ In many ways, the shift online allows us to rethink first principles of judicial power through the lens of technological disruption.

Specifically, this Article examines four framing principles that underlie the structure and practice of traditional criminal court, exploring whether new technologies might allow us to reweight those values differently and reimagine existing practices without the courthouse at the center. While not an exclusive list, traditional ideas around (1) place, (2) time, (3) accountability, and (4) equality offer new ways to reimagine our future criminal legal system.

The insight of this Article is that by decentering the physical courthouse via virtual hearings, a series of related practice changes will reshape judicial power. Part II explores how the default to a centralized *physical* courthouse has traditionally encouraged carceral solutions to social problems and how virtual courts could reduce that reliance on court-centered social control. Part III examines the effect of *time*—how virtual scheduling shifts power away from judges' convenience to refocus attention on the inconvenience to defendants and other nonprofessionals episodically involved in the criminal legal system. Part IV examines *accountability* systems that allow outsiders to observe and monitor court practice. The internal judge-centered practice of identifying legal error, ineffective assistance of counsel, or unfair process can be augmented by virtual video observation by external entities independent of the court. Part V examines *equality* and how a physical courthouse helps mask societal inequality. Virtual courts—because they focus attention outside the courthouse—help us see the unequal societal pressures influencing criminal practice in a new way. The final Part takes a different tack and examines how certain practices related to trial proceedings should remain rooted in the physical courtroom. While much of the bureaucratization of criminal justice process can move online, core constitutional trial rights should remain in court.

Ultimately, this Article seeks to reveal the structural inequities that undermine traditional and online justice and show how a shift in power away from criminal courthouses might create a less powerful, but more “just,” criminal justice system. When criminal courts no longer require a physical courthouse, power and control shift away from judges. This diffusion of power may ultimately refocus what courts do,

18. Janet Moore, *Isonomy, Austerity, and the Right to Choose Counsel*, 51 IND. L. REV. 167, 177 (2018) (defining carceral as a term that “denotes the sprawling, dynamic network of policies, institutions, personnel, and apparatuses through which federal, state, local, and tribal governments exercise power to police, prosecute, and punish.” (citing MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015))).

rebalance an increasingly punitive criminal legal system, and help rethink traditional practices.

II. DECENTERING PLACE

Online hearings offer the potential to decentralize court power. Once the courthouse becomes a home (or personal office) and the courtroom a video screen, the central role of the judge lessens. This Part examines what changes when participants no longer need to be physically present in the courtroom.¹⁹ As will be discussed, many of the most carceral instincts of courts become much harder to act on in a virtual world where communications are done on Zoom or an online equivalent.

A. Centralized Courts

Centralized physical courthouses are so elemental to the organization of the criminal justice system that one forgets that there could be another way.²⁰ As it has been for centuries, everyone in the justice system must personally interact in the same physical place.²¹

Centralizing a court system in a local courthouse makes logical sense in the physical world. Beyond tradition, it is logistically convenient to have a central office (like most government institutions do).²² With a constant flow of cases, lawyers, judges, witnesses, and jurors, the decision to dedicate a physical space to the operation of justice saves time and effort for those tasked with the responsibility of determining criminal matters.

The centrality, however, also creates downstream effects. For example, in a traditional system, a newly arrested defendant is brought to the courthouse for an initial presentment and detention hearing.²³ The decision to bring the defendant from the police station to the

19. See Susskind, *supra* note 14 (“Is court a service or a place? Do we really need on all occasions to congregate physically to settle our legal differences?”).

20. See, e.g., Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311, 320–22 (2012) (detailing the history of American courthouses).

21. See Keith J. Bybee, *Judging in Place: Architecture, Design, and the Operation of Courts*, 37 LAW & SOC. INQUIRY 1014, 1015 (2012) (“To assess the judiciary’s built environment, and to identify connections between courtroom layout and the prevailing legal order, is to advance ‘a jurisprudence of what’s real.’”).

22. Paul Matteoni, *Our Obligation to Defend the Judicial System*, NEV. LAW., Dec. 2019, at 5 (“Courthouses across the country were originally designed to be accessible and located in central locations.”).

23. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 202 (2008) (discussing the process of initial appearances).

courthouse is because that is where the judge physically sits.²⁴ The process might require an overnight lockup in a holding cell.²⁵ The process also results in a crowded daily docket because all arrested individuals and relevant parties are brought to the same place for processing at the same time: lawyers are assigned, pretrial interviews are conducted, an initial hearing is held, probable cause is determined, and conditions of release decided. The process is rushed, chaotic, and impersonal, yet it is justified because it is the only way to get through the daily docket. One cause of this rush, of course, is the initial determination to bring all the cases to the same *place* for resolution. Place-based convenience for courts results in a daily overload for court systems. While there may be good reasons to centralize things in a physical world, that may not be the case in a virtual one. As will be discussed, the decentralization brought on by online courts may reduce the rushed process.

Beyond convenience, centralized courthouses have other perceived advantages. For example, a physical courthouse reinforces traditional hierarchies of power considered necessary to justify the authority of law.²⁶ The courthouse itself is built to reflect the foundational centrality of law and the status of judges (high on benches with black robes).²⁷ Citizens enter a courthouse and see the architecture of legal order carefully curated to send a message.²⁸ This symbolic power is backed up by coercive state power, as defendants are required to sign a notice to return to court under penalty of criminal punishment.²⁹

24. See *How Courts Work*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/arrestprocedure/ [<https://perma.cc/636F-7J7F>] (diagramming the sequence of events in the criminal justice system and explaining pre-trial court appearances in criminal cases).

25. See, e.g., *What to Expect If You're Arrested*, LEGAL AID SOC'Y, <https://www.legalaidnyc.org/get-help/arrests-policing/what-to-expect-if-youre-arrested/> (last visited Sept. 5, 2022) [<https://perma.cc/S9SL-MWNE>] (explaining that, in New York, after being taken to Central Booking, an individual must be arraigned within 24 hours and will be taken to a holding cell once their case is docketed).

26. Spaulding, *supra* note 20, at 315 (“Architectural histories further reveal the relationship of courthouse design and construction to the authority of law and the legal profession during the colonial period and the first century of the Republic, and to architects’ parallel quest for professional authority.”).

27. Christopher E. Smith, *Law and Symbolism*, 1997 DET. C.L. REV. 935, 943 (1997) (“Judges and lawyers may be accustomed to enjoying the benefits of symbolism (e.g., legal language, majestic courtrooms, black robes, etc.) that provide functional contributions to public obedience of legal decisions and to stability in society.”).

28. Norman W. Spaulding, *Facades of Justice*, 110 MICH. L. REV. 1067, 1073 (2012) (detailing the imagery of courts as symbols of democratic power).

29. *Wilkins v. United States*, 137 A.3d 975, 978 (D.C. 2016) (describing the routine practice, “Courtroom clerks will orally notify a defendant of the date and time he is next required to appear

Courthouses are also central to pretrial detention. The ability of judges to impose incarceration for violations of pretrial release arises largely from the fact that deputies and marshals are present in court to effectuate a judge's order. While courts can still order someone detained by issuing a bench warrant, the ease and immediacy of judicial sanction are quite real because of the physical presence of courtroom deputies. A similar phenomenon occurs with mechanisms of pretrial monitoring and post-trial surveillance.³⁰ In part because the relevant pretrial service agencies are in (or near) the courthouse, it is easier to mandate in-person meetings, drug testing, or other forms of court supervision. In the context of several decades of mass incarceration, primarily focused on low-level property and drug crimes,³¹ this central role of court power has led to millions of contacts with the court for poor individuals.³²

This centrality has also led courts to become social service centers for clients with mental health, addiction, or other needs that require social services interventions.³³ The rise of community courts and specialty “problem solving” courts are manifestations of the idea that courts can solve the underlying social issues in society.³⁴ As cities

in court and of the consequences for failing to appear, require that he sign a Notice to Return to Court containing the same information, and give him a copy of the signed notice.”).

30. Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 726 (2020) (providing a taxonomy of pretrial surveillance technologies).

31. Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 954 (2020) (“Although misdemeanors have been overlooked because they have been perceived to impose minor consequences, we now know that these crimes have significant impacts on mass incarceration.”); see also Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 630 (2014); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1107 (2013).

32. Alisa Smith, *Empiricism and the Misdemeanor Courts: Promoting Wider, Deeper, and Interdisciplinary Study*, 39 PACE L. REV. 453, 454 (2018) (“Almost 80% of state court criminal caseloads—an estimated ten million cases filed annually in the United States—are comprised of misdemeanor prosecutions.”).

33. Cynthia Alkon, *Have Problem-Solving Courts Changed the Practice of Law?*, 21 CARDOZO J. CONFLICT RESOL. 597, 603–04 (2020):

The people we arrest and prosecute in the United States have high rates of substance use disorders, mental illness, and/or intellectual disabilities. Up to 80% of those in the criminal legal system are dependent on, abuse, and/or are addicted to a substance (alcohol and/or drugs). Approximately 40% suffer from at least one diagnosable mental illness.

34. Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809, 825–26 (2019):

Rather than focusing efforts on shrinking the feeder systems that led to the criminalization of wide swaths of poor communities or the devastation of social welfare resources . . . the problem-solving court movement took this criminalization as a given. In the face of this, they sought a way to respond for those individuals who found themselves subject to prosecution and potential incarceration. Today there are over 3,000 problem-solving courts found throughout every state in the nation. They include not only the traditional drug courts, but a wide range of specialized courts, including

have reduced funding for social needs, courts have increased their role in supervising individuals with treatment needs.³⁵ A judge's order can cut through the bureaucratic and financial red tape otherwise limiting drug treatment or mental health services. Many times, bed space is only available for those involved in the criminal justice system (and thus court funded). Whether it be drug court or community court or homeless court or veteran's court, the concept that courts can use their coercive power to fund social solutions has been an accelerant to bringing more people into the criminal legal system.³⁶ Viewed in this light, courts have defaulted to becoming the place for social service providers because judges see few other solutions to address these social needs.³⁷

The result of courts accumulating power to "solve" social problems has been to center the role of criminal courts in the administration of poverty.³⁸ Whether one studies the low number of trials, massive numbers of low-level pleas, or time judges devote to trial, the bulk of what courts do is process poor people through a pre-plea

domestic violence courts, mental health courts, veterans courts, and community courts, just to name a few.

35. *Id.* at 825:

In the late 1980s, as the War on Crime continued to escalate, the prison population grew exponentially. At the same time, the social safety net remained profoundly inadequate to meet the needs of those struggling in poor communities and resources for mental health deteriorated. As a result, judges saw before them an increasingly devastated and systemically failed population. In what in retrospect seems an inevitable development, the modern version of the problem-solving court movement was born.

36. Alkon, *supra* note 33, at 598:

There is also a serious concern that the existence of problem-solving courts has led to net-widening and may have pulled more people into the criminal justice system, particularly as these courts encourage the view that the solution to larger societal problems are within the narrow confines of the criminal legal system and not by other sectors in our society, such as public health;

Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1552 (2004) (describing the way drug courts draw more people into the criminal justice system).

37. Amy J. Cohen, *Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City*, 95 TEX. L. REV. 915, 955 (2017):

Problem-solving courts exemplify this logic. The services and benefits these courts provide are based on a particular set of social controls: an individual's responsibility to use his own resources to manage risk and engage in self-improvement rather than the state's obligation to meet social needs, and they combine incentives for state services with sanctions and punishments.

38. Peter B. Edelman, *Criminalization of Poverty: Much More to Do*, 69 DUKE L.J. ONLINE 114, 117 (2020), <https://dlj.law.duke.edu/2020/04/criminalizationofpoverty/> [<https://perma.cc/452Q-WJSC>] ("For far too long America's poor have been criminalized by intersecting systems that impact low-income individuals at all levels, including the school-to-prison pipeline, chronic nuisance orders, public housing shortages, anti-homelessness ordinances, claims of welfare fraud, and inadequate mental health systems.").

stage and post-plea stage with little actual time in trial.³⁹ Viewed in this light, what courts do is as much about processing individuals with economic or other social needs, as adjudicating criminal responsibility.⁴⁰ And this social service role remains intertwined with the pretrial detention role because the primary method of “encouraging” court-assisted social services involves the threat of pretrial detention.

Online virtual courts—during and after the COVID-19 pandemic—changed these underlying dynamics, literally shifting people away from courthouses and thus undermining the ease of judicial attempts to control, monitor, and “fix” these social issues. Defendants remained in the community, so services had to meet them in the community. Online criminal courts—while virtually enforcing the same social control and monitoring goals—subtly change power relationships, weakening judicial authority and court power.

B. Decentralized Online Courts

This Article is primarily concerned with virtual hearings for presentments, arraignments, status hearings, pleas, and post-sentencing probation hearings (i.e., non-trial rights).⁴¹ Whether conducted on Zoom or an equivalent service, the simple idea is that the parties will connect through an online system and conduct a hearing through video instead of showing up in court.

As described above, three related practical realities have traditionally justified the centralized courthouse paradigm: convenience, control, and role. The decentralization of online courts presents an opportunity to rethink how *place* shapes the system of criminal justice. The change forces us to ask what tasks really must happen in a courthouse and what practices emerged merely as a consequence of proximity. In addition, the shift also forces questions about who benefits from centralized systems of power.

39. Even the Supreme Court has acknowledged that trials are not the center of the criminal legal system anymore. See *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials.”).

40. Rekha Mirchandani, *Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State*, 33 LAW & SOC. INQUIRY 853, 855 (2008):

There is little debate about the structural causes for the problem-solving court movement; high rates of recidivism, growing numbers of offenses, and overcrowded jails have led to both lay and legal frustration with the traditional criminal justice system . . . It has become clear that for low-level misdemeanor offenses, many of which involve mental health problems or addictions, the traditional court system ineffectively sends offenders to jail or back home with a suspended sentence. The recognition is that if courts are to play any meaningful role in society, they have to find ways to address the underlying problems behind criminal cases.

41. Trial rights and procedures will be discussed *infra* Part VI.

1. The Logic of Convenience

First, as a general matter, decentralization reshapes the logic of convenience.⁴² The traditional valuing of courthouse convenience contributes to a professional-centric system where the convenience of the professionals supersedes the convenience of other participants including—e.g., defendants, jurors, and witnesses. But when court does not require physical presence in the same place, a different value system can be explored.

As stated, many courthouses operate in central downtown locations, which ignores the financial and personal costs (e.g., time, effort, and money) inherent in travelling to and from court, missing work, and finding childcare.⁴³ Changing to an online system where defendants or witnesses are at home (or at work) and need not go anywhere else is a significant shift in who bears the costs of inconvenience. Clearly defendants will benefit, but so will witnesses.⁴⁴ Courts may even reduce the number of “failure to appear” cases, which can result in additional criminal charges and punishment for defendants.⁴⁵

42. See BENNINGER ET AL., *supra* note 15, at 60 (quoting a Miami judge):

[T]here was a tremendous amount of stuff that we handle in court live that we didn't need to handle in court live, that could have been disposed of by agreed orders. . . . And now with what's going on, COVID, it forced us to sort of examine those processes. . . . I think this has really kicked it up a notch. It made us realize, like, why are we bringing people in unnecessarily?

43. Sarah Esther Lageson, *The Perils of Zoom Justice*, CRIME REP. (Sept. 1, 2020) (“For the defendant or witness, this [online court] is a welcome change. Going to court no longer requires a person to find childcare, take time off work, or risk exposure to COVID.”); Harrison, *supra* note 15 (“[T]he benefits have been less crowded court facilities during the COVID-19 pandemic, and less time and money required for people to travel to and from courthouses.”).

44. Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. 197, 240 (2021) (“Most respondents believe that the online format saves time or resource for participants in criminal proceedings. Open-ended responses suggest that the elimination of travel is the main factor behind this perceived benefit.”). Jurors also avoid significant travel time, which might expand participation in many areas. See Casey Grove, *Zoom in to Jury Duty: A Pilot Project in Rural Alaska Starts in August*, KTOO (June 30, 2020), <https://www.ktoo.org/2020/06/30/zoom-in-to-jury-duty-a-pilot-project-in-rural-alaska-starts-in-august> [<https://perma.cc/5KHD-47GS>].

45. *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/DRQ3-4VWE>]; Turner, *supra* note 44, at 213–14 (“[V]ideoconferencing is also likely to be more convenient for defendants who are out on bond, and it can therefore reduce their failure to appear rates.”); Ariturk et al., *supra* note 11:

[Virtual courts] could potentially lower failure-to-appear rates in pre-trial hearings; a failure to appear can result in severe consequences, including jailtime, for a person charged with a crime. Indeed, the limited data available from a handful of states suggest that virtual hearings can drastically improve court appearance rates: In New Jersey, the failure-to-appear rate dropped from 20 to 0.3 percent after the courts began conducting virtual hearings. In some parts of North Dakota, appearance rates are at

Most significantly, a decentralized court process may reshape the pretrial intake process. For many nonviolent crimes, misdemeanors, or certain first-time offenders, the shift to online courts might obviate the need for going to court in the first instance. Even though there is a high chance that the misdemeanant will be released, in the ordinary practice they are still detained (sometimes overnight) before seeing a judge.⁴⁶

In a virtual hearing system, however, the default presumption would be connecting through an online system. For example, with low-level offenses, police could just provide a citation release with instructions to see a lawyer in the community to begin the initial intake proceeding. Or courts could set up community intake centers akin to community probation centers. The lawyer, public defender's office, or community intake center, not the court, then could coordinate intake information and prepare for an initial virtual hearing. Such a process, with a presumption of release, would reduce the daily crush of cases in arraignment court, reduce overall pretrial detention, and reduce court costs.⁴⁷ Without a need for a central place of intake and detention, many of the downstream costs (practical and financial) of pretrial incarceration evaporate.

For violent crimes with a greater likelihood of pretrial detention, the presumption of release may not be practicable. But detention decisions can still be made through an online virtual process. In fact, some states (pre-COVID-19) had already shifted to online detention hearings from jail, with the defendant on video and the judge in a courthouse.⁴⁸ Having the judge and lawyers also online might not fundamentally change things, although real questions remain about the

roughly 100 percent, and in Michigan, failure-to-appear rates are down from 10.7 percent in April 2019 to 0.5 percent in April 2020;

see also BENNINGER ET AL., *supra* note 15, at 81 (quoting a judge):

And I would note that it seems to me, anecdotally, I don't know that, I don't have a really strong evidence, but it seems like we got a lot more compliance. It seems like people, people were calling in more. . . . If we have master calendar, there'd be 20 cases, you know, maybe we get 12 people and eight people don't show up. When we switched to phones, got a lot better compliance of people calling in.

46. Jessica S. Henry, *Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 AM. CRIM. L. REV. 665, 685 (2018) ("Described as 'assembly-line' justice, misdemeanor courts seek speedy resolution of cases. Upon arrest for a misdemeanor, people are processed through an overburdened system, locked in a dank holding cell (sometimes overnight), and forced to wait for their cases to be called.")

47. Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 59, 72 (2020), <https://northwesternlawreview.org/articles/pretrial-detention-in-the-time-of-covid-19/> [<https://perma.cc/UA6Z-Y9V2>].

48. See generally Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1095 (2004).

role of defense counsel and access to clients before the initial hearing.⁴⁹ Studies have shown that such virtual contacts provide a less effective and less meaningful type of representation, and thus they should be used sparingly.⁵⁰ A detention hearing or preliminary hearing mediated by a video will feel dehumanizing and will devalue the procedural justice elements that create a fair process.⁵¹ The “place” of justice will be a pretrial jail, not the courtroom, and if the defendant never leaves jail throughout the entire process, it will feel inadequate and unjust.

That said, in those jurisdictions that already use online detention hearings, systems exist to perform pretrial initial interviews, conduct drug screens, and appoint counsel.⁵² Issues of notice to appear in court can be made without the defendant being brought to a physical courthouse. In this way, online systems have already been shown to work for notice and other process-focused requirements.⁵³

2. Shifting Control

Another consequence of decentralized courts involves the shift in authority away from judges. At a symbolic level, a judge’s power will be shrunk through a small screen. As Judge Joseph R. Goodwin once wrote:

No video monitor can exert the same psychological pressures as a physical presence in the courtroom. The judge in robes, the raised bench, witnesses, lawyers, worried family, flags,

49. See *infra* Part V.

50. Ariturk et al., *supra* note 11 (“[I]n many states, local rules and statutes have long authorized remote videoconferences for first appearances or arraignments in criminal cases. However, it is not clear whether such virtual representation arrangements provide defendants with adequate legal representation.”).

51. Dodson et al., *supra* note 15, at 16 n.18 (citing *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., and the Internet, H. Comm. on the Judiciary*, 116th Cong. 8 (2020) (statement of the Hon. David G. Campbell)) (“The use of videoconferencing has been particularly challenging in court hearings with detained defendants Local jails and BOP facilities have not always had videoconference software or software compatible with courts or defender offices.”).

52. Turner, *supra* note 44, at 202 (“Some have additionally permitted video hearings at other stages of the criminal process, including hearings used to determine pretrial release, the validity of a guilty plea, and sentences.”).

53. In a trial context, this shift to online participation also could have a dramatic effect on the prosecution of misdemeanor and domestic violence offenses. One of the hidden realities of criminal court is the number of cases dismissed for want of prosecution because of witness problems. See *Robinson v. United States*, 769 A.2d 747, 756 n.19 (D.C. 2001) (examining a D.C. domestic violence calendar where cases were dismissed for want of prosecution charges against 47% of male defendants and 22% of female defendants). In many cases, after an arrest, the entire pretrial process, and setting a trial date, the actual case is dismissed because the victim fails to appear. Sometimes this failure is a function of the desire of the parties, or the overload on prosecutors, or the lack of effort needed to convince a reluctant witness into court. But, no matter the reason, the result is a significant number of dismissed cases that happen on the date of trial.

seals, armed marshals – these elements invest the occasion with the seriousness it warrants, and they surely impel even those bent on deception to reflect on the advisability of their plans. These are far more than empty trappings. Form and process are the pillars that support the structure of our justice system just as ceremony and ritual reinforce the solemnity of religious practice. All human societies have icons and rituals because we think them important.⁵⁴

The purposeful design of courtrooms to amplify the majesty of law and the control of the court cannot be easily replicated through digital streams initiated at home or in a jail, although some steps can be made to improve professionalism.⁵⁵ Accessing court through a handheld device with a mute button, a virtual background, and none of the hierarchies of power creates the perception of a less powerful and less central judicial role.⁵⁶

More practically, the levers a judge uses to wield judicial power are weakened. In a legal system that has relied on judges to coerce abstinence, mental health treatment, and other behavioral changes from people suffering from addiction, mental illness, or the effects of poverty, the lack of physical power to make anything happen in court is significant. Judges will be less able to “solve” social problems using court services because the court officials and social service representatives will not be physically present to coordinate the matters.⁵⁷ Many of the systems of pretrial monitoring, problem-solving courts, and drug testing will be made more difficult to enforce by a decentralized process.⁵⁸ For those that see court-centered solutions as a good, this shift in power will be viewed quite negatively. For those that

54. Gerald G. Ashdown & Michael A. Menzel, *The Convenience of the Guillotine?: Video Proceedings in Federal Prosecutions*, 80 DENV. U. L. REV. 63, 68 (2002) (citing Letter from Judge Joseph R. Goodwin, Dist. Ct. Judge for the S. Dist. of W. Va., to Judge Robin J. Cauthron, Chair, Def. Servs. Comm. (Sept. 6, 2001)).

55. Dodson et al., *supra* note 15, at 17:

Physical courtrooms feature a judge in a robe, elevated on a bench, with flags, the court seal, and portraits of former jurists, along with the formal cry opening court and the tradition of rising when the judge enters and leaves. These traditions of solemnity and formality bring home the fact that even in the most mundane of hearings in the least complicated case, this third branch of government, an institution to cherish and support, is the justice system at work.

56. Jenia I. Turner, *Virtual Guilty Pleas*, 24 U. PA. J. CONST. L. 211, 255–57 (2022) (describing examples of the informal nature of the participation in virtual hearings that undercut the heightened symbolism of courts).

57. There is a rich literature critiquing the concept that judges can “solve” such social problems. See generally Alkon, *supra* note 33, at 599 (describing the history of problem-solving courts); Tamar M. Meekins, “*Specialized Justice*”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 13 (2006) (describing the tension between specialty courts and zealous defense).

58. Obviously, the court can order the same requirements, but the ease of ordering and overseeing things in the court and around the courthouse will be missing.

believe that court solutionism reifies a carceral mindset, this shift will be quite positive.

Significantly, judges will find their pretrial detention enforcement power reduced. If initially released via citation, an online court system would likely mean fewer people detained before trial.⁵⁹ It would also mean fewer defendants locked up for violations of release conditions. After all, it would be more difficult for a judge to order a released defendant locked up without the physical presence of deputies or marshals. Because much of the perceived and real power of judges comes from the very literal power to incarcerate, the distance of a mediated screen is quite significant. Judges, of course, can issue bench warrants and have authority to enforce them, but one might imagine that the presumption of release would remain even in the face of violations of conditions of release.⁶⁰ The added effort, time, and cost to sending court officers out to effectuate an arrest for a violation of a condition of release may not be worth the trouble.

3. Redefining Role

Reconsidering the place of a central courthouse creates challenges for the traditional role played by the various professionals in the court system. Hard questions arise about what jobs really need to be done in a courthouse.

As has been discussed and will be discussed in the next Part, judges face a reduced role. The reduced role is both literal in where they sit, but also in the levers of power they have over the people before them. Ordering substance abuse and mental health treatment with a social worker and a deputy in the courtroom is much easier than ordering the same treatment over Zoom.⁶¹

59. Alaina Willis Spence, *Pretrial Release in the Age of COVID-19: What Did We Learn?*, 21 CONN. PUB. INT. L.J. 90, 99 (2021) (“One study revealed that, between April 16 and June 1, 2020, more than 81% of jurisdictions increased release during the pretrial stage. The same study revealed that nearly 68% of jurisdictions increased the use of personal recognition for non-violent offenses.” (citing NAT’L ASS’N PRETRIAL SERVS. AGENCIES, COVID-19 POLICY RESPONSE SURVEY 6 (June 19, 2020), <https://www.nyapsa.org/resources/national-association-of-pretrial-services-agencies-covid-19-policy-response-survey> [<https://perma.cc/4MMA-H4S3>])).

60. See *State v. Mohs*, 726 N.W.2d 816, 820 (Minn. Ct. App. 2007) (providing an insightful legal history of the authority of courts to issue bench warrants), *aff’d*, 743 N.W.2d 607 (Minn. 2008).

61. See, e.g., WORKING GRP. ON SUBSTANCE ABUSE & MENTAL HEALTH, MASS. SUP. JUD. CT., COVID-19 INTERIM REPORT 8 (2020), <https://www.mass.gov/doc/sjc-working-group-on-substance-use-and-mental-health-covid-19-interim-report/download> [<https://perma.cc/5WG9-CV8D>] (“For [substance abuse and mental health] evaluations conducted by court clinicians . . . , in-person and videoconference assessments have presented logistical and technological issues for both court staff and clinicians.”).

Lawyers also will face challenges relating to their role. For example, the connection between the defendant and the defense lawyer traditionally first occurs in the courthouse. While usually a suboptimal environment to meet, the meeting does happen early on and begins a legally and practically significant relationship.⁶² A system of citation release to meet with a lawyer might involve delays or missed appointments. A defendant may misunderstand the instructions or have other priorities, and the meeting may not occur in the same timeframe. Similarly, an online detention hearing will likely preclude a lawyer from adequately consulting confidentially with clients or advocating on their behalf.⁶³ In both situations, a lawyer may not be able to establish the proper connection (professional or literal) with their client without a physical place to meet.

In addition, some court employees will see increased burdens because decentralization will increase virtual work, and some will see lessened work. Pretrial service workers, for example—who must conduct background investigations, indigency determinations, and recommendations of release conditions—will be required to adapt their interviews online.⁶⁴ Other data systems about defendants may need to be created to augment and double check the virtual interviews. Clerks will have to adapt to holding court online, with different skills and a daily juggling of schedules and hearings.⁶⁵ Complicated court calendars will need to be managed with sophisticated computer software required for virtual trials to proceed.⁶⁶

62. Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853, 889–90 (1996) (“The ABA Standards state that ‘defense counsel should seek to establish a relationship of trust and confidence with the accused’ Commentators and courts have also recognized the pivotal nature of the attorney-client relationship. The time to begin trying to build rapport is in the initial interview of the defendant.”); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 575 n.333 (1990) (noting that the lawyer-client relationship is characterized by extensive mistrust, particularly in the criminal context).

63. BENNINGER ET AL., *supra* note 15, at 104–05 (discussing the difficulties for attorneys and clients to communicate using online systems).

64. William E. Hicks, Sara J. Valdez Hoffer & Thomas H. Cohen, *Pretrial Work in a COVID-19 Environment*, FED. PROB., June 2021 at 24, 25 (“Districts adopted new means of technology to conduct interviews, found different workspaces that allowed for acceptable social distance between officers, offenders, attorneys, and other court staff, and converted pretrial interviews to virtual platforms when approved by the court.”).

65. Alan J. Crivaro, *Virtual Technology Solutions Transcend the Brick and Mortar Courthouse*, ORANGE CNTY. LAW., May 2021, at 20, 22 (“Courtroom staff now have livestreaming responsibilities and remote hearing responsibilities that never existed in pre-COVID-19 times.”).

66. Samuel A. Thumma & Marcus W. Reinkensmeyer, *Post-pandemic Recommendations: COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup*, 75 SMU L. REV. F. 1, 33 (2022) (describing on virtual online platform and the technology used to facilitate online hearings).

Outside the courtroom, deputies and marshals will see much less need for their services if defendants are not in physical proximity to judges.⁶⁷ Travel time and processing time, in addition to security concerns, will all be lessened.⁶⁸ These changes will likely result in a smaller courthouse staff and, therefore, significant systemic and personnel cost savings.⁶⁹

Finally, the growing power of centralized court supervision services will be diffused through more community-oriented programs and virtual services.⁷⁰ The image of courts that emerged from a centralized place need not continue in a decentered world. More convenient, local community centers and virtual check-ins could replace a centralized court, or systems might recognize that they do not need these physical connecting points at all.⁷¹ While decentralizing the physical space of courthouses does not automatically mean reduced monitoring levels or supervision,⁷² the additional friction and cost associated with less centralized processes will likely discourage use. This shift might have a beneficial effect on communities that feel over-supervised and subject to court control.⁷³

4. Conclusion

The above discussion is not meant to be a normative argument for or against online hearings. Many challenges remain in even

67. BENNINGER ET AL., *supra* note 15, at 64 (discussing cost savings and security from reduced travel from jail to court).

68. *Id.*

69. *Id.* at 60.

70. Christopher Mangione & Thomas H. Cohen, *The Impact of COVID-19 on Treatment and Testing*, FED. PROB., June 2021, at 58, 58:

The COVID-19 pandemic dramatically shifted substance use disorder and mental health disorder treatment from group to individual delivery. For pretrial services, the system realized a 35 percent decrease in group substance use disorder treatment and a 39 percent increase in individual treatment. Similarly, there was a 52 percent decrease in mental health group treatment and a 60 percent increase in individual treatment.

71. See Thomas H. Cohen & Vanessa L. Starr, *Survey of U.S. Probation and Pretrial Services Agencies' Adaptations to COVID-19*, FED. PROB., June 2021, at 14, 16 ("Other technological applications manifesting extensive usage included telehealth for substance use and mental health counseling and video-conferencing; over 60 percent of respondents reported using these applications a great deal during the pandemic.").

72. This reality has been observed in the move to pretrial electronic monitoring which has exploded in use, creating greater court supervision not less. See, e.g., Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 663 (2019) ("[C]urrent decarceration efforts have sought the easing of the burden of correctional costs . . . and intensif[ie]d surveillance as a measure of control.").

73. On the other hand, efforts such as shifting carceral control may not adequately respond to the anti-subjugation arguments of critics that advocate for a more abolitionist position against all forms of court control. See Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 100 CALIF. L. REV. 1 (2022).

evaluating the full costs and benefits of the change. But rethinking “place” as a set value means that the court system likely will have a smaller imprint on the lives of some participants. Courts—as problem solvers—will be less central. This decentered shift in power may support a less carceral-focused criminal legal system, at least with regard to lower-level crimes. When convenience, control, and role are no longer the dominant pressures, the need to solve social issues through a criminal court proceeding also dissipates.

III. DECENTERING TIME

The shift to online hearings offers the ability to change the way courts schedule criminal cases. Due to the nature of online proceedings, traditional court calendar calls could shift to specific meeting times. This change will reveal how traditional courts devalue the time of defendants and lawyers while offering some practical improvements to participants. In addition, by exposing the hidden power of scheduling, other structural inequities of the criminal legal system will be revealed.

A. Traditional Court Time

Time is central to the routine of criminal courts. Efficiency concerns dominate case scheduling, judges’ colloquies, jury practice, and lawyer tactics.⁷⁴ Time pressures from too many cases shape plea practices and trial outcomes.⁷⁵ From the daily arraignment or

74. Efficiency pressures arise from both the number of criminal cases being brought into court, as well as the lack of judges to hear those cases. See Brian Sheppard, *Judging Under Pressure: A Behavioral Examination of the Relationship Between Legal Decisionmaking and Time*, 39 FLA. ST. U. L. REV. 931, 940 (2012) (“[M]any courts are shorthanded, so judges are facing higher docket loads.”); Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 824 (2016):

Given the pressures to process cases rapidly, misdemeanor judges must limit the amount of time they spend on any particular matter. This means they have less time for holding in-person hearings and instead decide more issues on the papers alone. This also means they have less time for engaging defendants in searching plea colloquies, which are supposed to be the final backstop for ensuring that there is a factual basis for the plea and a knowing and voluntary waiver of various constitutional rights.

75. See Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 357 (2016):

As state courts struggled with the budget stresses of the recent recession, case-management techniques that streamline disposition emerged as popular cost-cutting measures. The focus of these efforts has not been to convert more trials into guilty pleas but instead to help cases that are already headed for a guilty plea to get there *sooner*. The push to shrink disposition time has been based, at least in part, on research confirming that slower cases cost more money;

see also *id.* at 359 (“Lower criminal courts track and report how quickly they move criminal cases from charge to disposition or bindover, while felony courts detail how quickly they move cases from arraignment to plea or sentence.”).

presentment lockup list to the weekly final case disposition count, “time,” viewed as the pressure to efficiently resolve cases, is a dominant organizing principle.⁷⁶

Time pressures are squarely centered on judges, and due to the large volume of criminal cases, courts have developed practices to prioritize judicial resources.⁷⁷ For example, in many courthouses, all cases for the day might be set for the same morning start time, requiring lawyers and clients to all arrive and wait for their cases to be called.⁷⁸ Getting all the parties present and organizing the daily docket of arraignments, status hearings, pleas, sentencing, and trials involve a scheduling challenge that revolves around the judge’s time.

The judge-based scheduling system has downstream effects. Because judges set cases at the same time or around their other cases, defense lawyers must run from courtroom to courtroom (or courthouse to courthouse) checking in on clients in different rooms (also with cases set for the morning).⁷⁹ This delays the proceedings but also causes

76. This reality is true even beyond state cases, where the majority of criminal cases are resolved. Federal courts also face pressures of case management at trial and on appeal. Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity “Crisis”: Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 843 (2020) (describing the increased caseload for federal district courts); William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN ST. L. REV. 55, 65 (2013) (discussing the pressures of efficiency and resultant costs); Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1117 (2011):

The courts’ workloads are immense, and the judges are keenly aware that time and resources are scarce, making tradeoffs necessary. Some judges have described their work as requiring “triage,” by which they mean that customary procedures of common law judging—for instance, hearing oral arguments or publishing opinions—must now be limited to a select group of cases.

77. For example, most courts have published court rules and courtroom management practices.

78. See, e.g., *What Should I Expect in Court*, N.C. JUD. BRANCH, <https://www.nccourts.gov/going-to-court/going-to-court-basic-information> [<https://perma.cc/ZYK3-QD4N>]:

In most courtrooms, many cases will be scheduled at the same time. The judge, or the prosecutor in a criminal case, will typically begin court by calling the names of everyone with a case scheduled that day. . . . The judge or prosecutor will then handle the cases one by one. Each judge may handle cases in a different order: for instance, some judges may begin with the cases expected to take the least time, while others may handle cases in the order in which they were filed.

79. Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1772 (2016):

A defender’s day often consists of running from courtroom to courtroom with a huge stack of files under her arm. . . . The judges, most of whom are former prosecutors, are impatiently waiting for the defender to hurry up and dispose of her cases so they can clear their heavily-congested dockets;

Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 296 (2011) (“In some jurisdictions, misdemeanor lawyers might find themselves moving between several courtrooms, or even between different towns, in order to handle their assigned cases.”).

attorney-client conversations to be brief and decisions to be rushed, with parties feeling a pressure to resolve the case before the next hearing.⁸⁰ Time pressures constrain information sharing and discussion. Prosecutors' offices have adapted to judge-centered time by stationing fixed prosecutors in particular courtrooms, minimizing the necessity to run around the courthouse.⁸¹ While more serious cases will involve specifically assigned prosecutors with lower caseloads, they too are dependent on judge time with its attendant costs. Adding to this daily scramble are the fixed time pressures of sitting juries who need to hear trial evidence, cases involving speedy trial limits, and the unplanned but regular need to hold unscheduled hearings resulting from bail reform act violations and other emergency motions.

Further downstream, the daily waiting in courtrooms shortchanges other aspects of lawyerly practice. Time for investigation, jail visits, motions drafting, preparing experts, and client counseling suffers when a percentage of each day involves waiting for a judge to hear a case or ten.⁸² Adding the travel time to time spent in court, jail, and investigation, a lot of productive time of practicing lawyers is wasted waiting for a case to be called by a judge.⁸³

At the same time, the defendant's time is not valued at all. Status hearings and court dates usually conflict with other obligations. Most defendants must arrange to miss work or get all-day child care to cover what is usually a long wait before a brief proceeding in court.⁸⁴ The time cost of traveling to court, waiting for the case to be called, and heading home is rarely considered. These time pressures have direct financial costs, and indirect costs to familial and personal obligations.⁸⁵

80. Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 173 (2017) (describing a typical rushed proceeding in criminal court).

81. Stephanie L. Damon-Moore, *Trial Judges and the Forensic Science Problem*, 92 N.Y.U. L. REV. 1532, 1561 (2017) (“[I]n some jurisdictions the court system is organized such that prosecutors are assigned to specific courtrooms.”).

82. See, e.g., Martha Rayner, *Conference Report: New York City's Criminal Courts: Are We Achieving Justice?*, 31 FORDHAM URB. L.J. 1023, 1060 (2004) (“The large, daily dockets in most Criminal Court courtrooms prevent meaningful progress on individual cases.”).

83. See *supra* notes 79–80.

84. Dodson et al., *supra* note 15, at 16:

[C]ourts must weigh the burdens of videoconference appearances against the burdens of in-person appearances, such as the difficulties and costs to an indigent party to miss work or hire childcare, or to the costs to a detention center for escorting a prisoner to court. For routine conferences and hearings, we think that balance will often tip in favor of videoconferencing;

Ariturk et al., *supra* note 11 (“Participants no longer have to take time off work and travel for hours, or obtain public transportation to appear in court.”).

85. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017) (“A person detained for even a few days may lose her job, housing, or custody of her children.”).

The traditional time-value proposition⁸⁶ of criminal court can, of course, be defended as a functional way to address the crushing volume of cases. Judges are ultimately responsible for disposing of cases, so it makes sense to prioritize the judge's time. All significant events, arraignments, bond hearings, statuses, pleas, trials, and sentencings require judge participation and approval.⁸⁷ Since courts developed around judges as professionals, administrators, and authority figures, the focus and power has naturally led to a judge-based and judge-centered system.

The open question is whether valuing a judge's time over others' time remains necessary in a virtual world. In fact, by reimagining criminal court as a partially online process, the value proposition of time is pushed to the forefront in completely new ways.

B. Online Time

The nature of online courts offers a simple change in practice: establish set times for hearings where all parties can Zoom in at the same time. Like any other scheduled Zoom meeting, a court hearing would be set for a specific time and duration. Other litigants would not be online until their specific set time was scheduled.

This Section examines three insights about how we value "time" that emerges from a move to online criminal hearings. First, the time-value proposition will benefit legal outsiders (defendants, witnesses, and victims) but may worsen for court insiders (lawyers and judges). Second, online hearings will expose the real time pressures that distort fair process and decisionmaking in traditional criminal courts.⁸⁸ Third,

86. The term "time-value proposition" captures how courts value (or devalue) the time of participants in the criminal justice system. Many systems (including the legal system) do not consciously value the time of irregular contributors, tending to focus on the professional class of regular users of a system.

87. See Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 *FORDHAM URB. L.J.* 1157, 1173 (2004) ("The crowded calendar, which makes it seem impossible to do much more than set another date to appear in most of the cases, functions as the key management tool in the modern lower criminal court.").

88. See, e.g., L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 *YALE L.J.* 862, 875 (2017) (reviewing NICOLE VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* (2016)):

Judges, prosecutors, and defense lawyers in many criminal courtrooms across the country are laboring under the weight of far too many cases to give each one individualized treatment. This has systemic consequences as these professionals struggle to quickly sort defendants into those who are deserving of time and attention and those who are not, a process I describe as systemic triage;

id. at 877 ("For instance, public defenders in Rhode Island each handle more than 1,700 cases per year, on average. The equivalent figures for individual public defenders in Dallas and Arizona are 1,200 and 1,000 respectively.").

online hearings will redirect power away from the judge and to the parties who will shape the scheduling. Each of these changes shifts control (and thus power) away from judges to other players in the criminal justice system.

1. Valuing Time

As detailed in the previous section, one significant cost of a judge-centered scheduling system is wasted time for defendants, victims, and witnesses who are called into court for discrete events but required to travel and wait before having their moment in court.⁸⁹ Online systems would reduce the wasted time, allowing those nonprofessional participants the ability to connect only at the moments they are needed.⁹⁰ Essentially, at a “time certain” the parties would connect to the online court.⁹¹ Travel, waiting, and other wasted time would be reduced.⁹² A five-minute hearing might be a five-minute hearing, not a half-day trip to court. Downstream benefits for participants would be more time to prepare for the moments before court, rather than waiting in court.⁹³

The clearest beneficiary of this change is the defendant (and similarly situated witnesses).⁹⁴ Instead of rushing to court in the

89. Turner, *supra* note 44, at 213 (“Witnesses and victims who live far from the courthouse or who have demanding work or child care schedules are also more likely to take part via video.”).

90. Birmingham, *supra* note 17 (“Travel time to and from court takes time and money. Witnesses that might not have been otherwise available to spend all day away from work waiting on their turn to testify are now virtually available on a moment’s notice.”).

91. Dodson et al., *supra* note 15, at 14 (“Reliance on videoconference technology for these kinds of tasks benefits judges, lawyers, and clients. One benefit is the ease of scheduling. Especially for proceedings involving many participants. . . . A related benefit is the ease of participation and the alleviation of the stress, hassle, burden, and cost of travel.”).

92. Tashea, *supra* note 8 (“[P]roponents of the shift online argue that remote hearings alleviate pressures created by the pandemic, are more efficient than traditional hearings, and provide increased access to the court—especially in rural areas.”).

93. Turner, *supra* note 44, at 212 (“Video proceedings are often adopted because of their perceived efficiency and cost savings. While the switch to remote proceedings requires an upfront investment in technology, over time, the turn to virtual hearings is said to save time and resources for the parties involved.”).

94. BENNINGER ET AL., *supra* note 15, at 63 (“In-person court involves inefficiencies and access to justice issues, most especially for out-of-custody defendants but also for victims. While in-custody defendants are transported (or not) by the state, out-of-custody defendants ‘entirely’ bear the ‘economic burden’ of ‘com[ing] to the courtroom’ for in-person proceedings.”); Dodson et al., *supra* note 15, at 15 n.19 (“For all litigants, transportation, parking, child care and job responsibilities are not a barrier to participation in an online proceeding.” (citing *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., and the Internet, H. Comm. on the Judiciary*, 116th Cong. 4 (2020) (statement of Hon. Bridget M. McCormack, Mich. Sup. Ct. C.J.))); Turner, *supra* note 44, at 213:

Remote proceedings are also said to expedite the processing of cases by giving judges greater flexibility and predictability in scheduling criminal proceedings, and moving

morning only to wait until the judge is ready,⁹⁵ now a defendant can join at the appointed time and resolve the matter during a set time.⁹⁶ Arraignments and statuses can be completed in a few minutes.⁹⁷ Even something as significant as a guilty plea can be done rather quickly. In fact, while likely not always available, defendants might be able to schedule their court hearings at more convenient times (perhaps during a break during work).⁹⁸

cases along more speedily. Online proceedings are also said to reduce delays that might arise when a participant is “subject to traffic delays, or subject to physical limitations that make travel difficult.” On the whole, the expectation is that when videoconferencing is used, “more cases can be handled in the available amount of time with the available court personnel.”

95. BENNINGER ET AL., *supra* note 15, at 65 (“Defendants’ burden is more than transportation costs; lost wages and childcare costs also factor in. As one Milwaukee defense attorney noted, ‘people could wait in court, you know, all afternoon, finally get their case called at 4:30, and they’re taking off the whole day of work for that.’”).

96. *See* Turner, *supra* note 44, at 212 (“Video proceedings can save costs for counties by eliminating the need to transport detained defendants from the jail to the courtroom. In rural areas, they also save time and money for defendants and defense attorneys who often have to travel long distances to get to a courthouse.”).

97. Jessica Roth, *The Constitution Is on Pause in America’s Courtrooms*, ATLANTIC (Oct. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/constitution-pause-americas-courtrooms/616633/> [https://perma.cc/A89Q-YEMC] (“Although some courts are still holding them in person, first appearances and bail hearings are now happening remotely in much of the country, with many defendants appearing by videoconference while in custody.”); Turner, *supra* note 44, at 223 (“In March 2020, Congress passed the CARES Act, which authorized the use of videoconferencing for a range of federal criminal proceedings, including arraignments, detention hearings, preliminary hearings, misdemeanor plea hearings and, upon a specific finding by the chief judge for the district, felony plea and sentencing hearings.”); Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, Pub. L. No. 116-136, § 15002 (2020); Dodson et al., *supra* note 15, at 15:

Nonevidentiary hearings, particularly on matters that are not case-determinative, are particularly good candidates for routine remote argument. More crucial or complex oral hearings, such as on a motion to dismiss, a *Daubert* motion, or a motion for summary judgment, may benefit from in-person advocacy, engagement, and sparring. Though a videoconference option can still be a good alternative with consent of the parties or when lawyers are scattered geographically.

98. In her survey of Texas lawyers, Professor Turner received a comment from a defense lawyer that addressed this concern:

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

Turner, *supra* note 44, at 241. In addition, Professor Turner received a comment from a judge that expressed this sentiment:

With video technology, I can hold a short hearing to address the violations, with the defendant attending on his lunch hour so we do not disrupting his job status or cause him to miss work. Though not all cases can be ‘resolved’ this way, many can, and keeping a defendant employed while on release significantly increases the likelihood that defendant remains in compliance during release.

Both defense lawyers and prosecutors will also see time savings.⁹⁹ While lawyers may have several online hearings scheduled during a day, the ability to organize and structure individual hearings within a set time saves time and effort.¹⁰⁰ That saved time might allow defense lawyers to better educate their clients about the online process, the legal issues, and the consequences of the case. While one would hope lawyers would always do this work, the logistics of running from court to court, client to client, or judge to judge interfere with the ability to have nonrushed conversations about the legal matters in court.¹⁰¹ Online courts would (on the margins) reduce some of the rushed nature of the legal advice given to clients during the daily crush of cases.

That said, lawyers would gain extra responsibilities in an online system that would significantly undermine time savings. Lawyers would become responsible for contacting their clients or witnesses ahead of time, coordinating online access, troubleshooting technology, and sometimes providing technology to make the hearing happen.¹⁰²

Id. at 242.

99. BENNINGER ET AL., *supra* note 15, at 61–63 (quoting lawyers and court professionals who claimed to benefit from reduced travel); Turner, *supra* note 44, at 239 (“Survey participants broadly concurred that online proceedings save time or resources for prosecutors, the court, defense attorneys, and defendants. Roughly 85% of all three groups stated that online proceedings save time or resources for prosecutors sometimes, often, or always.”).

100. Dodson et al., *supra* note 15, at 14:

The days of multiple lawyers traveling cross-country—or even cross-town—for a conference with the judge are probably over. Almost every discovery or status conference before the court—even before judges who demand meaningful conversations with the lawyers about the issues, like what discovery may be needed, what motions are likely, and what schedule should be tailored to the case—can be held more easily via videoconference, with very little sacrifice in the quality of the exchange.

In Professor Turner’s survey of Texas lawyers, “One respondent explained that online proceedings help ‘ensure that attorneys can be present in a timely manner in multiple courts whereas before attorneys have had to ask for continuances for such issues, often leading to none of the matters getting resolved.’” Turner, *supra* note 44, at 242.

101. John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1292 n.226 (1994) (quoting Dennis R. Eckart & Robert V. Stover, *Public Defenders and Routinized Criminal Defense Processes*, 51 J. URB. L. 665, 675 (1974)):

At the misdemeanor level, the public defender normally sees his clients for the first time shortly before arraignment. After talking to the client, the public defender will confer with a deputy district attorney about a possible disposition. He usually does not get a chance to relay the offered deal to the defendant until a few minutes before the case is called. As one attorney expressed the problem, “I generally tell my clients, ‘Here’s what the D.A. will give you. You’ve got about three minutes to think about it and make a decision.’” In some cases the public defender is so rushed for time that he does not communicate the proposed deal to the client until the two of them are approaching the bench after the case has been called. Thus, the defendant must decide whether to take the deal or plead not guilty in the time span of a few minutes or less.

102. This additional burden has real time costs for lawyers who have additional responsibilities traditionally handled by the courtroom clerks. See BENNINGER ET AL., *supra* note 15, at 70–71.

These new tasks might involve additional travel to provide technology for virtual access, additional time to coordinate online meetings, and likely challenges with clients who lack access to reliable internet, cellular, or basic communications technologies.¹⁰³ In a world where everyone had access to reliable technology, the coordination task might be easy, but in a world of largely socioeconomically disadvantaged clients, this task may prove quite difficult.¹⁰⁴

While judges would lose a measure of certainty over their daily docket, the end result may not look too different to ordinary practice. At least in theory, a series of cases will be set for disposition every day, and a judge would have to follow the set schedule with appropriate modification to resolve those matters. Like a private practice lawyer, the day might be broken up into seven-to-fifteen-minute increments, but the traditional practice of managing cases, people, and issues will remain virtually the same.

Or so it would work in theory. In practice, of course, justice rarely settles itself into well-defined set time limits. In fact, as anyone who has practiced in a busy court knows, flexibility to deal with mental health issues, language barriers, emotional distress, legal puzzles, and a host of variables delays even the most perfect of schedules. Part of the virtue of a judge-controlled schedule is that a judge can adapt to a mental health evaluation or interpreter challenge in a way that does not rush the process. This flexibility would face real challenges with a more fixed time table. Judges may, in fact, have their time wasted more than other parties. The technical challenge of waiting for lawyers, defendants, witnesses, and others to get themselves coordinated to all join the online proceeding is real. This time pressure will cause its own problems as hearings scheduled for a time certain will go over time, creating a cascading overflow of delays and backups. Such delays could undercut any time efficiency savings, as lawyers and defendants will still end up waiting for their moment in court.

Online courts change the value proposition of time, but with the exception of defendants (who certainly benefit) and judges (who certainly lose some control), it is not clear whether the change will be normatively good or bad for other repeat players in the criminal legal system. Patterns of time management will refocus attention to the challenges outside of the courthouse, but who will benefit from the change and how is not clear.

103. See *infra* Part V.B.

104. See *infra* Part V.C; see also BENNINGER ET AL., *supra* note 15, at 77–79.

2. Exposing Time

Time as a hidden organizational pressure will also become more exposed in an online world. In addition, one of the insidious impacts of limited time—informational imbalances which serve to privilege professionals and devalue participants—may be lessened.

First, the move to online courts will reveal that courts do not budget enough time to give each case the attention it deserves. Even in the perfectly imagined system where every defendant gets a set scheduled amount of time for their legal hearing, the time value of justice¹⁰⁵ will be seen as inadequate. There are simply too many cases in the system to allot a sufficient amount of time for each case.¹⁰⁶ To fit all the cases into a daily docket, clerks will have to assign very short time segments. A defendant will get the equivalent of a five-minute status hearing, which might be enough to cover the legal matters but will feel largely inadequate for a system of human justice.¹⁰⁷ While this may be the exact same amount of time that a defendant would have gotten before a sitting judge, the process of coming to court, watching court, and waiting for their turn in court makes it feel like a more fulsome process (even if it is not). The defendant is at least watching justice get done, even if not for their case. But a five-minute status hearing on Zoom will appear (and be) too limited and lacking in substance.¹⁰⁸

105. By the time value of justice, I mean the rough equivalence that more time about a criminal matter will result in a more just outcome with the parties and the judge being able to reflect and consider all of the legal, human, and contextual issues arising from a criminal matter. Cases rushed through an adjudication process may fail to adequately consider the specific issues arising in a case and thus may risk a less just outcome.

106. Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-cases-loads.html> [<https://perma.cc/E6XM-ZEM4>] (“In Colorado, Missouri and Rhode Island, they found that the typical public defender had two to three times the workload they should in order to provide an adequate defense. In Louisiana, defenders have almost five times the workload they should.”); Primus, *supra* note 79, at 1771 (“The American Bar Association guidelines recommend that no defender handle more than 150 felonies or 400 misdemeanor cases in a year, but a 2009 report found that defenders in New Orleans Parish were handling the equivalent of 19,000 misdemeanor cases per attorney annually.”).

107. BENNINGER ET AL., *supra* note 15, at 68 (quoting a judge on the remarkable efficiency of Zoom hearings, “[W]e can get so much done. I mean, you know, I had Zoom hearings this morning. Zoom hearings, and you can crank out 20 hearings in an hour, you know, on Zoom.”).

108. Oppel & Patel, *supra* note 106 (“Public defenders are having to carry ‘outlandish, excessive workloads’ that make ‘a mockery of the constitutional right to counsel,’ the American Bar Association said.”); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1053–54 (2006) (“[D]efendants can often spend weeks or months without meeting their attorneys and defense lawyers sometimes have just minutes to prepare for court hearings or even trials.”).

Again, the time management puzzle is something that happens every day in traditional court but is masked by the general lack of any preset scheduling involved. The creation of a formal online scheduling system will reveal this lack of time to adequately address all cases. Observers will be confronted with the time-value proposition of a given case or argument. And because of the large number of cases in the system, that time value will be quite small.¹⁰⁹ In other words, online courts will expose the lack of time allotted to cases in overcrowded and underresourced court systems.

Second, in parallel fashion, the pressures that arise from lawyers not having enough time to explain legal matters to clients will be somewhat mitigated. In far too many cases, rushed explanations in court hallways force decisions based on imperfect information or deliberation. Defendants must defer to the professionalism and power of insiders because they are inside the system without access to external sources of information or any way to stop the process from proceeding. “The judge is waiting” is a coercive threat that keeps dockets on track and defendants in the dark. And, while the judge might be waiting on Zoom, the practical pressures of another inconvenient trip to the courthouse, people waiting their turn in a courtroom, and the vocal pressure of clerks demanding decisions are absent. In this way, the online nature of the proceedings may offer some extra time to make decisions.¹¹⁰

3. Controlling Time

Finally, a shift to online scheduling could have the unintended effect of shifting power away from judges to the lawyers. This change would manifest itself both practically and symbolically.

As a practical matter, a defendant’s interaction with the online legal system would be mediated by their lawyer. The lawyer would schedule the hearing (in consultation with clerks) for their clients. Either lawyers will schedule a hearing for a “time certain” in advance, or lawyers will virtually attend a morning call with the defendant only needing to be virtually present during the time of the actual hearing. In either case, the defendant (and lawyer) need not wait in the

109. Robert C. Boruchowitz, Malia N. Brink & Maureen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts*, NAT’L ASS’N OF CRIM. DEF. LAWS., 30–35 (Apr. 2009), https://www.opensocietyfoundations.org/uploads/9b7f8e10-a118-4c23-8e12-1abcc46404ae/misdemeanor_20090401.pdf [<http://perma.cc/P3H2-CEK6>] (detailing the time limitations for many overworked public defenders in misdemeanor courts).

110. Time, however, does not automatically equate with comprehension. The digital nature of online communication may interfere with comprehension. See BENNINGER ET AL., *supra* note 15, at 84–85 (discussing some of the comprehension issues that arose with early uses of virtual courts).

courtroom for the lengthy process of sorting through the different matters ready for the judge's attention. Instead, the lawyer would arrange with the defendant when to Zoom into court. This means that the lawyer, not a court representative, will be the primary connecting point to the system. The lawyer's role will grow with additional coordination and planning responsibilities.

The symbolism of the lawyer (and not the judge) being central involves more than scheduling. Again, the online nature of the proceedings flattens the role of the judge. Judges appear to play an equal role as the defense counsel and prosecutor who all connect to the meeting at the same time through the same system. In addition, because all the defendant observes is his or her case and not the assembled cases, the role of the judge as arbiter of all justice in a courtroom is lessened. Judges are no longer commanding every detail of the system's pace or process. Instead, their control appears limited to the particular case.

4. Conclusion

The shift in scheduling may have a real effect in pushing the center of court control outside of court. The time-value proposition for legal outsiders (like defendants) will be valued more. The power to control scheduling will shift from judges to the lawyers (and defendants). In addition, the pressure to get through the docket with everyone waiting on a particular defendant will ease because the ability (via technology) to reconnect at a later time will be simplified. And all of the largely structural and hidden time pressures will be more visible, exposing the rushed nature of justice and lack of time taken for each case. While courts still will be central to docket coordination, they may not be perceived as such by defendants and other parties. The mediation of a small screen, other players, other priorities, and the lack of physical presence of a judge controlling the day may all conspire to reduce the perceived centrality of the courts.

IV. DECENTERING ACCOUNTABILITY

Criminal courts are forums for accountability and are designed to hold individuals to account for violations of society's laws. Yet in actual practice, the operation of most courtrooms remains free from formal accountability measures about the quality of the court process itself. Judges run courtrooms in markedly different ways, with few

qualitative metrics.¹¹¹ While professional standards govern the practice of lawyers, in truth, internal attorney discipline is rare.¹¹² And almost no one judges the judges.¹¹³ Comparative data on optimal outcomes, efficient processes, and societal impacts is almost nonexistent.¹¹⁴ To this day, we have little data on who makes a good defense lawyer, who is a fair prosecutor, or who makes a wise judge.

One reason for this accountability gap is that most of the quality controls are internal to the legal system. In defaulting to allowing courts and lawyers to police themselves, we have largely acquiesced to court-centered accountability mechanisms.¹¹⁵

Online courts offer a measure of transparency and external accountability never before available. New video technology

111. See generally Young & Singer, *supra* note 76, at 58 (discussing the difficulty of measuring trial court efficiency and effectiveness).

112. See, e.g., Standing Comm. on Pro. Discipline, *2018 Survey on Lawyer Discipline Systems*, AM. BAR ASS'N (2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2018sold-results.pdf [<https://perma.cc/55HN-JWZ7>]; Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PRO. 209, 212 (2011); Leslie C. Levin, *When Lawyers Screw Up*, 32 GEO. J. LEGAL ETHICS 109, 112 (2019) (describing malpractice lawsuit rates).

113. Of course, many state judges are elected and dependent on the approval of the electorate. Appointed judges also have retention decisions where judges are evaluated. Despite these accountability mechanisms, neither has proven to be a strong form of accountability. See, e.g., Rebecca D. Gill, *Beyond High Hopes and Unmet Expectations: Judicial Selection Reforms in the States*, JUDICATURE, July/Aug. 2012, at 278, 279 (2013) (detailing the systems of elected judges).

114. One exception is Measures for Justice, a nonprofit organization that has been collecting data about the criminal justice system. MEASURES FOR JUSTICE, <https://measuresforjustice.org/> (last visited July 9, 2022) [<https://perma.cc/T732-LJCB>]. Another is the data collected by the National Center for State Courts. *NSCS Offers Steps for Court Reengineering Success*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/services-and-experts/court-reengineering> (last visited June 13, 2022). The Federal Court system also has strong data collection systems through the Administrative Office of the Courts. *Administrative Office of the Courts*, U.S. CTS., <https://www.uscourts.gov/topics/administrative-office-us-courts> (last visited June 13, 2022) [<https://perma.cc/94F5-ZC57>].

115. Numerous scholars have addressed the failures of accountability in U.S. criminal courts around ineffective assistance of counsel, ethical lapses of counsel, trial error, faulty forensic science, and other causes of wrongful conviction. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (discussing the failure of courts to police ineffective assistance of counsel in capital cases); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1178 (2003) (discussing the ethical failures in providing competent counsel); David Rudovsky, *Gideon and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 LAW & INEQ. 371, 377 (2014) (describing the crisis of indigent defense and adequate counsel); Ellen Yaroshfsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 278 (2004) (discussing the lack of prosecutorial accountability); Justin Murray, *Policing Procedural Error in the Lower Criminal Courts*, 89 FORDHAM L. REV. 1411, 1431 (2021) (discussing the lack of accountability for error in trial courts); Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051, 1059 (2013) (describing the lack of accountability for faulty forensic science); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 406 (2006) (discussing causes of wrongful conviction).

democratizes who can observe and new digital technology captures what is happening in court. Both provide external mechanisms for outsiders to see inside the justice system. One can now watch, study, and analyze court proceedings in new ways and at scale. Cameras combined with digital analytics and public availability change who can watch and who can critique and offer new opportunities for community accountability. The shift opens court proceedings to outsiders and offers the potential to strengthen traditional insider modes of accountability. It is another example of how power shifts from the courts to the community.

A. Traditional Accountability

Traditionally, judges have been at the center of courtroom accountability. Judges keep order, threaten contempt, rule on motions, sustain objections, enforce deadlines, conduct sentencings, and generally hold the lawyers, witnesses, and jurors to account. Judicial power and accountability go hand in hand, with significant deference given to individual judges to make hard judgment calls. The decisions are specific to facts of the case and very much centered around court rulings and judicial determinations.

Holding the criminal legal system to account has been more difficult. Court systems have looked to process and not outcomes to evaluate what “works.”¹¹⁶ Since achieving a “just” outcome is such a contingent and contextual determination, courts have focused on the process of achieving an outcome rather than the outcome itself.¹¹⁷ In a traditional case, as long as a defendant has adequate counsel, is advised of constitutional rights, receives fair notice and process, and is sentenced within statutory limits, the system has “worked.”¹¹⁸ The

116. Bob Lambrechts, *May It Please the Algorithm*, J. KAN. BAR ASS'N, Jan. 2020, at 36, 40 (“A basic premise of our legal system is that if the trial is procedurally fair, the outcome of the process is presumed to be correct. If people consider that they have been treated fairly, they are more likely to accept a decision and outcome.”).

117. Young & Singer, *supra* note 76, at 73 (“[L]itigants and the general public look to the trappings of procedural fairness in judicial decisionmaking as cues to the legitimacy of the final outcome. One reason for this focus is instrumental: ‘fair procedures . . . are perceived to produce fair outcomes.’”).

118. Yvonne Byrd & Judith Gibson, *Restorative Justice: ADR in Criminal Cases*, VT. BAR J., Spring 2010, at 49:

In our traditional criminal justice system, outcomes are deemed *just* if: (1) set rules regarding legal process, applicable laws, and precedent are followed in determining the outcome; (2) the punishment imposed is perceived to be as serious as the crime and delivers a deterrence message to the offender and others; and (3) there are orders for offenders to pay for material damages;

Young & Singer, *supra* note 76, at 80:

defendant might disagree substantively, procedurally, and emotionally (and might objectively be correct in that normative critique). The structural imbalance of power, resource constraints, and other extralegal pressures undermine a fair result in many cases, even if it takes place through a fair process.

Perhaps worse, the professionals involved in the process largely escape scrutiny. Competent lawyering is judged by the profession, a form of self-policing that leaves a lot to be desired.¹¹⁹ Standards of optimal performance remain largely unenforceable by judges or Bar Counsel.¹²⁰ Even egregious derelictions of duty have escaped trial court oversight, needing to be corrected on appeal (if then).¹²¹ With rare exception, there is no formal external community oversight mechanism over the internal performance of criminal courts. While court-watching programs are being developed to add some measure of community-enforced accountability,¹²² it is striking how little accountability or even empirical data we collect about the daily operation of the players in the criminal justice system.

What makes a process fair—or more accurately, perceived as fair? Social science has identified four characteristics of legal procedures that primarily contribute to judgments about their fairness: (1) opportunities for participation and voice; (2) the neutrality of the forum; (3) the trustworthiness of legal authorities; and (4) the degree to which people are treated with dignity and respect.

119. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1208 (2003) (“State supreme courts have satisfied their own and lawyers’ interests by delegating virtually all of their regulatory authority under the vaunted system of ‘lawyer self-regulation.’”); see *id.* at 1208–09:

[F]or obvious reasons, regulation of attorney discipline is a low priority for bar associations. The ABA itself, among others, has determined that attorney discipline is, and always has been, a neglected area. Attorney discipline is underfunded. There are backlogs for investigations. In most states, the process is secret. Up to ninety percent of the complaints are summarily dismissed, partially because many complaints are over fee disputes which generally are not covered by the rules.

120. David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, CHAMPION, February 2009, at 14, 15. The author identified:

many significant criticisms of the system of ensuring effective assistance through claims for IAC. These include general criticism of the *Strickland* standard as too low, too rarely enforced, too easily circumvented through going directly to the prejudice prong, and largely unenforceable because IAC claims generally cannot be heard on direct appeal.

Id.

121. Despite occurring during trial, most IAC claims are only litigated after trial. This is so even though a judge is present to witness the alleged ineffectiveness. See, e.g., Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 433 (2011) (discussing the empirical reality of ineffective assistance of counsel claims as viewed through the federal habeas process).

122. Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1618 (2017) (“Courtwatching groups help define the proceedings through their presence, reminding courtroom players that each individual case is connected to larger aggregate harms to families and neighborhoods.”).

Even in trial, the information about lawyer performance is limited. Because we rely on court reporters and paper transcripts and not video evidence for appeal, a whole host of other data points are never collected.¹²³ And because practice has been localized without the ability to personally observe trials in any structured or centralized manner, national data about lawyer performance in trial has rarely been studied. In short, evidentiary and constitutional rules are held to account, but not the lawyers who litigate them.

A similar systemic accountability gap exists around judges. While court systems collect top level quantitative data about the number of open cases, trials, and resolved matters, there is little emphasis on qualitative data about judges.¹²⁴ To frame the question of criminal court accountability in real terms, ask why the following questions remain unanswered in almost all courthouses in America. If arrested, would you get a fair criminal trial? How would you know? Who is a fair trial judge? How do you know? Where would you look to find out an answer about good judges or systems? Any answers would not involve empirical data, or comparative data, or even agreed upon benchmarks to study—a rather startling omission since judges have been deciding criminal law for centuries.

In sum, we have a system that centers accountability on individual judges and internal mechanisms but offers few insights about best practices and good outcomes. In addition, it is an inside-out form of accountability, reliant on judges and insiders to police process and evaluate results.

B. Online Accountability

Video acts as an external “witness” to the proceedings in court. The camera is recording, and because all digital video communication platforms enable a form of surveillance, this camera can be used to deconstruct court in new ways.

At a very basic level, the content of the video proceeding is recorded and can be digitally searched and studied in ways unavailable in live court proceedings.¹²⁵ With powerful computer analytics and

123. For example, the demeanor, voice, charisma, physical expressions, and other nonverbal advocacy techniques are not observed in a written record.

124. Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7, 9 (2008) (discussing the purpose and design of judicial performance evaluation systems); Marin K. Levy, Kate Stith & Jose A. Cabranes, *The Costs of Judging Judges by the Numbers*, 28 YALE L. & POL'Y REV. 313, 319 (2010) (critiquing judicial management metrics).

125. This assumes that both the digital video is recorded and recorded in a medium capable of digital searching. But if saved and if captured in a digital system that allows for coding,

artificial intelligence, words, actions, or events can be identified, sorted, and viewed.¹²⁶ So, for example, if you wanted to find all examples of an “objection” in court, video analytics could find every instance. Or, if you wanted to find every example of a particular police officer’s testimony, you could find it with a search and compare the different versions in similar cases.¹²⁷

At a second level, metadata about the video—time, location, parties, duration—can be collected and studied.¹²⁸ This information might provide clues about the length of an attorney-client counseling call, a criminal plea, or a sentencing hearing. These types of digital analytics capabilities will open up new forms of accountability and possibly improve some longstanding issues with the transparency of the criminal justice system.¹²⁹ This Section examines three forms of digital accountability now available because of the medium of online video.

categorizing, and analysis, the searching is relatively simple. See *What Is Real-Time Video Content Analysis?*, BRIEFCAM, <https://www.briefcam.com/resources/blog/what-is-real-time-video-content-analysis/> (last visited June 13, 2022) [<https://perma.cc/AS29-CLHP>].

126. This type of technology is being used in law enforcement now but could be easily adapted to court proceedings. John S. Hollywood, Michael J. D. Vermeer, Dulani Woods, Sean E. Goodison & Brian A. Jackson, *Using Video Analytics and Sensor Fusion in Law Enforcement*, RAND CORP., 4 (2018), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2600/RR2619/RAND_RR2619.pdf [<https://perma.cc/69ZE-8XYC>]. It also has some use in identifying human rights violations through video streams. Jay D. Aronson, *Computer Vision and Machine Learning for Human Rights Video Analysis: Case Studies, Possibilities, Concerns, and Limitations*, 43 LAW & SOC. INQUIRY 1188, 1195 (2018) (describing how machine learning works with video and can be applied to human rights violations).

127. Litigants in Washington D.C., for example, mined the search warrants of D.C. detectives to find patterns of inconstant statements under oath. See Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2076 (2016) (describing how patterns of police warrants using the exact same language were discovered in the District of Columbia). In addition, databases of police officers are beginning to be created. Primarily, these databases focus on police misconduct and allegations of perjury. See generally Cynthia H. Conti-Cook, *Defending the Public: Police Accountability in the Courtroom*, 46 SETON HALL L. REV. 1063, 1084 (2016) (describing the creation of a “Cop Accountability Project”); Jason Tashea, *Databases Create Access to Police Misconduct Cases and Offer A Handy Tool for Defense Lawyers*, ABA J., Feb. 2016, at 17, 18; Leon Neyfakh, *The Bad Cop Database*, SLATE (Feb. 13, 2015, 11:43 AM), http://www.slate.com/articles/crime/news_and_politics/crime/2015/02/bad_cops_a_new_database_collects_information_about_cop_misconduct_and_provides.html [<https://perma.cc/2SH6-FSJV>].

128. Eli Burriss & Thomas Kurth, *Videotape Depositions and Related Technology Tools: Important Considerations Regarding the Taping and Presentation of Video Deposition Testimony and Exhibits*, 28 ADVOC. (TEX.) 51, 51 (2004) (“Digital video cameras encode metadata onto the digital cassette along with the video stream. Metadata is essentially a digital fingerprint that records information such as the time and date of the recording and the camera’s settings.”).

129. Maggie Burreson, James Carlos McFall & Brian Oates, *COVID-19 and Cameras in the Courtroom: Could the Pandemic and Emerging Technologies Usher in a New Era of Judicial Transparency?*, JD SUPRA (Apr. 21, 2020), <https://www.jdsupra.com/legalnews/covid-19-and-cameras-in-the-courtroom-67237/> [<https://perma.cc/2XBJ-M9EK>].

1. Direct External Accountability

The public nature of streaming video will allow external groups to monitor court practice. In recent years, local court-watching projects have added an element of community accountability to the criminal justice system.¹³⁰ Volunteer court watchers go to court, observe the daily practice of justice, and comment about it in informal or formal reports.¹³¹ Observers have been able to expose systemic inequities in the legal system, from bail decisions to probation revocation. By bearing witness and reporting on court practices, a new awareness of the systemic problems in courts has been created.¹³² Amplified by social media, these reports have acted as an informal check that someone is watching court proceedings and making sure that problematic practices regarding bail requests, pretrial detention, and sentencings are being held to account.¹³³

The move to online public proceedings allows for a similar direct external accountability project, but at scale. Instead of requiring human beings to go to a courtroom and watch in person, now volunteers can monitor several courtrooms at once from the comfort of home. Crowdsourcing court watching would be a technologically simple and perhaps socially positive endeavor. There is both an accountability element and a public education angle. Egregious or amazing courtroom moments could be amplified on social media, creating another layer of

130. Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1617–18 (2017):

Courtwatching groups affiliated with larger social movements, for example, gather volunteers to document everyday proceedings in local courts—bond hearings, arraignments, plea bargains—and report to the public the results of their observations. These community groups become self-appointed watchdogs who can present the results of their observations in their own words, on their own terms, and independent of official accounts of policies and trends.

131. Rebecca Goldstein, *The Politics of Decarceration*, 129 YALE L.J. 446, 468 (2019) (reviewing RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019)):

In Boston, the nonprofit advocacy organization CourtWatch MA is observing Suffolk County courtrooms to make sure that charges are in fact not being filed for the fifteen minor offenses new District Attorney Rachael Rollins announced her office would decline to prosecute, and Rollins reported being pleased with their efforts at accountability.

132. Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 269 (2019) (“Some community groups participate in efforts at courtwatching, not to support an individual defendant but rather to voice opposition to larger prosecutorial policies and practices, or to collect information so as to hold prosecutors accountable.”).

133. Courtwatching groups like CourtWatchNYC have partnered with influencers on social media, and have also partnered with public defenders to draw attention to the daily problems in criminal court. See @CourtWatchNYC, TWITTER, <https://twitter.com/courtwatchnyc?lang=en> (last visited July 10, 2022) [<https://perma.cc/56C3-N54P>]; ZEALOUS, <https://zealo.us/action/zealous> (last visited July 10, 2022) [<https://perma.cc/Z5C4-P6WQ>].

accountability.¹³⁴ Plus, more citizens will be engaged in the daily workings of the court system. The same justifications that support developing court-watching projects can be applied nationally to online courts, but with much less cost or effort involved.

In a similar vein, academic researchers would be able to observe the criminal process in new ways.¹³⁵ Either through a social-science lens or legal lens, suddenly the actual practice of criminal court would be studied in a more comprehensive manner. The barriers of a localized and fragmented court system which impede personal observation and evaluation would evaporate. In addition, the digitization of video would allow new types of pattern-matching studies to be designed. Researchers might be able to uncover insights about what works in the existing system, compare those practices across jurisdictions, and quantify the practices and outcomes in completely new ways.

2. Direct Internal Accountability

At a less direct level, video of court proceedings encourages accountability. This is especially true for criminal trials but can apply throughout the criminal legal process. For example, video provides the ability to evaluate judicial determinations.¹³⁶ Appellate courts reviewing trials will be able to see more clearly the impact of the legally erroneous decision based on viewing the error in the context of the entire trial.¹³⁷ Similarly, once appellate judges can view the video transcript, there is less reason for extreme deference granted to trial courts.¹³⁸

134. For example, a lawyer's misfortune with a cat image filter in a virtual court hearing resulted in his assuring the court, "Your honor, I am not a cat" and becoming a viral internet sensation. Bloomberg Quicktake, *'I'm Not a Cat:' Filter Turns Texas Attorney Into a Cat During Zoom Hearing*, YOUTUBE (Feb. 10, 2021), <https://www.youtube.com/watch?v=s-frHneo95k> [<https://perma.cc/MMP8-93WJ>].

135. A few law professors have had students observe Zoom trials and report back on their observations. See Elizabeth Thornburg, *Observing Online Courts: Lessons from the Pandemic*, 54 FAM. L.Q. 181 (2021). See also Turner, *supra* note 56, at 232 (collaborating with students to observe virtual court plea processes).

136. 36 C.J.S. *Federal Courts* § 615 (2022) ("[A]n appellate court must give due regard to the opportunity of the trial court to judge the credibility of the witnesses, and thus, particularly strong deference should be granted to findings based on live testimony in light of the fact finder's unique ability to assess the witness."); see, e.g., Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 238 (2009) (discussing standards of review); Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 699 (2015) (describing the abuse of discretion or plain error review for evidentiary errors).

137. See, e.g., *Deemer v. Finger*, 817 S.W.2d 435, 437 (Ky. 1990) ("We have adopted videotaping technology as a means to further the ends of justice. In the present case, it has revealed a serious trial error which, absent the innovation, might have gone undetected.").

138. Mary E. Adkins, *The Unblinking Eye Turns to Appellate Law: Cameras in Trial Courtrooms and Their Effect on Appellate Law*, 15 J. TECH. L. & POL'Y 65, 73 (2010):

But even if appellate courts did not want the burden of re-litigating trial court decisions, other forms of external accountability previously ignored could be observed. Ineffective assistance of counsel (“IAC”) claims can be difficult to evaluate because the target lawyer has little incentive to make a record against themselves. In addition, many times omissions (failure to object, failure to argue) are the grounds for an IAC claim.¹³⁹ The necessarily silent record makes determining ineffectiveness quite hard on appeal because the prejudice is in what was not said or done in court.¹⁴⁰ A video record would give voice to the silence of omissions and their harms.

Beyond appellate reversals, court systems could use the videos for internal quality control of lawyers. Judges tend to be rather hands-off with internal discipline because the proof of a professional lapse is hard to articulate without clear benchmarks for good lawyering.¹⁴¹ In addition, judges cannot intervene to create a record of omissions or mistakes. But, again with video, the gaps of competence could be shown with relative ease. For example, instances of a lawyer being unprepared for court could be collected and studied. Less punitively, these videos could help with training and improving the quality of lawyers in a courthouse. Such qualitative quality checks would be relatively simple to accomplish with video analytics technology that can track individual lawyers, types of cases, or particular words.¹⁴² In sum, once court proceedings are digitally recorded and encoded, all sorts of patterns can be analyzed and studied. Equally important, the source of this new accountability mechanism lies outside of direct judicial control. Video becomes the outside observer. Digital analysis becomes the accountability monitor.

The reason typically given for the greater deference for a trial court’s findings of fact is that the fact-finder—jury or trial judge—was there and had an opportunity superior to that of the appellate court to observe the evidence. Appellate court review historically has been restricted to the “cold record” or the “bare record,” as the word-for-word typed transcript is often called. But video recording can produce a readily reviewable record which provides far more information than a transcript does.

139. *Commonwealth v. Grant*, 813 A.2d 726, 736 (Pa. 2002) (“Many of these [ineffective assistance of counsel] claims are based on omissions, which, by their very nature, do not appear on the record and thus, require further fact-finding, extra-record investigation and where necessary, an evidentiary hearing.”), *clarified on denial of reargument*, 821 A.2d 1246 (Pa. 2003), *modified by Commonwealth v. Bethea*, 828 A.2d 1066 (Pa. 2003).

140. In fact, courts will generally presume that the silent record is insufficient evidence for appeal. *See* Gregory G. Sarno, Annotation, *Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel’s Representation of Criminal Client*, 2 A.L.R.4th 27 § 4.5 (“Silent record does not establish either prong of the *Strickland* test for ineffective assistance of counsel unless there cannot simply exist satisfactory explanation.”).

141. *See supra* note 120.

142. *See supra* notes 125–127.

3. Indirect Digital Accountability

The final accountability piece will be more quantitative than qualitative, focusing less on substantive outcomes and more on monitoring how the system works. One consequence of shifting to an online, digital communication system is that everything gets recorded and collected. Independent of the direct substantive content, the digital system will be recording the number of communications, connections, duration, location, and other metadata.¹⁴³ This indirect and usually ignored dataset provides an external, objective accounting of time, focus, and priorities.

For judges, this data will provide a more granular understanding of the nature of their routines, including a temporal and quantitative analysis of their responsibilities.¹⁴⁴ As more scheduling goes online, this information might be helpful for finding average times to set pleas, sentencing, and status hearings. For lawyers, the communication data might show the time they spend with various clients, in hearings, or waiting for hearings. While the content of attorney-client meetings will not be recorded by a court's online system, the noncontent data will be available to lawyers to allow them to track billable hours.

Whether desirable or not, the tracking of digital communication allows for greater visibility of patterns, workload, and access barriers. Connected hours will become observable minutes online, and everything will have a corresponding data trail. Quantifiable data will provide an external check on who is working and also offer new ways to visualize what works in criminal courts. Over time, this data can be used to study resource gaps in the criminal legal system.

4. Conclusion

All three of these accountability methods—external community monitoring, internal monitoring, and metadata monitoring—share two commonalities: (1) they are only available because of new digital video analytics; and (2) they shift the source of accountability away from the

143. This inherent surveillance capacity is true for all digital platforms like Zoom, because they rely on digital technologies that can be saved, searched, and monitored with relative ease. Mansoor Iqbal, *Zoom Revenue and Usage Statistics (2022)*, BUSINESS OF APPS, <https://www.businessofapps.com/data/zoom-statistics/> (last updated June 30, 2022) [https://perma.cc/257R-K6H6].

144. King & Wright, *supra* note 75, at 327 (“The technology to track and report the daily progress of a criminal case leaves trial judges exposed: court administrators can now hold individual trial judges accountable for each tiny variation in docket speed and related administrative cost.”).

trial judge to an external observer. Each presents an outside source of information—video, AI search capabilities, communications data, metadata, etc.—to increase oversight. While trial judges will always remain a factor in determining fair process and ensuring adequate lawyering, these new forms of accountability will provide an additional, decentered check on criminal courts.

V. DECENTERING EQUALITY

The fourth insight of this Article is that virtual courts will reveal the façade of equal justice by highlighting the stark disparity of how the carceral system treats people of different economic means, social power, race, and education.¹⁴⁵ In many ways, the unequal nature of online access is a more accurate reflection of the unequal power structures that shape criminal justice outcomes. By studying equality outside of the courthouse, the real economic, social, and racial inequalities that shape criminal courts are made more visible.¹⁴⁶

A. *The Physical Façade*

A physical courthouse masks underlying societal inequality with procedural regularity. In court, the legal process appears more or less the same for everyone. Everyone comes to the same room. Everyone faces the same judges. Everyone follows the same script. This legal process papers over the societal realities outside that shape outcomes. Everyone has a right to a lawyer, although some can afford the best, most attentive counsel, and some receive overworked, underfunded

145. Numerous scholars have critiqued the inequality in the criminal legal system in a range of books and law review articles. See ANGELA J. DAVIS, *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* (2017); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); see also Clair & Woog, *supra* note 73, at 7 (critiquing criminal courts from an abolitionist frame); Nicole Gonzalez Van Cleve & Lauren Mayes, *Criminal Justice Through “Colorblind” Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice*, 40 *LAW & SOC. INQUIRY* 406, 409 (2015) (using critical race theory to critique the criminal justice system); Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 *U. PA. L. REV.* 1161, 1237 (2019) (discussing inequality in the right to counsel); Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 *U. RICH. L. REV.* 1093, 1095 (2017) (discussing inequality in immigration and criminal law reform); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2100 (2017) (describing inequality in policing and relationships with the criminal justice system); Jasmine E. Harris, *Reckoning with Race and Disability*, 130 *YALE L.J.F.* 916, 919 (2021) (discussing inequality and disability).

146. See generally Kaaryn Gustafson, *The Criminalization of Poverty*, 99 *J. CRIM. L. & CRIMINOLOGY* 643, 716 (2009); Eisha Jain, *Arrests as Regulation*, 67 *STAN. L. REV.* 809 (2015).

lawyers.¹⁴⁷ The legal system is color-blind, except that many decisions are influenced by structural racial inequality,¹⁴⁸ involving policing¹⁴⁹ and prosecutorial discretion.¹⁵⁰ Everyone has the ability to post bond for release, but only those with sufficient economic means can buy freedom through money bond.¹⁵¹ Court-funded drug or mental health treatment has limited availability, but if you can pay for it on your own, you can gain access to freedom. Favorable pretrial risk factors like employment, housing, and connections to the community correlate with economic status, but penalize the poor.¹⁵² Disproportionate minority contact with policing in poor communities increases risk scores and decreases the chance of pretrial release. Even what we consider a “crime” is shaped by structural racial and economic inequalities.¹⁵³ So, when we say,

147. For many, poverty distorts the quality of criminal defense. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2631 (2013) (“Indigent defense is in a state of crisis. Defender offices are chronically underfunded, resulting in crushing caseloads. Most offices do not have caseload limits, and those that do regularly surpass them.”); Alissa Pollitz Worden, Andrew Lucas Blaize Davies & Elizabeth K. Brown, *A Patchwork of Policies: Justice, Due Process and Public Defense Across American States*, 74 ALB. L. REV. 1423 (2011); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2180 (2013); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1036 (2006).

148. Robert D. Crutchfield, April Fernandes & Jorge Martinez, *Racial and Ethnic Disparity and Criminal Justice: How Much Is Too Much?*, 100 J. CRIM. L. & CRIMINOLOGY 903, 928 (2010) (examining studies that confirm “that racial and ethnic disparities exist in both the American juvenile and adult criminal justice systems”). See generally Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2248 (2014); Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2258 (2013).

149. See Paul D. Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1457–62 (2016).

150. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 17 (1998).

151. External socioeconomic realities control case outcomes, as issues of poverty, addiction, mental health, trauma, and other drivers of criminal cases result in different outcomes based on the resources available to defendants. See EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019); RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019); FORMAN, *supra* note 145; BUTLER, *supra* note 145.

152. Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota’s Prison and Jail Populations?*, 38 CRIME & JUST. 201, 263 (2009):

Poverty and lack of opportunity are associated with higher crime rates; crime leads to arrest, a criminal record, and usually a jail or prison sentence; past crimes lengthen those sentences; offenders released from prison or jail confront family and neighborhood dysfunction, increased risks of unemployment, and other crime-producing disadvantages; this makes them likelier to commit new crimes, and the cycle repeats itself.

153. Alec Karakatsanis, *Why Crime Isn’t the Question and Police Aren’t the Answer*, CURRENT AFFS. (Aug. 10, 2020), <https://www.currentaffairs.org/2020/08/why-crime-isnt-the-question-and-police-arent-the-answer> [<https://perma.cc/EWE6-J2E9>] (“The concept of ‘crime’ is constructed by people who have power. Throughout history, powerful people have defined ‘crime’ in ways that benefit wealthy people and white people.”); see also KARAKATSANIS, *supra* note 2.

“everyone is equal before the law,” we mean it’s true only if you ignore what happens outside of the courthouse.¹⁵⁴

Online criminal courts and virtual technology reveal the equality façade. First, at a very basic level, the reliance on communications technology undermines the utility of online courts because certain defendants will lack basic access to communication devices.¹⁵⁵ As a secondary matter, the shift to online courts will provide a window into the structural inequalities that can be papered over in traditional court. Both of these insights will be discussed in turn.

B. Online Digital Divide

One of the obvious ways digital courts reveal structural inequality is that they require a costly technological infrastructure to work. The shift to online courts necessitates a reliance on computers, Wi-Fi, cell phones, printers, and technological know-how. As with many things involving technology, money provides access to better equipment and connections. Law firms will likely start advertising their technological sophistication (for those who can pay for it). Competition will arise not just for the top lawyers, but also the top technology.

The problem, of course, is that many indigent defendants do not have access to such technology.¹⁵⁶ In fact, many poor defendants lack reliable computers, stable internet access, or the experts to help optimize their use.¹⁵⁷ Some defendants do not even have homes or stable

154. By almost any measure, the criminal justice system remains riven with inequality. *See, e.g.,* Gonzalez Van Cleve & Mayes, *supra* note 145, at 407 (“Currently, the criminal justice system is the most oppressive tool that creates racial inequality in America.”); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 5 (1999) (“[O]ur criminal justice system affirmatively depends on inequality.”).

155. BENNINGER ET AL., *supra* note 15, at 31 (“[D]ata indicates that survey respondents believe that both in-custody and out-of-custody defendants lack consistent access to the technology and private spaces conducive to virtual criminal proceedings.”).

156. Cahn & Giddings, *supra* note 14, at 3 (“Many litigants and defendants lack the hardware and / or internet connectivity to participate.”); Amrita Khalid, *America’s Digital Divide Is Even More Urgent During the Pandemic*, QUARTZ (Apr. 9, 2020), <https://qz.com/1836040/americas-digital-divide-is-more-urgent-during-a-pandemic/> [<https://perma.cc/T84J-UQVP>].

157. Dodson et al., *supra* note 15, at 16 (“The digital divide is real. Many pro se parties and prisoners do not have a hardware device or appropriate [remote-technology] software.”); Harrison, *supra* note 15 (“Uneven internet access across Maine presents a barrier for some jurors and witnesses to participate in court remotely, and others think that something is lost when a lawyer and defendant have to build trust remotely rather than in person.”); *see also* BENNINGER ET AL., *supra* note 15, at 31 (“50.7% of attorneys reported that out-of-custody defendants have access to the internet all or most of the time; 67.3% of attorneys reported that out-of-custody defendants have access to smartphones all or most of the time; 35.3% of attorneys reported that out-of-custody defendants have access to a tablet or computer all or most of the time.”).

places to connect to court.¹⁵⁸ Others will have language barriers, education barriers, or financial barriers in using the technology. For older defendants, the technology may not be familiar.¹⁵⁹ For juvenile defendants, the technology may not be affordable. For those suffering from untreated mental health issues, the technology may be threatening or disempowering. At a basic level, some defendants will just not be able to connect to court, and many more will be penalized for having inadequate or less effective means of communication.¹⁶⁰

In addition, addiction, mental health, and general distrust of technology or courts may undercut a personal connection to a video screen. Because so many individuals in the criminal justice system suffer from a combination of addiction, mental health issues, abuse, and/or trauma, the challenge to trust an unfamiliar, impersonal system may be too great. Without the personal connection or support of a physically present lawyer, there will not be a willingness to engage with the system. Similarly, without onsite technological support, there may be so many technical problems to make the entire process a series of delays and frustrations. As anyone who has worked with Zoom-challenged relatives can attest,¹⁶¹ online communication can be baffling and distancing for many not used to the technology.¹⁶²

One response to this challenge might be to provide digital access points to defendants at places other than their courthouse. Courts could even provide digital devices (tablets, phones, etc.) to defendants as a part of their release conditions in the community. Another response might come from defenders who—with the appropriate funding—could outfit their offices to improve online court hearings. Establishing video rooms with high-speed Wi-Fi, good lighting, and the appropriate professional technical assistance could counterbalance some of the

158. BENNINGER ET AL., *supra* note 15, at 31 (“[D]ata indicates that survey respondents believe that both in-custody and out-of-custody defendants lack consistent access to the technology and private spaces conducive to virtual criminal proceedings.”).

159. Susskind, *supra* note 14 (“[T]here have been clear difficulties, for instance, for elderly as well as young parties, for those requiring translation, and for court users with poor internet connection.”).

160. See Andrew Perrin & Sara Atske, *7% of Americans Don’t Use the Internet. Who Are They?*, PEW RSCH. CTR. (Apr. 2, 2021), <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-don-t-use-the-internet-who-are-they/> [<https://perma.cc/74FV-ELUK>].

161. Not naming names, but they are probably related to you.

162. Cahn & Giddings, *supra* note 14, at 9:

Perhaps the most obvious area of concern in moving court hearings and trials online is the digital divide, which perpetuates unfairness in access to proceedings or timely case resolutions due to disparities in tech ownership or familiarity. A low-quality internet connection or outdated hardware can result in transmission delays, degraded sound and image quality, and loss of connectivity, making a litigant look less truthful and persuasive.

inherent inequality in existing online systems. This may occur anyway, but in an effort to respond to inequality, it may be required.

Even with appropriate financial investment in the communications capacity of indigent defendants, it is easy to see how a shift to online courts will negatively affect equality. Defense lawyers are already overburdened without additional technological responsibilities.¹⁶³ Additional burdens to not only be a good lawyer, but a competent IT professional may be too much to bear. The divide will grow, risking the fairness of the court system.

This digital divide will reveal the economic inequality that has always existed in legal services—it will now just be more visible.¹⁶⁴ Low-bandwidth connections will reflect the reduced bandwidth of legal service providers. Spotty connections will symbolize the lack of human connections between lawyer and client. While not to make too much of metaphors, the effects of financial limitations may be more clearly reflected in legal technology than human lawyers. In sum, the digital divide will reveal the legal divide that largely remains unacknowledged in courtrooms.¹⁶⁵

163. Roth, *supra* note 97:

Meanwhile, defense lawyers' ability to investigate their cases has been significantly undermined—not only by restrictions on in-person meetings with their clients, but because of travel restrictions, witnesses' health concerns, and the amount of time many have had to devote to trying to get their clients out of jail, where they risk infection with COVID-19. Some also lack access to the basic equipment needed to work remotely.

164. Tashea, *supra* note 8:

[T]hose that argue virtual hearings will make a more equitable justice system don't acknowledge the digital divide in our country. Eighty-two percent of defendants facing felony charges in state courts have a public defender or appointed attorney, according to a Bureau of Justice Statistics report from 2000, the most recent year for which there is detailed data. At the same time, households making less than \$30,000 a year, the very population that would need a public defender, has less access to the technology and high-speed internet required to attend a virtual courtroom. In 2019, nearly half of these low-income Americans lacked home broadband internet access or a computer. About one-in-three don't have a smartphone. Further, about 42 million Americans, regardless of class, live beyond the reach of broadband internet.

165. Recognition of the digital divide that hinders people without technological knowledge or economic means from accessing legal systems has been growing during the COVID-19 pandemic. See, e.g., Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1892 (2021) (recognizing the digital divide in virtual courts); Pamela R. Metzger & Gregory J. Guggenmos, *COVID-19 and the Ruralization of U.S. Criminal Court Systems*, U. CHI. L. REV. ONLINE (Nov. 16, 2020), <https://lawreviewblog.uchicago.edu/2020/11/16/covid-metzger/> [<https://perma.cc/55Z9-C65W>] (discussing the specific problems in rural systems); Orna Rabinovich-Einy & Ethan Katsh, *The New New Courts*, 67 AM. U. L. REV. 165, 207 (2017) (recognizing the pre-pandemic digital inequality in legal systems).

C. The Digital Reveal

The digital divide is about more than technology; it is also about what gets revealed. Virtual courts will shift the lens outside of the courtroom. In fact, both the digital divide (who has access to technology) and the digital reveal (what inequities are exposed) shift the focus away from the courthouse to all the things that shape judicial outcomes before you get to court.

One concrete change will involve the judge being required to see the circumstances of a defendant's life in more direct ways. If you step back to think about it, the view a judge sees from the bench is rather circumscribed by the court-centered nature of the process. In sentencings, probation revocation hearings, or even status updates, a defendant's life is summarized through a series of mediated and somewhat artificial proxy arguments. Life-changing liberty determinations are made on a limited record filtered through what is brought into court by insiders.

For example, in traditional sentencing practice, lawyers formally speak on behalf of their clients in court.¹⁶⁶ On occasion, character witnesses or letters from character witnesses might buttress a written and oral request for leniency.¹⁶⁷ Almost always, the defendant speaks on his or her behalf.¹⁶⁸ Reports by the probation department and recommendations by the prosecutor complete the formal process.¹⁶⁹ But everything happens in court. All the information is brought to the courtroom for the judge to decide. This makes sense, of course, in a world where judges are geographically bound to the courtroom and limited to paper records and oral advocacy, but makes less sense in a virtual world.

166. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1464–65 (2005) (“Defendants are entitled to address the court at sentencing. However, as with most legal proceedings, the lawyers do most of the talking.”).

167. Todd Duncan, *Sentencing*, CHAMPION, Mar. 2009, at 47, 47 (describing the use of character letters in federal sentencing).

168. Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2644 (2007) (“Another persistent rationale for allocution—and for sentencing hearings in general—is individualization or humanization of the defendant.”).

169. D. Brock Hornby, *Speaking in Sentences*, 14 GREEN BAG 2D 147, 148–49 (2011):

[T]he judge opens the proceedings, ensuring that the defendant and counsel have read and discussed the presentence report; the prosecutor presents the government's sentencing recommendation and reasons; defense counsel presents the defendant's sentencing recommendation and reasons; the defendant's family and friends (if any are present) speak; victims (if any are present) speak; the defendant speaks; the lawyers have a final opportunity to comment on what has been said; the judge consults with the probation officer who wrote the presentence report; finally, the judge pronounces sentence and describes appeal rights.

Freed from the constraints of a courthouse or the time pressures of a set hearing, why not use the existing video technology to investigate the defendant's life? Clearly, the technology exists to give a more colorful and contextual picture of someone's life, via images, interviews, and other information.¹⁷⁰ Some of this information will be incidental, as in the personal information that can be gleaned by the video background.¹⁷¹ But, some of it can be curated by defense counsel seeking to humanize the social and economic realities of their client's lived experience. Either way, the practice shifts the focus to the world outside the courthouse doors. This might include more information about the community, the crime, the victim, and a whole host of other factors that likely should be at the forefront of a judge's decision about sentencing.¹⁷² In addition, family members from different geographical areas could participate through virtual means.¹⁷³ All of these external sources of real information could also be used for pretrial release, status hearings, and probation hearings.

Of course, real privacy concerns exist. A shift to online proceedings also invades a defendant's privacy.¹⁷⁴ If the video connection takes place at a defendant's home, a host of private details may be revealed.¹⁷⁵ Some of these home details may negatively shape a judge's perception of the defendant. Concerns about poverty, cleanliness, and other personal but legally irrelevant details may be revealed in the background. Instead of the professional atmosphere of the courthouse, the intimacy of a home environment will be revealed in a virtual process.¹⁷⁶ Allowing the virtual process to peer into one's home can create issues for defendants, and yet it also allows parties to witness the poverty and challenges faced by so many.

The point is not necessarily that a virtual system would be better than the existing in-court system but that the shift necessarily alters

170. Doug Passon, *Using Moving Pictures to Build the Bridge of Empathy at Sentencing*, CHAMPION, June 2014, at 14, 14–15 (describing the use of sentencing videos).

171. BENNINGER ET AL., *supra* note 15, at 87 (“One judge (in treatment court) believed that ‘it always helps to see people in their own environments. You know, it humanizes them. It gives you a different perspective about who they are.’”). *But see id.* (recognizing that this was only a small minority of respondents).

172. Alan Ellis, *What Federal Judges Want to Know at Sentencing*, FED. LAW., Sept. 2017, at 62, 63 (describing the value of sentencing videos).

173. Birmingham, *supra* note 17 (“Far away friends, family and supporters of loved ones involved in cases – whether the accused or the victim – can now be a part of the process.”).

174. *Cf.* Anisha Reddy, *Covid School Closings Raise Privacy Concerns for Students and Parents*, NBC NEWS (Nov. 18, 2020), <https://www.nbcnews.com/think/opinion/covid-school-closings-raise-privacy-concerns-students-teachers-ncna1247717> [<https://perma.cc/7Z6S-XWV6>].

175. *See id.*

176. *See* Jack Morse, *Zoom Is a Work-from-Home Privacy Disaster Waiting to Happen*, MASHABLE (Mar. 13, 2020), <https://sea.mashable.com/tech/9813/zoom-is-a-work-from-home-privacy-disaster-waiting-to-happen> [<https://perma.cc/M9UK-2DFB>].

the center of attention to the outside world. Lawyers and judges can no longer ignore how the outside reality directly affects in-court decisions. And this “reveal” will not be comfortable. It is one thing to describe a client’s struggle with being homeless, and it is another to show the court the very real challenges via video. Struggles to communicate will be magnified by poverty and technical limitations. Seeing daily poverty and confronting economic inequality might open eyes to the unfair burdens sometimes placed on defendants. Judges routinely add fines and fees to defendants without thinking about the external costs of poverty. Seeing the challenges of poverty firsthand might change those defaults.

The inequality will be completely revealed if courts use in-jail communication systems to facilitate court hearings. There are no good examples where adequate systems have been created to provide optimal communication between courts, jail, and lawyers. Detained defendants reliant on court and jail technology will be adversely affected. The inadequate systems will dehumanize defendants, impair communications, and devalue the process.¹⁷⁷

Complicating the move is the fact that defendants with economic means will do better with this system. Lawyers and clients with better technology will gain in power, control, and influence. The digital divide will widen. The courtroom—as equalizer—will fade in importance, replaced either by high-quality private communications systems or low-quality indigent or jail communication systems.

In sum, the inequalities of life will be witnessed in new ways because the outside unequal reality will be streamed into court. This newly seen unseen should generate debate about the state of inequality that underlies the need for criminal courts in the first place and their appropriate role in addressing these inequalities.

VI. CENTERING TRIAL RIGHTS

The preceding four sections have examined the criminal justice system largely outside the trial context. In a legal system where over ninety percent of criminal cases are the result of pleas,¹⁷⁸ and status hearings and post-sentencing hearings consume most of court resources, this focus makes good sense. In addition, when much of the

177. This dehumanization may happen by virtue of the digital medium being used. See BENNINGER ET AL., *supra* note 15, at 70 (“Respondents described the loss of physical cues, emotional connection, or simply ‘something intangible’ in the transition to virtual interactions. Defense attorneys, too, described lost personal connection when their attorney-client relationships shifted from in-person to virtual.”).

178. See *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

volume of criminal cases involves low-level property, drug, or nonviolent crimes, moving the bureaucratic processing away from the courthouse offers some real benefits.

Trial, however, is a fundamental part of the criminal legal system and must be examined in light of experiments to move cases online. Trial, and the constitutional rights protecting defendants in trial, should be centered in court. Trial rights, unlike court mechanisms of pretrial monitoring and social services, should be a place to push back on attempts to decenter court power. As will be discussed, centering trial process, while at the same time decentering court control mechanisms, will improve both aspects of the criminal legal system.

A. *Traditional Trial Process*

Detailing the traditional rules that govern criminal trials is beyond the scope of this Article, but any such discussion would include federal, state, and local procedural rules, constitutionally-mandated rules of practice, evidence rules, and professional ethical rules.¹⁷⁹ Each set of rules from code, cases, and culture has its own history, entitlement to authority, and remedies for breach.¹⁸⁰ Practicing lawyers are bound by these rules and obligated to know their local variations.¹⁸¹

All of these rules and procedures, however, share the commonality that they were written for in-person criminal courts for physically present lawyers being observed by physically present judges.¹⁸² Any move to online criminal trials must address the fact that decentering power from courts weakens many of the procedural protections designed for in-court proceedings.

179. See generally Paul W. Grimm, Daniel J. Capra & Gregory P. Joseph, *Authenticating Digital Evidence*, 69 BAYLOR L. REV. 1, 2 (2017). See also Daniel R. Tilly, *Adopted Statements in the Digital Age: Hearsay Responses to Social Media “Likes,”* 93 N.D. L. REV. 277, 282 (2018); Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7, 27 (2013).

180. See FED. R. CRIM. P.; FED. R. EVID.; MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2022); see, e.g., Justin Sevier, *The Unintended Consequences of Local Rules*, 21 CORNELL J.L. & PUB. POL'Y 291, 295 (2011).

181. 13 AM. JUR. *Trials* § 465 (2022) (“Almost all states have codified their rules of criminal procedure and penal laws.”); Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54 GA. L. REV. 411, 414 n.1 (2020) (“The codification of federal rules of civil procedure, criminal procedure, and evidence, as well as the parallel codification of state rules of procedure and evidence, have gone far toward developing the legal community’s expectation that our rules of procedure should be codified.”).

182. Spaulding, *supra* note 20, at 315 (“[T]he dominant, indeed controlling, metaphor for the constitutional guarantee of procedural due process is a courtroom trial. That metaphor, with all that it conjures up about the organization of adjudicative space, emerged as viva voce confrontation in jury trials came to define the local practice of justice.”).

B. Online Trial Process

Attempts to adapt existing trial rules and procedures to an online format raise a host of practical, constitutional, and ethical concerns.¹⁸³ Several foundational constitutional protections may (and should) curtail the expansion of online criminal courts. For example, felony defendants are constitutionally entitled to a public jury trial, with rights to confront adverse witnesses in person and compel helpful witnesses, all guided by effective counsel.¹⁸⁴ While each of these rights is waivable,¹⁸⁵ and none absolute, the constitutional guarantees of public trials, juries, confrontation, compulsory process, and effective assistance of counsel are in tension with online proceedings. As will be discussed, physical courts and related procedures play a central role in these trial situations that may not be replaceable by virtual equivalents.

1. Public Trial

The Sixth and First Amendments of the Constitution protect a public trial.¹⁸⁶ Drafted to reject a history of corrupt, unfair, and secret court proceedings, the Sixth Amendment explicitly guarantees a “speedy and public trial.”¹⁸⁷ The First Amendment and the right to report on public happenings also ensure the public nature of the proceedings.¹⁸⁸ The commitment behind both protections is that public justice requires public awareness about how justice is practiced.¹⁸⁹

183. See generally Jordan S. Rubin, *Coronavirus Containment Collides with U.S. Constitutional Rights*, BLOOMBERG L. (Mar. 31, 2020, 4:50 AM), <https://news.bloomberglaw.com/us-law-week/coronavirus-containment-collides-with-u-s-constitutional-rights> [<https://perma.cc/ZD4N-227F>].

184. See U.S. CONST. amend. VI.

185. *Brady v. United States*, 397 U.S. 742, 748 (1970) (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”).

186. *Presley v. Georgia*, 558 U.S. 209, 212 (2010) (discussing the interplay of protections under the First Amendment and Sixth Amendment around public trials).

187. U.S. CONST. amend. VI; *Kleinbart v. United States*, 388 A.2d 878, 881 (D.C. 1978) (“The common law right to a public trial was expressly incorporated in the Constitution because of the ‘Anglo-American distrust for secret trials,’ symbolized by institutions such as the Court of Star Chamber which our ancestors perceived as a menace to liberty. The guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.” (citing *In re Oliver*, 333 U.S. 257, 268–70 (1948))).

188. U.S. CONST. amend. I; *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501 (1984).

189. Stephen E. Smith, *The Right to a Public Trial in the Time of COVID-19*, 77 WASH. & LEE L. REV. ONLINE 1, 6–7 (2020), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1126&context=wluir-online> [<https://perma.cc/N624-9DG7>]; Roth, *supra* note 97:

The Sixth Amendment provides that the trial by an impartial jury to which a criminal defendant is entitled must be “public.” Although this right is primarily for the protection

While not always acknowledged, one of the realities of a public trial is allowing the community to bear witness. The center of power is the courtroom and a move to online courts shifts that court focus. In an online trial, there is no place for the public to attend as there would be in a physical courthouse. The public stage with a citizen audience at the center is lost.¹⁹⁰ If the purpose of bearing witness is active community presence, then online courts do not provide the same check on the system.¹⁹¹ With online courts, there is no way for communities or families to show they care about a case or a defendant because they cannot be physically present. Citizens cannot look the judge in the eye to state a claim of community concern or support. Reporters cannot shed light on the proceedings of trial from the courtroom.

A “public trial,” of course, does not necessarily mean an open physical courtroom.¹⁹² Public could just mean a transparent and accessible court, and from one perspective online trials are far more “public.”¹⁹³ If, for example, the online hearings are posted in a publicly accessible video platform like YouTube (as the State of Texas did in 2020), then the public access to observing court is expanded.¹⁹⁴ Concerned citizens and journalists would still—albeit passively—have access to the substance of the proceedings.¹⁹⁵ This expands potential observation. After all, in the traditional system, interested citizens were limited by physical realities to the number of cases they could watch. With online trials, those same observers could watch a trial (or trials)

of the accused—to discourage misconduct through the disinfectant of outside scrutiny—the public has an independent right of access under the First Amendment.

190. Jamiles Lartey, *The Judge Will See You on Zoom, but the Public Is Mostly Left Out*, MARSHALL PROJECT (Apr. 13, 2020), <https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out> [<https://perma.cc/GN25-YDUK>].

191. Young & Singer, *supra* note 111, at 76–77 (“Open court proceedings also carry important symbolic value: at their best, they are emblematic of fair, swift, and transparent justice. The strengths and weaknesses of a party’s case, the credibility of evidence, the skill of attorneys, and the demeanor of the judge are all on display in the open courtroom.”).

192. In earlier times, the Supreme Court weighed in to allow accommodations to the public trial right. In *Press–Enterprise Co. v. Superior Court of California*, the Court balanced the needs of the public and the court. 464 U.S. at 508–12.

193. Lageson, *supra* note 43 (“Today, you can watch hundreds of livestream court events—many on YouTube—ranging from felony arraignments to traffic ticket hearings to family court proceedings.”).

194. Jake Bleiberg, *Texas Court Holds Jury Trial in Traffic Crime Case over Zoom*, AP NEWS (Aug. 11, 2020), <https://apnews.com/4e9d8013a7aa92f19551328a975e5579> [<https://perma.cc/PF88-YUHB>].

195. See Justin Jouvenal, *Justice by Zoom: Frozen Video, a Cat—and Finally a Verdict*, WASH. POST (Aug. 12, 2020), https://www.washingtonpost.com/local/legal-issues/justice-by-zoom-frozen-video-a-cat--and-finally-a-verdict/2020/08/12/3e073c56-dbd3-11ea-8051-d5f887d73381_story.html [<https://perma.cc/TR4W-XM3T>].

with less effort.¹⁹⁶ From a First Amendment perspective, this reality might open courts up to more, not less, public scrutiny.

But if the public trial right, like other Sixth Amendment provisions, is defendant focused, then the place where trial happens must also protect the defendant.¹⁹⁷ Defendants may feel that their community support has been eroded by the online equivalent that does not center their support. Also, from an originalist perspective, online equivalents are not public from any original understanding. Distant trials, separated from the local communities' ability to participate, do not serve the same check on judicial power as envisioned by the Founders.

This is not to say that a virtual trial could not withstand a Sixth Amendment public trial challenge, but only that online courts move the analytical focus to the technology and screens and away from court itself. Whether ultimately constitutional or not, legal power shifts from the court and the defendant to other places.

2. Juries

The requirement of a criminal jury has been a constitutional principle rooted in both Article III and the Sixth Amendment.¹⁹⁸ The right to serve on a jury was central both to the Woman's Suffrage Movement and the Civil Rights Movement¹⁹⁹ because juries symbolized democratic engagement and the community conscience and have long acted as a check on government overreach.²⁰⁰ While not without criticism, juries have been an integral part of the trial process for serious criminal cases. The question is: Are juries enshrined in the Constitution because we want human beings to physically represent the community in court? Is it the institution, the people, or the process that matters?²⁰¹

196. Smith, *supra* note 189, at 6 (discussing the arguments around public trials during the COVID pandemic).

197. The Supreme Court has acknowledged that the public trial right both protects the defendant and the community. *Press-Enter. Co.*, 478 U.S. at 7 (“The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness.”).

198. See U.S. CONST. art. III, § 2; U.S. CONST. amend. VI.

199. See Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1124–32 (2014) (discussing the history of racial and gender equality in jury service).

200. *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (“Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people.”); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.”).

201. *Compare Shannon v. United States*, 512 U.S. 573, 579 (1994) (“The jury’s function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged.”),

Certainly, the form of the jury has not been sacrosanct. The Founders envisioned a jury of twelve citizens (originally white, male property holders) serving in the role, but as political franchise has grown, juries have diversified and become more democratic.²⁰² Up until quite recently, the Court allowed nonunanimous verdicts.²⁰³ In addition, the Supreme Court has allowed different sizes of juries, blessing juries of only six members.²⁰⁴ What mattered to the Supreme Court was the institutional barrier that the jury provided (no matter the size). As the Court stated in *Williams v. Florida*, in justifying a six-person jury:

The purpose of the jury trial . . . is to prevent oppression by the Government. . . . Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury.²⁰⁵

The question is whether an online jury can play this structural role of “interposition” when it is not physically centered in a courtroom. Clearly, a reviewing court could analogize to the diminution of the number of jurors to create a parallel argument. As long as an institutional check exists, the argument goes, the jury right is protected. But, as with the “public” nature of the jury trial, something significant—perhaps constitutionally significant—is missing with the online equivalent.

A physically present jury offers both practical and symbolic value. First, jurors, as factfinders, might evaluate evidence differently in person.²⁰⁶ The screen gives a visual of only part of the person testifying. Other aspects of body language and body movement are

with *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (“[The right to a jury trial] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”).

202. Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 355 (1996); Barbara Allen Babcock, *A Place in the Palladium: Women’s Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1147–48 (1993).

203. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020):

Wherever we might look to determine what the term “trial by an impartial jury trial” meant at the time of the Sixth Amendment’s adoption—whether it’s the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

204. *Williams v. Florida*, 399 U.S. 78, 100 (1970).

205. *Id.*

206. Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1292 (2020) (“Relying on demeanor in online proceedings is likely to create additional difficulties because evaluating demeanor online is very different from evaluating it in the traditional courtroom.”).

hidden.²⁰⁷ The screen also removes the stage-like pressure and tension of trial. Witnesses and jurors react differently when the show is live as opposed to on screen.²⁰⁸ Also important, online jurors are limited to focusing on one person at a time, whereas in trial, jurors are simultaneously watching the witness, the lawyers, the judge, and the defendant (and even sometimes each other) all at the same time.²⁰⁹ The full picture of the human reaction to evidence is lessened and the structure of observation, evaluation, and scrutiny is distorted.²¹⁰

Second, online jurors, in their role as judges, lose some of the solemnity and ritual of physical court.²¹¹ In traditional court, jurors enter jury service as ordinary citizens but play a more elevated role in trial.²¹² As representatives of the community tasked to play a part in democratic governance, jurors get their cues from the surrounding

207. *Id.* at 1297–99 (describing issues of eye contact, fidgeting, technical delays, and other nonverbal demeanor changes that result from using Zoom or videoconferencing).

208. *Id.* at 1304:

The perception and evaluation of others' demeanor will also be different in virtual court because the phenomenology of virtual environments differs from that of direct, face-to-face experience. Most importantly, the feeling of *co-presence*, the sense of being together with others in the world, is very different. Co-presence does not simply disappear when physical co-location does; indeed, some have argued that online interactions, including online legal proceedings, are capable of producing a psychologically rich sense of co-presence, defined as “the synchronization of mutual attention, emotion, and behavior.” However, Zoom makes it very hard to achieve the kind of co-presence that exists in a physical courtroom;

see also Lisa Bailey Vavonese, Elizabeth Ling, Rosalie Joy & Samantha Kobor, *How Video Changes the Conversation: Social Science Research on Communication over Video and Implications for the Criminal Courtroom*, CTR. FOR CT. INNOVATION, 3–6 (2020), https://www.courtinnovation.org/sites/default/files/media/document/2020/Monograph_RemoteJustice_12032020.pdf [<https://perma.cc/VE2X-K93X>] (discussing tone, eye contact, and other challenges using video means of communication).

209. *See* Poulin, *supra* note 48, at 1121–22 (describing the technical limitations of video on perception of jurors and others).

210. *Cf.* Jessica Roth, *The Constitution Is on Pause in America's Courtrooms*, ATLANTIC (Oct. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/constitution-pause-americas-courtrooms/616633/> [<https://perma.cc/3KQT-LX2U>] (“Does a trial by a jury that is spread throughout the courtroom, rather than sitting together in the customary jury box or jury room, suffice? Most courts are betting that it does and are investing significant resources in converting spaces to that purpose.”).

211. James L. Gibson, Milton Lodge & Benjamin Woodson, *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 LAW & SOC'Y REV. 837, 840 (2014):

When citizens pay attention to judicial proceedings, they are bombarded with a host of specialized judicial symbols, typically beginning with the court building itself (often resembling a temple . . .), and proceeding through special dress for judges (robes), and honorific forms of address and deference (“your honor”), directed at a judge typically sitting on an elevated bench, surrounded by a panoply of buttressing symbols (a gavel, the blind-folded Lady Justice, balancing the scales of justice, etc.).

212. Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 U. COLO. L. REV. 233, 279 (2013) (discussing the elevated role of jurors playing a constitutional role in the criminal justice system).

environment.²¹³ Again, it is not accidental that everyone in the courtroom stands up when the jury enters.²¹⁴ Each aspect of trial is meant to reflect the serious role jurors play. Much of that ritual and physical presence is lost in an online trial. Jurors who would not have to leave their bedrooms or change out of their pajamas are not playing the same role.

Defendants would also be diminished.²¹⁵ The central player in a criminal case is the defendant. From the first moment of jury selection to the final verdict, the defendant is physically present. That presence centers the gravity of the case before the jury. Jurors cannot look away as they are facing the defendant and the lawyers. The defendant—human, vulnerable, and on trial—is central to the weight of judgment.²¹⁶ Structurally, the jury exists to protect the defendant from governmental power, and within an online equivalent, that physical presence is lacking.

Deliberations might also be diminished due to the format of digital communication. As a practical matter, having jurors debate in a virtual jury room may not be too difficult. Twelve-person Zoom meetings are now a common part of everyday life.²¹⁷ Slightly different jury instructions would need to be developed, but such changes are rather minor. The big difference would be the atmosphere. Talk to any sitting jury and it becomes clear that the hours of deliberation while confined in a room together hold a special significance.²¹⁸ The physical

213. *Powers v. Ohio*, 499 U.S. 400, 407 (1991):

Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people . . . for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

214. Nancy S. Marder, *Cyberjuries: A New Role as Online Mock Juries*, 38 U. TOL. L. REV. 239, 264 (2006) (“When the jury enters, all rise including the judge, as a sign of respect for the jury.”); Bandes & Feigensohn, *supra* note 206, at 1315:

Several features of the traditional courtroom tend to make the experience of going to court feel out of the ordinary, even momentous. . . . [C]ourtrooms in courthouses are discrete physical places dedicated to a particular kind of activity. For most litigants and witnesses, going to court takes them outside their daily routines and into a separate environment that, by its distinctive location (as well as its symbolism . . .), signals that they will be engaged in a special, culturally acknowledged kind of activity requiring appropriate behaviors.

215. See Zak Hillman, *Pleading Guilty and Video Teleconference: Is a Defendant Constitutionally “Present” When Pleading Guilty by Video Teleconference*, 7 J. HIGH TECH. L. 41 (2007) (describing the negative effects on virtual court for defendants); Poulin, *supra* note 48, at 1113 (same).

216. See BENNINGER ET AL., *supra* note 15, at 86 (describing the fears of dehumanization that come from virtual courts).

217. See Life in 2020–2022.

218. See ANDREW GUTHRIE FERGUSON, WHY JURY DUTY MATTERS: A CITIZEN’S GUIDE TO CONSTITUTIONAL ACTION (2014) (discussing the history and role of jury deliberations).

space becomes part of a shared bond. When done correctly, the deliberations between jurors can be the most significant part of the experience.²¹⁹ Online—outside the courthouse—the experience of collective deliberation is missing.

Complicating the jury question is whether jury selection can take place online.²²⁰ In addition to the recognition that jury selection has been deemed part of the “public trial” right,²²¹ logistical challenges make virtual jury selection difficult.²²² If jury selection is simply turned into an online equivalent, the lawyers will have a more limited way of assessing potential jurors.²²³ Defendants may also be less able to help with jury selection as they will not necessarily be near their lawyers to assist in decisionmaking.²²⁴

Each of these challenges to the jury system raises alarms. The jury is an institution predicated on human deliberation and interaction.²²⁵ The questions presented about selection, role,

219. A wonderful example of the bond and shared difficulty arising from jury deliberations is captured in D. Graham Burnett’s memoir *A Trial by Jury*. See D. GRAHAM BURNETT, *A TRIAL BY JURY* (2001).

220. Seymour B. Everett, III & Samantha E. Dorey, *A Jury of Your Remote Peers: Is It Working?*, ORANGE CNTY. LAW., Nov. 2020, at 32, 32:

The country’s first remote trial was held on Zoom in northeast Texas on May 18, 2020. During the remote voir dire process, twenty-six potential jurors logged into a secure Zoom call to begin their service. During the call, lawyers from both sides were able to ask the jurors a series of questions, asking all jurors to raise their hands in response. Plaintiff’s attorney Matthew Pearson reported it was a better experience than anticipated and believed the comfort of the potential jurors’ homes made them more open to answering questions honestly.

221. *Presley v. Georgia*, 558 U.S. 209, 212 (2010).

222. *Dodson et al.*, *supra* note 15, at 16 (“Jury trials present special challenges. The logistics and the effectiveness of remote voir dire and jury deliberations seem to be two of the most severe obstacles to the migration of jury trials to remote video.”).

223. *Everett & Dorey*, *supra* note 220, at 32 (“There are also concerns over the efficacy and fairness of remote selection. Remote jury selection could subconsciously impact a juror’s response to questions regarding certain biases. Remote participation distances the juror from the parties, depersonalizing the process and potentially undercutting the jurors’ understanding of the gravity of their decision.”). *But see id.* (“A great advantage of remote jury selection, and even remote trials in general, is the ability to encourage as much diversity within the jury pool as possible.”).

224. Jury selection, of course, need not be limited to traditional processes. New information sources potentially provide lawyers with richer data about possible jurors. Andrew Guthrie Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935, 972 (2016) (discussing how big data information sources can provide additional insights about prospective jurors).

225. Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 471 (1997):

Jury deliberations are the time for jurors to present their individual views on the case. Ideally, they will voice their views candidly, though not in such a domineering or unrestrained manner that they offend or silence others. One of the benefits of group deliberations is that individuals can contribute their viewpoints, thoughts, and recollections to the decision-making process, and thus provide a range of perspectives unavailable to any one individual acting alone. The deliberations are not only a time to air individual views, but also a time to reach consensus.

deliberation, and really all of the functional and symbolic roles of the jury raise the question of whether a virtual jury can ever be constitutionally sufficient.

3. Trial Rights

Trial rights are also directly affected by a shift to online courts. Sixth Amendment protections like the Confrontation Clause and Compulsory Process Clause allow defendants to challenge the government's case in court.²²⁶ In addition, the defendant's right to be present in the courtroom at trial impacts both due process and Sixth Amendment guaranties.²²⁷

The Confrontation Clause provides a trial right to cross-examine the government's witnesses in court.²²⁸ In recent decades, the Supreme Court has reiterated that the central purpose of the protection is to prohibit testimonial statements from being used as evidence without cross-examination.²²⁹ As Justice Antonin Scalia stated in *Crawford v. Washington*, trials without live witnesses, relying on sworn *ex parte* affidavits, are anathema to fair process.²³⁰

As a historical matter, confrontation involved a process of truth finding through the crucible of live, in-person testimony and cross-examination in a courtroom.²³¹ The open question is which part of that live process is critical to the constitutional protection and which part might allow online substitutes. For some justices, what mattered for confrontation was not the cross-examination but the face-to-face

226. This is not a new concern. Issues arising from video and confrontation date back several decades. See Francis A. Weber, *Complying with the Confrontation Clause in the Twenty-First Century: Guidance for Courts and Legislatures Considering Videoconference-Testimony Provisions*, 86 TEMP. L. REV. 149, 155–56 (2013) (discussing case law and confrontation issues surrounding videoconference testimony); Michael D. Roth, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 194–95 (2000) (discussing same and also legislative responses); Ronnie Thaxton, *Injustice Telecast: The Illegal Use of Closed-Circuit Television Arraignments and Bail Bond Hearings in Federal Court*, 79 IOWA L. REV. 175, 181 (1993) (discussing effects of using videoconference testimony on the judicial process).

227. *United States v. Gagnon*, 470 U.S. 522, 526 (1985).

228. *United States v. Owens*, 484 U.S. 554, 557 (1988) (“The Confrontation Clause of the Sixth Amendment gives the accused the right ‘to be confronted with the witnesses against him.’ This has long been read as securing an adequate opportunity to cross-examine adverse witnesses.”).

229. *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (“To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

230. *Id.* at 50 (“The principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”).

231. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (“[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”).

accusation—the requirement of an accuser to look into the face of the defendant and state their claim.²³² “Whatever else it may mean in addition, the defendant’s constitutional right “to be confronted with the witnesses against him” means, always and everywhere, at least what it explicitly says: the *‘right to meet face to face all those who appear and give evidence at trial.’*”²³³ But for other justices, what mattered was the adversarial process that produced reliable evidence and a fair outcome.²³⁴

Online hearings change the nature of face-to-face human confrontation.²³⁵ Screens present both symbolic²³⁶ and practical concerns.²³⁷ From a defendant’s perspective, the accuser is able to avoid looking into the eyes of the accused, therefore, also avoiding the face-to-face emotional moment thought to check false accusations.²³⁸ Mediated

232. *See id.* at 1017 (“[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution.’”).

233. *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) (quoting *Coy*, 487 U.S. at 1016); *see also Coy*, 487 U.S. at 1019–20:

It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’ . . . That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.

234. “Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.” Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.) (rejecting proposed amendment to Federal Rules of Criminal Procedure allowing testimony by two-way video as a replacement to live trial testimony upon certain findings).

235. *Haggard v. State*, 612 S.W.3d 318, 331 (Tex. Crim. App. 2020) (Yeary, J., concurring):

I would only add to this debate that the founders of our country could not have thought that some then-undreamed-of technological advancement, such as testimony by two-way video, could take the place of literal face-to-face confrontation, no matter how faithfully it might mimic the perceived truth-finding advantages of physical presence in the courtroom. . . . Literal, physical, face-to-face confrontation, live in the courtroom, is the procedure the Sixth Amendment mandates—not some other procedure that might be thought by us today to secure the objectives of confrontation at least as efficaciously, if not more so;

see also BENNINGER ET AL., *supra* note 15, at 112 (discussing the undermining of confrontation with virtual systems).

236. *Craig*, 497 U.S. at 847 (“We have also noted the strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused’s presence.”).

237. *See* Jessica Arden Ettinger, David Gerger & Barry J. Pollack, *Ain’t Nothing Like the Real Thing: Will Coronavirus Infect the Confrontation Clause?*, *CHAMPION*, May 2020, at 56, 59 (discussing the increased judicial findings courts have to make regarding testimony through video technology and the objections available to defense counsel).

238. *Harrell v. State*, 709 So. 2d 1364, 1368–69 (Fla. 1998):

At its essence, a trial in 1791, the year the Sixth Amendment was ratified, involved attorneys and parties, witnesses, a jury, and a judge, all of whom physically appeared in a courtroom. The same holds true for a trial today. We are unwilling to develop a per se rule that would allow the vital fabric of physical presence in the trial process to be replaced at any time by an image on a screen. Perhaps the “virtual courtroom” will someday be the norm in the coming millennium; for now, we do not conclude that virtual

by a screen, the accuser can now look away. In addition, the tools of cross-examination are less powerful online. The defendant's opportunity to confront, challenge, counter, and probe a witness's story is made more difficult without physical proximity.²³⁹ The drama of an expectant pause when faced with an inconsistent statement is just less powerful online.²⁴⁰ While similar questions can be asked, the physical nature of confronting a witness with a false statement or impeaching fact loses effect with a virtual medium.²⁴¹ In addition, logistical hurdles of showing impeaching documents, marking them as exhibits, and making sure all of the players are on the same page make the process less dramatic, and more time-consuming.²⁴² The jury is also limited in its ability to watch the witness, the questioner, the judge, and the defendant through a video screen all at the same time.²⁴³ Not only are individual reactions harder to evaluate online, but the body language of the witness is limited to facial features.²⁴⁴ Finally, judges will be unable summarily to hold witnesses in contempt without physical proximity of all parties being in a courtroom.²⁴⁵

Additional problems arise with the Compulsory Process Clause.²⁴⁶ Unlike the Confrontation Clause, which has been the focus of

presence is the equivalent of physical presence for the purposes of the Confrontation Clause.

239. *See* *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006):

The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation. As our sister circuits have recognized, the two are not constitutionally equivalent. . . . The Sixth Amendment's guarantee of the right to confront one's accuser is most certainly compromised when the confrontation occurs through an electronic medium.

240. *See* *Turner*, *supra* note 44, at 218–19:

The parties may have trouble assessing the credibility of witnesses who are testifying remotely, and cross-examination may be less effective on video. While judges and juries are generally not very accurate in evaluating the credibility of witnesses based on demeanor, when the testimony occurs via video, the technology can further mar such assessments.

241. *See* *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999) (“There may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony.”).

242. *State v. Rogerson*, 855 N.W.2d 495, 506 (Iowa 2014) (“Impeachment of a witness with documents or prior statements also becomes more cumbersome and less attention-grabbing when performed through a video connection.”).

243. *Id.* (“[T]echnological limitations could prevent the jury from adequately observing the witness's demeanor.”).

244. *See supra* notes 206–209 (discussing demeanor online).

245. *Rogerson*, 855 N.W.2d at 505–06 (denying the use of remote testimony in part due to contempt concern: “Although a witness can be placed under oath when testifying remotely, the State does not explain how a court in one state could hold a recalcitrant witness in contempt when he or she is located hundreds of miles away in another jurisdiction.”).

246. *See* Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1111–12 (1999) (detailing the history of the Compulsory Process Clause).

many Supreme Court cases, the Compulsory Process Clause has received scant attention.²⁴⁷ The Sixth Amendment provides that a defendant has a constitutional right “to have compulsory process for obtaining witnesses in his favor.”²⁴⁸ At a minimum, that has included the right to call witnesses to trial and obtain evidence favorable for the defense. Traditionally, of course, the witness was a live witness who would come to court. Online courts change the form of testimony. Virtual witnesses may not have the same effect as a physical witness in court. In addition, the court loses the ability to compel process using contempt in a virtual context.²⁴⁹

Another less recognized trial right also creates definitional tension. All defendants have the right to be present throughout their trial.²⁵⁰ Presence is central to a human-centered criminal justice system. It is hard then to imagine courts without this human sensibility in a move to online criminal courts. The loss of a defendant’s physical presence may come at too great a cost.

Whether being virtually present is the same as being physically present raises hard questions of why it matters that defendants participate in their own cases. Some states have held that absent consent or a waiver, video conferences do not qualify as being present.²⁵¹ Harder questions emerge in an era of online communications when you think about the practical reality of what presence means. If presence merely means that the trial cannot go on without the awareness of the defendant (to protect against secret trials or a miscarriage of justice), then having a video feed that allows the defendant to observe trial and communicate with counsel should suffice. If, on the other hand, presence requires the jury or factfinder to see the defendant in the flesh,

247. Thousands of law review articles have addressed issues arising from the Confrontation Clause. Fewer than fifty address the Compulsory Process Clause.

248. U.S. CONST. amend. VI.

249. *State v. Roma*, 357 A.2d 45, 48 (N.J. Super. Ct. Law Div. 1976):

The right to offer testimony would be meaningless without access to compulsory process, and that process encompasses more than the compelling of the physical presence of a witness in the courtroom. . . . It includes recourse to the contempt power of the court to compel a witness to testify. The compulsory production of evidence upon the petition of a defendant is basic to the adversary system of criminal justice and is an integral part of the due process of law guaranteed by the Fourteenth Amendment. Writing of the Sixth Amendment, the Supreme Court has stated that, “In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.”

250. *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (protecting the right to be present “whenever [the defendant’s] presence has a relation, reasonably substantial, to the fulness of opportunity to defend against the charge.” (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934))).

251. *See, e.g., Hillman, supra* note 215; *Ashdown & Menzel, supra* note 54, at 65.

then during many parts of trial, the defendant will be erased.²⁵² Such a risk of erasure cuts in favor of requiring physical presence in a criminal trial.

4. Right to Counsel

The Sixth Amendment right to counsel stretches from the initial appearance until acquittal or the filing of the first direct appeal.²⁵³ The right to counsel protects the defendant at all “critical stages,”²⁵⁴ requires reasonable investigation²⁵⁵ and the protection of the attorney-client privilege,²⁵⁶ and ensures “effective assistance” of counsel.²⁵⁷ It is also the right most endangered by the move to online criminal courts.

The impediments to effective assistance of counsel for online trials involve practical, technological, and human challenges.²⁵⁸ Representing a client involves interpersonal communication, trust, and connection.²⁵⁹ Building trust, learning about the case, investigating

252. BENNINGER ET AL., *supra* note 15, at 88–93 (describing the loss of human connection felt by practitioners in virtual courts). Of course, the weight and impact of human presence in a courtroom is also sometimes more ideal than reality. Justice in many courthouses offers only a thin veneer of real humanity. Mass pleas, rushed hearings, and a lack of time to produce quality, in-depth sentencing allocutions means that the human in the orange jumpsuit might not be anything more than another statistic. While defense lawyers can fight against this dehumanizing process through creative sentencing allocution and community letters of support or a well-prepared client statement, the truth is that the human standing up in court is usually a two-dimensional figure, without real depth. See Thomas, *supra* note 168, at 2666 (detailing the mitigation theory of allocution); Joshua I. Burger-Caplan, *Time of Desperation: An Examination of Criminal Defendants’ Experiences of Allocuting at Sentencing*, 51 COLUM. J.L. & SOC. PROBS. 39, 58–60 (2017) (interviewing incarcerated individuals who went through the allocution process at sentencing and challenging the humanizing theory).

253. See, e.g., *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment); *Massiah v. United States*, 377 U.S. 20 (1964) (postindictment interrogation); *United States v. Wade*, 388 U.S. 218 (1967) (postindictment lineup); *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (felonies); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (potential jail time); *Douglas v. California*, 372 U.S. 353 (1963) (appeal).

254. *Geders v. United States*, 425 U.S. 80, 88–89 (1976).

255. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

256. *Murphy v. State*, 112 S.W.3d 592, 602 (Tex. Crim. App. 2003).

257. *Strickland v. Washington*, 466 U.S. 668, 686–87 (1984).

258. BENNINGER ET AL., *supra* note 15, at 103–06 (describing issues with attorney-client communication and confidentiality).

259. Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL’Y 83, 89 (2003) (“My own view of criminal defense lawyering owes much to Monroe Freedman. I agree with his ‘traditionalist view’ of criminal defense ethics as a lawyering paradigm in which zealous advocacy and the maintenance of client confidence and trust are paramount.” (citing MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS (1990))). Of course, such trust building is not always done well. Marcus T. Boccaccini, Jennifer L. Boothby & Stanley L. Brodsky, *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 LAW & PSYCH. REV. 97, 101 (2002) (“[R]esearch findings showing that defendants maintain low levels of trust in their own counsel demonstrate that many criminal defense attorneys have failed to establish effective working relationships with their clients.”).

facts and mitigating circumstances, offering legal counsel, explaining legal terms, and addressing questions have all traditionally been done in person. The hard issue is when court goes online, where does the lawyer go? Are they in their office, with their client at home, or somewhere else? How does an online system change the way lawyers and clients interact?

As discussed, a significant consideration will be whether the defendant is detained pretrial or not. Conducting online proceedings with a detained client, unable to communicate in the same room or beholden to jail technologies, may well undermine the whole online court project.²⁶⁰ It is difficult to imagine a situation in which lawyers can adequately prepare in jail with the necessary computers, legal books, cell phones, documents, and other materials that usually are kept out of jail. Virtual client communication will not be an adequate substitute, both risking attorney-client secrets on unsecure jail communication systems and creating a barrier to trust and communication.²⁶¹ In addition, any online trial proceedings will disadvantage defendants without assistance in using the technology or the ability to ask questions or receive legal counsel from a lawyer in real time. Simply put, for detained defendants, inadequate access to counsel may result in structurally ineffective assistance of counsel without a huge rethinking of the technological barriers interfering with lawyering inside a jail setting.²⁶²

A different circumstance arises with released clients. Lawyers will have to figure out a way to counsel clients before and during online hearings. This may mean that lawyers travel to where their clients are—essentially bringing the courtroom to the client. In addition, because so many individuals in the criminal justice system are poor, lawyers may need to develop mobile communication studios to help fill the technological gap. It should not be that access to technology determines liberty, but it may end up being the reality. In any case, the

260. Cahn & Giddings, *supra* note 14, at 11 (“When an attorney and their client are physically separated during a hearing, the defendant cannot discretely communicate with or pass notes to counsel, which represents an infringement of the Sixth Amendment right to counsel.”).

261. BENNINGER ET AL., *supra* note 15, at 105–06 (describing the challenge of client confidences with virtual courts); *see also* Cahn & Giddings, *supra* note 14, at 12:

Communicating via remote means from the beginning greatly reduces the quality of the attorney-client relationship, as in-person interactions foster trust and build the relationship necessary for effective assistance. Attorneys cannot fully gauge a client’s mental and emotional state remotely, and neither party can use nonverbal cues to communicate during a proceeding—both of which are necessary to effective communication.

262. *Strickland*, 466 U.S. at 692 (“In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel’s assistance.”).

move to online courts will put the defense lawyer in a more central position. The communications from all parties to the client will need to go through the lawyer. Lawyers will become a walking courthouse, bringing the case from the courthouse to the community. Again, as with other aspects of virtual proceedings discussed earlier, the technological change necessitates a power change of who controls the process.

In sum, unlike the discussion of the ministerial and supervisory aspects of the criminal legal system, trial rights may not be amenable to virtual equivalents. While this section recognizes that some online equivalents could pass constitutional muster, the main takeaway is that virtual trial rights are lesser than traditional, in-person trial practices. Trial rights as both constitutional principles and practical human protections should remain centered (literally and doctrinally) in court.

CONCLUSION: DECENTERING COURT POWER

This Article has focused on how virtual criminal hearings post-pandemic might reshape court power, and the consequences of shifting that power and attention away from judges. Physically moving away from the courthouse decreases the centrality of a judge-based carceral system. Reorganizing court scheduling reduces the centrality of the judge as organizer. Developing external monitoring technologies recenters accountably mechanisms away from internal court systems. A move to online courts thus presents an opportunity to decenter and disrupt judicial power.²⁶³ At the same time, the rules of trial should not be so easily shifted online. As discussed, the constitutional principles supporting criminal trials—while not fixed—likely will be difficult to adapt to online equivalents.

The end result is a criminal legal system that may step back from trying to solve social problems through a centralized court system and perhaps even ask hard questions about why we are asking courts to solve social problems in the first place. Court-centered solutionism makes less sense when the courthouse and the judge no longer play the same central role in the process. Community-based solutions appear more appealing when the work of criminal justice is happening outside of court. As communities look to reshape government and police power in other ways, the shift to online courts might offer a way to literally and metaphorically redirect power away from the courthouse and into the community. At a minimum, reexamining criminal courts through

263. See Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 107 (2020) (discussing the defund the police movement).

the prism of virtual experimentation allows society to ask deep questions about our reliance on criminal judges to solve issues arising from poverty, structural inequality, and social ills.