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TRANSFORMATION OF THE AMERICAN LEGAL SYSTEM:
PERMANENT MEASURES FROM COVID-19

*John B. Taschner**

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ABSTRACT

The COVID-19 pandemic upended virtually every aspect of everyday life, from grocery stores to judicial procedures. The American judicial process is a unique adversarial system that guarantees the right to confront, often before a live jury. Yet, the necessities of social distancing and protecting public health means that these once unshakeable tenets of the United States justice system have been forced to undergo watershed transformation throughout the pandemic. The word transformation is carefully chosen, as certain measures are no longer temporary. Rather, a fundamental shift in the formerly concrete facets of judicial procedure has occurred – almost certainly never to be fully reversed. In the article, I describe the potential benefits of the unprecedented shift, while comparing both the original design and social perceptions of the American court system and judicial procedure. While great potential presents for virtual hearings and trials to continue to provide justice throughout this chaotic period, there are many serious nuances to the untested digital shift that must be acknowledged and accounted for in creating new and permanent change.

INTRODUCTION

There has never been a place where rights are protected as much as they are in America. If rights are violated and the legal system begins to churn with the addition of a court case, you will enter what is most likely one of the largest buildings in sight. After passing through the security lines, feelings of awe and intimidation by the solemnity and intensity of the building's atmosphere will settle. You will never be able to forget the way the cage clinks as the metal bars slide into place or the sight of orange jump-suited inmates shuffling into the room in a line. This is the American justice system. Or, what was. The United States' system of democracy and judicial processes is one of the most remarkable on the planet. Nowhere else do citizens have the right to trial, the right to confront accusers, and the right to receive justice the way they do in America.¹ Watching the inner workings of the long-standing and extraordinary system of American law up close shows that it is not like the movies, which show the highlight reel consisting of the few minutes of glorious triumph by the lawyer.

The real functions of a courthouse and legal proceedings are nothing like that which is shown in *A Few Good Men*.² One of the most iconic scenes in cinematic history takes place in a courtroom exchange between Tom Cruise

¹ U.S. CONST. amend. VI.

² *A FEW GOOD MEN* (Columbia Pictures 1992).

and Academy Award-winning actor, Jack Nicholson. Cruise plays Lieutenant Daniel Kaffee, a naval prosecutor who faces a uniformed Nicholson in a cross examination in the midst of a murder trial. In the scene, a bitter Nicholson asks Cruise rhetorically “You want answers?”, to which he responds, “I think I’m entitled.” Nicholson asks again, “You want answers?” and a furious Cruise emphatically pounds his fist into the air and shouts, “I want the truth.” The next line by Nicholson’s character, Colonel Nathan Jessup, has gone down as one of the most famous lines from any film: “You can’t handle the truth.”³ While this may have made for excellent filmmaking, this scene has created serious and problematic misconceptions about what the United States judicial process is truly like.

Courthouse security, jury selection, opening arguments, reading of depositions, and more are all overlooked as not being film-worthy, but are still vital components of the traditional American legal system.⁴ People have fought in wars to protect this system that has prided itself on equality and fairness for centuries, but it is now facing tremendous change in light of COVID-19. One of the most unique characteristics of the United States’ judicial system is that the laws that govern our society are constantly changing.⁵ Thus, the legal system in one time period can look drastically different than another. Nonetheless, the current circumstances resulting from the coronavirus pandemic have created an avalanche of changes that were completely unprecedented. In January and February of 2020, interim steps were being discussed.⁶ Now, we recognize this is a major catastrophe in human history that will undermine the bedrock of American jurisprudence.

The live courthouse proceedings that have been in place since America’s beginning in the 18th century now carry severe risk to public health and thus cannot be held in the same manner in which they were before. At the beginning of the pandemic in March, it was relatively unproblematic to close the courthouses and delay judicial proceedings because the shifts were presumed to be temporary.⁷ However, as infection and death rates continued to climb even after the initial plateau, it became abundantly clear that navigating

³ *Id.*

⁴ *Criminal Trial Procedures: An Overview*, NOLO, <https://www.nolo.com/legal-encyclopedia/criminal-trial-procedures-overview-29509.html> (last visited Jan. 10, 2021).

⁵ See, e.g., Elizabeth Boone & Erin Jane Illman, *2020 Brings Times of Change: Key Privacy Law Updates This Year*, JDSUPRA (Nov. 11, 2020), <https://www.jdsupra.com/legalnews/2020-brings-times-of-change-key-privacy-73099/>.

⁶ *Listings of WHO’s response to COVID-19*, WORLD HEALTH ORG. (June 29, 2020), <https://www.who.int/news/item/29-06-2020-covidtimeline>.

⁷ See Cheryl Miller, *Closures and Continuity: California’s Courthouses Face Coronavirus Threat*, THE RECORDER (Mar. 13, 2020), <https://www.law.com/therecorder/2020/03/13/closures-and-continuity-californias-courthouses-face-coronavirus-threat/?slreturn=20210219182936>.

through coronavirus was going to be a marathon, not a sprint.⁸ This, in turn, created serious questions regarding the centuries of established legal precedent based on constitutional rights because of the urgent temporal need to replace live trials and proceedings with virtual options. Months later, these shifts are beginning to appear permanent and the country is fighting to establish and evolve with a radical new legal ecosystem.

What was once an immovable, stoic, and untouchable signifier of the great American values on justice and equality is no more. Live trials may be written into the Constitution, but the coronavirus, which has already taken hundreds of thousands of lives, has shown that any precedent or document is alterable for the sake of public health.⁹ We may not necessarily desire change, but we must embrace it because there is no clear end in sight for the virus.¹⁰ Virtual trials were first experimented with in early 2020, but have been highly controversial as a long-term replacement.¹¹ Because of how heavily the American population has been influenced by media portrayals of trials, a virtual option does not seem feasible. However, the true reason for skepticism towards virtual trials should not be grounded in false media narratives. Still, due to the potentially fatal risk to public health that reopening courthouses poses without a vaccine, returning to the previous system is not feasible either. Virtual trials are inadequate replacements for live proceedings because of the sensory, psychological, constitutional, and privacy differences between the two.¹² Through careful examination of key legislation, such as the Sixth Amendment and the Speedy Trial Act of 1974, I argue that the United States' judicial system has been forever altered by the coronavirus and that we must collectively work to create a hybrid system of both live and virtual proceedings in order to maintain the standard of justice as well as evolve with the financial and time efficiencies provided by technology.

A. Background of the American Judicial Process

The pandemic required two necessary adaptations of jury trials to meet the needs of the criminal court system necessary: live trials that are compliant

⁸ See *Video, Audio, Photos & Rush Transcript: Amid Ongoing COVID-19 Pandemic Governor Cuomo Issues Executive Order Moving New York Presidential Primary Election to June 23rd*, GOVERNOR ANDREW M. CUOMO (Mar. 28, 2020), <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-amid-ongoing-covid-19-pandemic-governor-cuomo-issues>.

⁹ See *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Jan. 12, 2021), <https://nyti.ms/39jvJEY>.

¹⁰ See *No end in sight to COVID crisis, and its impact will last for decades to come*, UN NEWS (Aug. 1, 2020), <https://news.un.org/en/story/2020/08/1069392>.

¹¹ See Jason Tashea, *The legal and technical danger in moving criminal courts online*, BROOKINGS (Aug. 6, 2020), <https://www.brookings.edu/techstream/the-legal-and-technical-danger-in-moving-criminal-courts-online>.

¹² See *id.*

with social distancing policies or virtual trials.¹³ Despite the need to change the traditional formatting, these alternatives have been suggested as violating the Sixth Amendment right to a speedy, public trial by an impartial jury as well as creating ethical concerns for prosecutors, defense attorneys, judges, and jurors.¹⁴ Nonetheless, these are the circumstances we find ourselves in. As a result, virtual trials must be recognized for their allowance of the accused to still maintain some semblance of their Sixth Amendment rights or to give a knowing and voluntary waiver, and provides the criminal justice system the best opportunity possible to mitigate the other health issues created to attempt to ensure a fair jury trial.¹⁵

In an American criminal jury trial, the foundational Constitutional description of their rights is the Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.¹⁶

The jury is composed of twelve people who agree to hear the case and swear to make a decision without allowing personal biases to impede their judgment.¹⁷ The jury is composed of citizens of your community, taken at random, to serve you and ensure your constitutional rights to a trial are established and adhered to throughout the duration of the trial.¹⁸ Voir dire, from French meaning “to see to speak,” is the questioning of the prospective jurors by a judge and attorneys in court; it is used to determine if any juror is biased and/or cannot deal with the issues fairly, or if there is cause to not allow a juror to serve.¹⁹ One of the unspoken goals of voir dire is to allow the attorneys to become aware of the personalities and views of people who will serve on their jury panel and decide the fate of their clients.²⁰ This jury selection process is critical because it can set the foundation for the case. Jury selection

¹³ See Brandon Draper, *And Justice for None: How COVID-19 is Crippling the Criminal Jury Right*, 62 B.C. L. REV. I.-1, I.-3 (2020).

¹⁴ See Henry E. Hockeimer, Jr. et al., *INSIGHT: Virtual Criminal Jury Trials Threaten Fundamental Rights*, BALLARD SPAHR LLP (June 23, 2020), <https://www.ballardspahr.com/-/media/files/articles/bloomberg---fundamental-rights---06-20.pdf?la=en&hash=9626A0D36211C78A6B9C01D33F67C8AD>.

¹⁵ See *id.*

¹⁶ U.S. CONST. amend. VI.

¹⁷ See Gerald Hill & Kathleen Hill, *Jury*, LEGAL DICTIONARY, <https://dictionary.law.com/Default.aspx?selected=1076> (last visited Jan. 8, 2020).

¹⁸ *Id.*

¹⁹ Gerald Hill & Kathleen Hill, *Voir Dire*, LEGAL DICTIONARY, <https://dictionary.law.com/Default.aspx?selected=1076> (last visited Jan. 8, 2020).

²⁰ *Id.*

is where the trial truly starts—long before opening arguments. Any biased juror that slips through in this stage could be the difference between a defendant going to jail or walking freely.

Watching the voir dire process and listening to the depth of questioning in real time as lawyers begin strategically assembling the final jury makes a solemn impression. While the details of the case are not explicitly made at this point, lawyers will question the potential jurors for any information that could impact their ability to make a non-biased ruling.²¹ For example, in jury selection for a case that involves police officers' testimony, it is critical for lawyers to eliminate jurors who have a negative perspective of police officers. If a juror was to express vociferous dissent for officers, then that juror's ability to provide an unbiased judgment in the final ruling is questionable at best and should be dismissed.

Voir dire proceedings typically take place in a courtroom with lawyers, a judge, bailiffs, and, at times, observing employees of the court.²² It is common for them to all squeeze into a room at once as the jurors are questioned and excused.²³ Now, with coronavirus making social distancing non-negotiable, the traditional way of holding jury selection must change. However, this change could bring with it severe challenges as the allowance for social distancing is limited by the architectural structures of the courtroom and even the courthouse itself. The average courtroom has been estimated at 1,700 – 1,800 square feet and standards varying between 1,200 – 3,000 square feet.²⁴ With approximately forty people selected at the beginning stages to go through voir dire and the additional lawyers, judges, bailiffs, court reporter, and any others, the number of people in the room can easily climb to fifty or more. These people are not dispersed equally across the room, but rather pushed into intentionally created spaces: the jury box, general audience room, etc. This limits the space even further.

During the beginning of the pandemic, courts opted to stop all jury trials and live proceedings in order to prevent the spread of the virus.²⁵ Months later and with new cases being confirmed daily, necessary changes are being made to each step of the judicial process, including jury selection.²⁶ Suggestions

²¹ Sherilyn Streicker, *Jury Selection in Criminal Cases*, NOLO, <https://www.nolo.com/legal-encyclopedia/jury-selection-criminal-cases.html> (last visited Jan. 10, 2021).

²² *How Courts Work*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect/.

²³ *Id.*

²⁴ Keith Fentress, *Is Your Courtroom Design Intimidating?*, FENTRESS INC.: FENTRESS BLOG (June 22, 2017), <https://blog.fentress.com/blog/is-your-courtroom-design-intimidating>.

²⁵ See e.g., *Courts Suspending Jury Trials as COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), <https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge>.

²⁶ See e.g., Toby Board, *The Rise of Supplemental Juror Questionnaires During COVID-19*, JURY

include Supplemental Jury Questionnaires (SJQ) which can be used for quicker jury filtering, time saving, additional information, greater privacy, more honest answers, and data-driven prediction.²⁷ These have historically not been considered as notable assistances to the jury selection process; but now, in light of the larger need to cut down on the number of people inside the courtrooms, SJQs, when used correctly, can be a tremendous aid to the new judicial processes in a COVID-19 world.

In “The Jury Is Out” podcast, which discussed jury trials during the coronavirus, it was suggested to allow “meaningful selection in every case so that we can seat people who don’t already have predisposed views that mean they won’t hear the evidence that’s so critical to these people who only have one case and whose lives will be changed by the result.”²⁸ Jury selection is one of the most fundamental aspects of any trial, and being able to follow this idea of meaningful selection would mean that more appropriate jurors would hear cases and allow for a fair trial. Every individual who is summoned for jury duty will have preconceived notions and ideas, but the challenge for lawyers is to weed through these and determine which of them hold views that would potentially be greatly harmful to their cause.

I. COVID-19 is Challenging the American Legal Process and Procedure

The Honorable Tani G. Cantil-Sakauye, the Chief Justice of California and Chair of the Judicial Council, released a statewide order in March 2020 that specific Superior Courts were authorized to make certain amends to procedure due to COVID-19—at that point still considered a pandemic.²⁹ In accordance with the CDC, the California Department of Public Health, and the local county health departments’ recommendations of social distancing measures of at least six feet between people and at-risk individuals avoiding public spaces,³⁰ courts fell under new restrictions. Stating that “courts cannot comply with these health restrictions and continue to operate as they have in the past”; new measures were taken to continue to provide judicial support to those in need, whilst continuing to adhere to policies designed to protect public health.³¹ As a result, all jury trials were suspended for a period of sixty

ANALYST (Aug. 7, 2020), <https://juryanalyst.com/blog/supplemental-juror-questionnaires-covid-19/>.

²⁷ *Id.*

²⁸ *Jury Bias and Reconceptualizing Jury Trials in the Age of COVID-19*, CISION PR NEWSWIRE (July 9, 2020), <https://www.prnewswire.com/news-releases/jury-bias-and-reconceptualizing-jury-trials-in-the-age-of-covid-19-301091093.html>.

²⁹ Statewide Order by Hon. Tani G. Cantil-Sakauye, Chief Just. of Cal. & Chair of the Jud. Council, Jud. Council of Cal. (Mar. 23, 2020) (on file with the California Courts Newsroom).

³⁰ *Id.*

³¹ *Id.*; Dave Simpson, *Calif. Judicial Council Adopts Rules In Response To Pandemic*, LAW360 (Apr. 6, 2020), <https://www.law360.com/articles/1261004/calif-judicial-council-adopts-rules-in-response-to-pandemic>.

days from March 20, 2020; the time period for holding criminal trials and civil trials was also extended for sixty days.³² However, courts were permitted to conduct trials at a date earlier than this sixty-day mark, either “upon a finding of good cause shown or through the use of remote technology, when appropriate.”³³ This was completely unprecedented, as courts had never been closed nor had the option of a virtual trial ever been considered to be a viable replacement for live courts.

A trial is a formal proceeding, which takes place in a courtroom that has been carefully designed and built to meet the necessary functions of a trial.³⁴ Initiating social distancing would be nearly impossible. A jury box is built to seat twelve—all seated beside one another.³⁵ The only way to create social distancing would be to spread jurors out in the audience seats. However, if this is implemented, the jurors will be further away from the witness stand: their view may be obscured by the lawyers or parties or they may not be able to view the screen that is conveniently placed directly in front of the jury box. Additionally, both arguing parties often share a table, meaning they would need to be split up and put into different areas of the courtroom. Currently, there is no clear place to move the parties. The bailiffs responsible for directing the jurors and ensuring that they are appropriately sequestered would be unable to perform their jobs as efficiently since the jurors would no longer be confined to a small area. It should also be noted that such modifications could allow for courts to continue functioning in certain capacities, but “they also inhibit public access to the courtroom, create new challenges for court personnel, and pose obstacles for case parties and those required to have contact with the court.”³⁶ These few examples effectively demonstrate the difficulty of continuing to host live trials during the pandemic.

Making amends to the current architectural structures would require significant time and money. In many areas, courthouses are in downtown areas with massively imposing structures.³⁷ The size and styling of these buildings are done deliberately in order to evoke feelings of awe and understanding of the significance and importance of the events that occur within.³⁸ They are

³² Statewide Order by Hon. Tani G. Cantil-Sakauye, *supra* note 29.

³³ *Id.*

³⁴ See Alan Ruby, *The Historic Roots of American Courtroom Design*, FENTRESS INC.: FENTRESS BLOG (June 9, 2016), <https://blog.fentress.com/blog/american-courtroom-design/>.

³⁵ See *id.*

³⁶ Julie Marie Baldwin et al., *Court Operations During the COVID-19 Pandemic*, 45 AM. J. CRIM. JUST. 743, 747 (2020).

³⁷ See, e.g., *Contacts and Locations: Courthouses in Los Angeles County*, SUPER. CT. OF CAL. CNTY. OF L.A., <http://www.lacourt.org/courthouse> (last visited Jan. 24, 2021).

³⁸ See Kate Diamond, *5 Key Elements of Courthouse Design*, HDR (Jan. 22, 2020), <https://www.hdrinc.com/insights/5-key-elements-courthouse-design>.

tall, often concrete buildings that loom over the passers-by. In short, these structures are not easily altered. Furthermore, the courtrooms within the buildings also come with their own set of established traits: judge's bench, witness stand, court clerk, reporter, and bailiff stations, attorney, prisoner, plaintiff, and defendant stations, jury box, and public spectator seating area; all are backed with significant historical backgrounds—these are all essentially the same in today's courtrooms as they were in colonial times.³⁹ Although these buildings may never return to their prior usages, there are promising virtual alternatives that are beginning to look more possible.

A. *Public Health Risks with Coronavirus*

Dr. Anthony Fauci has been the director of the National Institute of Allergy and Infectious Diseases for three decades and is considered one of the United States' leading experts on the coronavirus.⁴⁰ Although Americans are eagerly awaiting a vaccine in the hopes of eradicating the virus and allowing for safe reopenings and a return to "normal" life, he has warned that vaccines may not meet the standards for full elimination.⁴¹ While still a necessary goal to strive towards, he has continually advocated for face masks, social distancing, and avoiding bars or indoor spaces with crowds.⁴² A courthouse is one of the latter, and the lack of ventilation or opportunity for social distancing poses tremendous risks.

In the first year of the coronavirus, the ability to carry out live trials safely was often compromised and subsequently replaced with virtual trials. The United States District Court for the Central District of California announced unprecedented standards for court hearings: all civil case appearances were by telephone or video conferencing and hearings in criminal matters would only proceed in court when defendants do not consent to appear by telephone or video conferencing, with a limit to the number of members of the public allowed inside the courtroom.⁴³ However, as time went on and the need for justice remained constant, some courts opted to restart jury trials, albeit with radically different setups. The Norfolk Circuit Court is one of four in Virginia

³⁹ See Ruby, *supra* note 34.

⁴⁰ See Quentin Fottrell, *Fauci says that in his 40 years of dealing with viral outbreaks, he's never seen anything like COVID-19*, MARKETWATCH (July 12, 2020), <https://www.marketwatch.com/story/fauci-says-covid-19-has-one-characteristic-hes-never-seen-before-ive-been-dealing-with-viral-outbreaks-for-the-last-40-years-2020-06-23>.

⁴¹ See *id.*

⁴² Quentin Fottrell, *Dr. Fauci Tells Americans to be Mindful of These Important Limitations About Any Future Coronavirus Vaccine*, MARKETWATCH (Aug. 12, 2020), <https://www.marketwatch.com/story/fauci-says-public-should-temper-expectations-on-covid-19-vaccine-as-us-infections-near-5-million-2020-08-09>.

⁴³ Kiry K. Gray, *Southern Division's Operations*, U.S. DIST. CT. CENT. DIST. OF CAL. (Nov. 25, 2020), <https://www.caed.uscourts.gov/news/southern-division%E2%80%99s-operations>.

that won approval to restart jury trials but required potential jurors to wear a face mask and stay six feet apart while in the courthouse.⁴⁴ Additionally, potential jurors were scheduled to arrive in groups of thirty approximately every two hours, given regular breaks for handwashing, and waited in groups of no more than fifteen.⁴⁵ This is no small change. This is a complete upheaval of centuries of precedent and opting to pursue irrevocable changes to one of the world's greatest examples of democracy and judicial process. The complete ecosystem of the American justice system has changed because of the COVID-19 pandemic. The courts, judges, juries, cases, and every insignificant detail that is taken for granted during "normal" times, are now all going to permanently change along with various new developments.

No one thought that this would be permanent. One of the early measures that President Trump released, after weeks of declaring the virus unproblematic and assuring the American people that they would be fine, was "15 Days to Slow the Spread."⁴⁶ This was not supposed to last. The President said that he had heard the coronavirus would "go away in April" because of "the heat," but unfortunately the statement was grossly untrue.⁴⁷ We are long past the fifteen days, over hundreds of thousands of Americans have died, and there is no end in sight.⁴⁸ When it was supposed to be temporary, the closing of courts was not explicitly and obviously problematic. A few civil and criminal trials would be delayed, but the presumption was that we would bounce back. As the number of confirmed coronavirus cases extended far beyond what anyone could have imagined, there is no choice but to move forward with virtual options to maintain the sanctity and service of our justice system.

B. Florida Case Study: The Future of Trials?

Florida made headlines as being one of the first states to hold a trial through Zoom.⁴⁹ After court officials spent months consulting epidemiologists and infectious disease specialists so that safety was paramount, 120

⁴⁴ Jonathan Edwards, *Norfolk will be the first city in Hampton Roads to restart jury trials. Here's how they'll work*, VIRGINIAN-PILOT (Sept. 15, 2020), <https://www.pilotonline.com/news/crime/vp-nw-norfolk-covid-jury-trials-20200915-7nv35bzrezninb45pafblcsq-story.html>.

⁴⁵ *Id.*

⁴⁶ *15 Days to Slow the Spread*, THE WHITE HOUSE (Mar. 16, 2020), <https://www.whitehouse.gov/articles/15-days-slow-spread/>.

⁴⁷ See Kathryn Watson, *Trump touts economic success, criticizes sanctuary cities in meeting with governors*, CBS NEWS (Feb. 10, 2020), <https://www.cbsnews.com/news/trump-meets-with-governors-white-house-watch-live-stream-today-02-10-2020/>.

⁴⁸ See *CDC COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Jan. 4, 2021).

⁴⁹ Aila Slisco, *America's First Jury Trial via Zoom Begins, Complete with Virtual Jurors*, NEWSWEEK (Aug. 10, 2020), <https://www.newsweek.com/americas-first-jury-trial-via-zoom-begins-complete-virtual-jurors-1524154>.

prospective jurors received jury duty summons that instructed the panel to report for duty via the Internet.⁵⁰ It was decided earlier that there was only need for twenty to twenty-five jurors during voir dire in order to keep the process as concise as possible.⁵¹ Still, people were aware that the check-in process would be new and different. Once the group was narrowed down to twenty-three potential jurors, the group was taken to a virtual courtroom where a group of attorneys from the American Board of Trial Advocates used a negligence case to ask questions, most of which primarily focused on the use of Zoom while performing jury duty.⁵²

After the jury was selected, a question and answer session was held in which they were asked questions like “do you feel you could participate in a jury trial and render a fair verdict if the trial was conducted completely on video?” or “do you feel you were limited in engaging in the process due to technology limitations *i.e.* Wi-Fi or equipment?”⁵³ Overall, there was agreement that all jurors could comfortably participate in a remote jury trial, but some felt that it would have limitations in scope. For example, they did not believe a Zoom trial would be an appropriate format for a serious criminal trial.⁵⁴ Thus, the question remained if technological platforms would be a suitable, permanent addition to the American legal system.

This “experiment” was telling. It demonstrates both the great promise and potential pitfalls in holding jury trials remotely. If this was to be proposed in March of 2020, it likely would have been met with intense suspicion and immediately rejected. Now, it seems we have little choice. Still, it is critical to recognize that from this panel of jurors, some felt it was not appropriate for a criminal trial. A criminal jury trial poses an entirely new set of nuanced concerns outside of the civil trials or legal aid that is also administered in a courthouse.

C. Benefits to the Virtual Trial Experience

Walking into a courthouse at the start of 2020 was a very different experience than it is in the midst of a global pandemic. Before, one would be awestruck by the environment; now, you are seated at home watching the judge on an inch by inch square of pixels. Having all the people that you

⁵⁰ *First Remote Jury Selection Pilot Program Held in Miami*, FLA. SUP. CT. (July 16, 2020), <https://www.floridasupremecourt.org/News-Media/Court-News/First-Remote-Jury-Selection-Pilot-Program-Held-in-Miami>.

⁵¹ Chief Judge Jack Tuter, *Remote Jury Selection During A Pandemic*, FLA. BAR (July 22, 2020), <https://www.floridabar.org/the-florida-bar-news/remote-jury-selection-during-a-pandemic/>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

would typically see seated only a few feet away from you appear through the Internet creates a drastically different experience. Despite the drawbacks of virtual trials, there are still significant positives that come out of being able to stay at home and participate. Most of what is common knowledge about the judicial system are based on the existence of major jury trials like the OJ Simpson case or media depictions like *CSI: Crime Scene Investigation* or *Law & Order SVU*.⁵⁵ However, many do not realize that few cases actually end up going to trial.⁵⁶ Making the choice to go to trial creates a huge financial burden since trials can easily cost upwards of \$40,000.⁵⁷ Parties must pay for lawyers and experts to testify over numerous days—something that should not be taken lightly. For example, if a case is located in San Diego, but the lawyer is based in Los Angeles and requires expert testimony from Denver, Minneapolis, and New York, then travel fees for all four persons must be covered. Thus, having a virtual hearing means that these travel expenses and time spent will not be as high because the attorney and the experts will be able to log into the hearing from anywhere in the world as long as they have an electronic device and strong internet connection.

This ease of convenience is a huge advantage to moving towards the virtual alternatives right now. After the first year of coronavirus cases, the CDC confirmed that travel increases chances of getting and spreading COVID-19.⁵⁸ At some future point, it may be safe to fly without high risk of COVID-19 transmission or contraction and hosting necessary in-person hearings will resume. Still, the global reach of the COVID-19 and uncertainty about timely containment has created new patterns in human engagement beyond temporary virtual options adopted while awaiting vaccines and virus eradication.

The benefits of virtual trial also include the ability to host current hearings more efficiently. Rather than having to pick and choose which cases could be appropriate to hear and not to hear based upon subjective perception of importance, cases that clearly require in-person hearings can choose the in-person option and cases that could successfully be heard virtually can opt for

⁵⁵ Kimberlianne Podlas, *Guilty on All Accounts: Law & Order's Impact on Public Perception of Law and Order*, 18 SETON HALL J. SPORTS & ENT. L. 1, 43, 45 (2008) (arguing that *Law & Order's* ideologies of justice can impact the way jurors assess cases and the public's appreciation of the justice system as a whole); *but see* Simon A. Cole & Rachel Dioso-Villa, *Investigating the 'CSI Effect' Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1340–41 (2009) (claiming that the notion of *CSI* influencing jurors' decision-making is theoretically possible, but there is no convincing evidence that it actually exists).

⁵⁶ *See generally* Adam B. Shniderman, 38 L. & PSYCH. REV. 97, 102 (2014) (noting that in *Law & Order*, 35% of cases end in a plea, compared to 95% in reality).

⁵⁷ Anna Jeanne Niemann, *The Real Cost of Going to Court*, AVVO (Sept. 6, 2010), <https://www.avvo.com/legal-guides/ugc/the-real-cost-of-going-to-court> (outlining the cost of civil litigation).

⁵⁸ *Travel: Frequently Asked Questions and Answers*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 13, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/faqs.html>.

remote trials. This means that non-criminal cases could be heard sooner and without concern of indefinite delay. Those who are involved in civil cases will no longer be told that their cases are not important enough to be heard and will have access to the American judicial system in a modified manner.

Additionally, while full trials may not be held on Zoom forever, leading trial attorney Mark Lanier has explained that recent court closures have had permanent effects on his daily routines.⁵⁹ Lanier states, “I’ll probably never again get on an airplane to go somewhere for a two-hour meeting. I’ve learned that videoconferencing is a real thing that works quite well, and I am doing it, it seems, from the early, early morning to the late, late evening.”⁶⁰ By utilizing the technology that we have in order to promote cost and financial effectiveness, justice can be served in a cheaper and timelier manner.

The downsides to this new virtual road must be recognized but the overarching truth is that courts must still operate in some capacity. Any introductions of rules or regulations will, in turn, become more normal in time. This period of transition is awkward and there will still be growing pains in the coming months while the American judicial system continues to adapt to the “new normal.” As a collective society, we relied more heavily upon technology for remote work in 2020 than at any other point in time.⁶¹ Fortunately, the legal community has grown accustomed to remote work habits⁶²—something that will only make this transition to virtual courtrooms and trials smoother.

When the United States is able to create a vaccine that decreases the risk of coronavirus then perhaps the heavy dependence on technology may ease. However, the newly discovered financial and time benefits indicate that technological platforms are likely to be incorporated permanently into the United States judicial process.⁶³ Throughout federal, municipal, and state district court levels, cases will be conducted using the platforms being tested

⁵⁹ See Daniel Siegal, *Trial Recess: Mark Lanier On Isolating At His Houston Ranch*, LAW360 (Apr. 17, 2020), <https://www.law360.com/articles/1264883/trial-recess-mark-lanier-on-isolating-at-his-houston-ranch>.

⁶⁰ *Id.*

⁶¹ See Thomas Roulet, *2021: Another Year of Remote Work, During Which We Will Need The Office More Than Ever*, FORBES (Jan. 5, 2021), <https://www.weforum.org/agenda/2020/10/permanent-remote-workers-pandemic-coronavirus-covid-19-work-home>.

⁶² See Brenda Sapino Jeffreys, *Legal Professionals Want to Keep Working From Home, but Will That Last?*, LAW.COM (June 11, 2020), <https://www.law.com/americanlawyer/2020/06/11/legal-professionals-want-to-keep-working-from-home-but-will-that-last/> (reporting a majority of lawyers and staff want to continue remote work even when safe to return to offices).

⁶³ See Andrea Bricca, *The Future Is Here: The Legal Profession Can Succeed Working Remotely*, LAW.COM (May 27, 2020), <https://www.law.com/corpocounsel/2020/05/27/the-future-is-here-the-legal-profession-can-succeed-working-remotely/>.

currently in order to repurpose the system to where it will be faster and cheaper for citizens to attain justice.

D. Changing Faulty Perceptions of Legal Processes

The legal system has been the highlight of many mainstream television programs which has created award-winning shows and even spin-offs of the original shows. As a result of this infiltration within their homes, the American public's understanding of courtrooms and trials has been deeply manipulated and warped by the programs and media.⁶⁴ While they are beneficial in expanding people's knowledge and information about what rights they have, the public can also be incorrectly educated and subjected to controversial biases.

In what is known as the CSI Effect, it is claimed that forensic science television dramas influence American jurors to want more forensic evidence to convict defendants of crimes.⁶⁵ This comes from the popular television show *CSI: Crime Scene Investigation* and is a relatively controversial claim held primarily by prosecutors.⁶⁶ The study *Engaging the CSI effect: The influences of experience-taking, type of evidence, and viewing frequency on juror decision-making* demonstrated that when mock jurors are exposed to crime dramas and then provided with only an eyewitness or both eyewitnesses and forensic evidence, they offered more confident "not guilty" verdicts the more frequently crime dramas were watched.⁶⁷ In the same study, viewers who did not watch crime dramas and were presented with forensic-only evidence rendered similar levels of guilt verdicts regardless of the frequency of their crime drama viewing.⁶⁸ Other claims regarding the CSI Effect have found little support for the impact of crime dramas on the deliberations within the jury room.⁶⁹

Regardless of whether or not American jurors make decisions based on the content of their television shows, if a permanent transformation to virtual trials occurs, the media portrayals of trials will suddenly become incredibly inaccurate. The implications of such a shift are unknown and unimagined but could potentially create an even less-biased jury.

⁶⁴ See Podlas, *supra* note 55, at 2–3, 9.

⁶⁵ Michael Roberts, *How the CSI Effect Influences American Jurors*, THE BALANCE CAREERS (Jan. 5, 2020), <https://www.thebalancecareers.com/csi-effect-1669447>.

⁶⁶ *Id.*

⁶⁷ Ian Hawkins & Kyle Scherr, *Engaging the CSI Effect: The influences of experience-taking, type of evidence, and viewing frequency on juror decision-making*, 49 J. CRIM. JUST. 45, 49 (2017).

⁶⁸ *Id.*

⁶⁹ John Alldredge, *The "CSI Effect" and Its Potential Impact on Juror Decisions*, 3 THEMIS: RSCH. J. JUST. STUD. & FORENSIC SCI. 114, 120 (2015).

II. COVID-19 Related Internal Measures are Leading to Watershed Permanent Changes in the U.S. Legal System

To suddenly be confronted with a global pandemic that brings a 200-year-old system to its knees is a hard blow regardless of how many digital alternatives exist. Without hearings, there will no longer be the same established routes to justice, ability to confront accusers, advocacy for a case, or jury trial procedures. Since COVID-19 is undeniably significant and is lasting longer than initially expected, if there is a point in our lifetimes when the virus is eradicated, we will have had several iterations of Zoom and virtual trials could possibly be the new normal. Nevertheless, we must still take hold of the promising opportunities that lay in virtual technology, particularly in video conferencing systems like Zoom to be able to adapt to and overcome the coronavirus' immense strain on our legal society. Several proceedings have already begun working through the virtual processes: creating client portals as a way to submit briefs securely, viewing the details and status of present matters, paying invoices, and accessing case histories.⁷⁰ These may not be the most traditional proceedings for complex civil, business, or criminal trials, but, again, this world is no longer normal.

It is critical to not become bogged down in what was “the normal.” Rather, the sooner we can lift ourselves up, use the technological resources we already have, and disregard any expectations of what circumstances ought to look like, the better equipped our new judicial system will become. The greatness and dependability of the American justice system has not been destroyed through the coronavirus. Rather, this is a transformational time of radical and permanent changes that will become the new precedent and evolution of our American judicial values. While the Sixth Amendment right to a public trial is important, courtrooms may still be closed to the public when the closure is justified by a strong government interest and is narrowly tailored to further that interest.⁷¹

In June 2020, Order of the Chief Judge No. 20-080 was signed, leading to renewal of the authorization of the use of video and telephonic conference technology in certain criminal proceedings under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”).⁷² This Act was applicable for the ninety days after the initial signing, unless earlier terminated.⁷³ It was

⁷⁰ See, e.g., *As Courts Restore Operations COVID-19 Creates a New Normal*, U.S. CTS. (Aug. 20, 2020), <https://www.uscourts.gov/news/2020/08/20/courts-restore-operations-covid-19-creates-new-normal>.

⁷¹ See Stephen E. Smith, *The Right to a Public Trial in the Time of COVID-19*, 77 WASH. & LEE L. REV. ONLINE 1, 5 (2020).

⁷² In Re Coronavirus Public Emergency, Order of the Chief Judge No. 20-080 (C.D. Cal. Sept. 23, 2020).

⁷³ *Id.*

also said that if the emergency persists longer than ninety days, the situation would be potentially extended pursuant to the provisions of the CARES Act.⁷⁴ In a July 2020 interview, Dr. Anthony Fauci has said that the coronavirus “is not to be underestimated” and reminded the U.S. that the pandemic is still far from over.⁷⁵ Adjustments in legal and administrative process, and reallocation of resources will persist, with video and telephonic conferencing and proceedings becoming the norm in the American court system. COVID-19 measures will not be interim; developments adopted for COVID-19 are becoming the new face of the United States’ judicial processes.

A. *Are Virtual Trials an Equal Replacement?*

The foremost concern when it comes to virtual trials should be the expectation and protection of privacy. In the last few years, as technology has become more firmly embedded into our culture, people have been more willing to trade their privacy for convenience or financial gain when it comes to the Internet.⁷⁶ In the United States, we take immense pride in the establishment of rights to trial and ensuring that this trial happens in accordance to the Constitution. This is a highly admirable aspect of our judicial system, but COVID-19 changes this. In a live trial, sequestering the jury is critical. If even one member of the jury is exposed to outside influence or information, the judge could order a mistrial and the entire process of selecting a jury, holding a trial, and making a ruling would have to be repeated.⁷⁷ The financial burdens previously discussed as well as lack of justice itself could be expanded upon with greater harm to the parties.

In a virtual trial, each juror would observe the proceedings from their homes on a computer via camera. The computer would have to be secure, the room empty and the surrounding rooms unable to hear what is happening. An agreement must also be made not to share any information about the case while serving as a juror. However, how can we be certain that this online proceeding is in fact secure and confidential? Once data is transmitted electronically, through Zoom or any other platform, it does not just disappear. In fact, it can bounce off servers all over the world, leaving the platform highly

⁷⁴ *Id.*

⁷⁵ Gaby Galvin, *Fauci: 'We Will Get Back to Normal' But the Pandemic Is Far From Over*, U.S. NEWS (Aug. 3, 2020), <https://www.usnews.com/news/health-news/articles/2020-08-03/fauci-we-will-get-back-to-normal-but-the-pandemic-is-far-from-over>.

⁷⁶ See Gregory Barber, *I Sold My Data for Crypto. Here's How Much I Made*, WIRED (Dec. 17, 2018), <https://www.wired.com/story/i-sold-my-data-for-crypto/>.

⁷⁷ See *e.g.*, *Whitaker v. State*, 168 N.E.2d 212, 215 (Ind. 1960) (concluding that the trial court’s decision to not sequester the jury was in error); see also *People v. Conyers*, 592 N.Y.S.2d 694, 695 (N.Y. App. Div. 1993) (holding that a juror who escaped sequestration but was immediately caught before talking to anyone did not prejudice the defendant).

susceptible to hackers. In the past, there have been issues in regard to illegal privacy violations within the legal field. Los Angeles lawyer, Anthony Pellicano, was investigated by the FBI and faced a trial in response to accusations of wiretapping and racketeering.⁷⁸ Authorities cited nearly 100 instances in which Pellicano and his associates had allegedly accessed confidential law enforcement records and illegally taped conversations in order to benefit their clients.⁷⁹ While we have continuously advanced cybersecurity, there are still cyber-attacks and digital breaches all over the world.⁸⁰ If a hearing were to be tapped or hacked it could cause a mistrial and, ultimately, disrupt justice.

Internet connectivity can also be very temperamental. If a juror's internet connection was weak or they were experiencing technical difficulties during a court proceeding, would the court proceeding be delayed for a few hours or continued even longer? Additionally, while most American households do have internet at home, not everyone has access to this luxury. Jurors without internet may be rendered unable to fulfill their civic duty for this simple reason. Or, perhaps the internet may work at the beginning but then there is an interruption later on. If this happens, the juror will undoubtedly miss out on critical information and will not be able to make the same thoroughly deliberated decision that the other jurors will.

Beyond technical issues, there is a strong psychology involved in the way arguments are delivered in a courtroom. Television shows provide the façade that all lawyers appear relatively similar in terms of their professional attire and well-groomed physical appearances.⁸¹ However, it is not uncommon to see lawyers wearing ill-fitting or unkempt suits with non-conventional hairstyles. This is because lawyers will, at times, dress more casually in order to appeal to a jury.⁸² While suits and shined shoes adhere to the television lawyer "look," they may repel the jury by appearing elitist and unrelatable. Lawyers' tones, body positioning, word choice, and even attire all play tremendous roles in how juries perceive them and how their clients perceive them as well. An unlikeable lawyer may isolate the jury making them more likely to rule against the lawyer's client. This may not be fully ethical but it is human nature to support those whom we feel camaraderie with. In a virtual session,

⁷⁸ Elizabeth A. Harris, *Anthony Pellicano, Notorious Detective to Stars, Walks Free From Prison*, N.Y. TIMES (Mar. 22, 2019), <https://www.nytimes.com/2019/03/22/arts/anthony-pellicano-prison-release.html>.

⁷⁹ Greg Krikorian, *Pellicano trial a story made for Hollywood*, L.A. TIMES (Mar. 5, 2008), <https://www.latimes.com/local/la-me-pellicano5mar05-story.html>.

⁸⁰ See Devon Milkovich, *15 Alarming Cyber Security Facts and Stats*, CYBINT (Dec. 23, 2020), <https://www.cybintsolutions.com/cyber-security-facts-stats/>.

⁸¹ See *Stereotypical smart talking: lawyers on TV*, QUALITYSOLICITORS, <https://www.qualitysolicitors.com/blog/stereotypical-smart-talking-lawyers-on-tv> (last visited Jan. 10, 2020).

⁸² See Brenda Swauger, *9 tips on how to dress for the courtroom*, ABA J. (Jan. 16, 2020), <https://www.abajournal.com/voice/article/how-to-dress-for-the-courtroom>.

lawyers will not be able to fully utilize the psychological tricks of the trade that they have mastered over years of preparation. Returning to the *A Few Good Men* anecdote discussed in the Introduction, the altercation portrayed would have never occurred over Zoom. There would have been a cue from the lawyer reminding Nicholson's character not to answer. Additionally, virtual experiences feel far less personal than live ones. The tension and stress that is deliberately imposed upon people in court by the atmosphere will dissipate in a virtual hearing if you can simply sit in the comfort of your own home to testify. Had Nicholson's character been afforded this luxury, he would have likely felt far less inclined to answer the prosecution's (portrayed by Cruise) line of questioning.

Although witnesses and parties involved in trials swear an oath to tell the truth or risk committing perjury, there is still less of a likelihood that this will occur in a virtual trial. The aforementioned intensity created by the courtroom atmosphere will be lacking, and thus, there will be more opportunities for attorneys to wrongfully coach their clients on what to say. The establishment of this new legal ecosystem will not only have a major impact on jurors, but on lawyers as well.

While there are infinite doubts, questions, and concerns about the new technologically driving the judicial process, ultimately all questions boil down to one root doubt: are virtual alternatives truly a reasonable and appropriate replacement to establishment justice?

B. Problematic Examples in the Current Climate

The issue of speedy trials guaranteed by the Speedy Trial Act of 1974 is further complicated by the fact that courts are not open at the same hours as they were previously.⁸³ The Speedy Trial Act was designed to regulate the time in which a trial is to begin in order to ensure that criminal prosecutions are not unduly delayed.⁸⁴ Generally, a trial is required to begin within seventy days of filing of information, an indictment, or the initial appearance of the defendant.⁸⁵ The severely limited hours of courthouses coupled with the high caseloads from months of closures means that serious decisions need to be made in regard to which cases will take precedence. These will be the criminal cases because of the federal rules on time constrictions.⁸⁶ This seems fair

⁸³ See *Analyzing Court Orders Tolling the Speedy Trial Act During COVID-19*, WINSTON & STRAWN LLP (May 7, 2020), <https://www.winston.com/en/thought-leadership/analyzing-court-orders-tolling-the-speedy-trial-act-during-covid-19.html>.

⁸⁴ See *Speedy Trial*, ABA, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_speedytrial_blk/ (last visited Jan. 10, 2021).

⁸⁵ 18 U.S.C. § 3161(c)(1).

⁸⁶ See *Speedy Trial*, *supra* note 84.

for the criminal trials but this also means that civil cases will not be heard. Is this justice if they must wait?

Suppose an eighty-year-old woman was hit by a car and left severely injured in West Los Angeles before the coronavirus. Because these cases take time to assemble and attempts to settle were made, she had no trial date set until the pandemic had already started. Since the courts were closed during her trial date, her trial was also delayed. This woman now has to wait for months or even years to receive money to cover the costs of her medical bills. At eighty-years-old, she does not have a significant amount of time left to be spent waiting around. If she was fortunate enough to be offered a live courtroom trial, would it be feasible for her to take it? She and her equally aged partner would need to enter a courtroom in one of the hottest COVID-19 hotspots in the country and sit inside a closed room surrounded by other potentially infected carriers for an extended period of time. This isn't a promising option for someone in her situation. An ordinary civil case and subsequent appeal can take anywhere from four to five years. In this new COVID-19 environment where criminal trials take priority, the wait will likely be even longer. At eighty-years-old she may not have appropriate time left to reach justice and secure quality living.

The risks to health posed by being forced to go to a closed courtroom with little opportunity for ventilation is also problematic for jurors. For example, perhaps a juror is healthy, able-bodied, and able to attend jury duty. However, while they themselves are not a high-risk patient, maybe they live with someone who has a compromised immune system. If Dr. Fauci is correct and this does not go away and is far more dangerous than the flu, people may not be willing to come to court and put their health or their loved ones' health at risk. Before the pandemic jury duty was an obligation that all citizens were required to fulfill.⁸⁷ Now, the stakes are higher and they are not simply carrying out their civic duty. They are volunteering their lives. Since people who are medically vulnerable are being released from jails out of concern that they may contract the virus it seems obvious that jurors ought to also be released from jury duty if they are medically vulnerable. Unfortunately, while this solution appears relatively simple, the social implications of this can be troubling.

How could one prove that they are medically vulnerable and that they should be released from jury duty? Many people already do not enjoy being summoned so if they are allowed an out by claiming medical exemption then it is likely there will be large amounts of the people taking advantage. A

⁸⁷ Susan M. Heathfield, *What is Jury Duty? Definition and Examples of Jury Duty*, THE BALANCE CAREERS (July 7, 2020), <https://www.thebalancecareers.com/what-is-jury-duty-1917981>.

doctor's note could be beneficial in helping to establish who is medically exempt but across the United States there is a tremendous divide over who has access to healthcare and who does not.⁸⁸ This creates a messy environment in which, once again, economic privilege becomes entangled in civic responsibilities.

This new, virtual system may be cheaper and faster but may not immediately provide the same security that the previously established system offered. Instead of triumphant justice, we will instead be offered a rougher version of justice that could be susceptible to numerous appeals further down the line. Still, though we may not have all the answers right now, it is critical that decisions are not made just to move forward blindly. There is a right and wrong way to navigate this confusing environment, and it is imperative that we consider the hugely important repercussions of the decisions made now and how these decisions can impact the future.

C. Managing COVID-19 Safely in the Legal System

Contact tracing efforts are one of the most successful ways that countries around the world have been able to reduce their COVID-19 cases.⁸⁹ This is commonly done through phone apps or digital software, but the United States has struggled to develop an efficient contact-tracing protocol for the duration of the pandemic.⁹⁰

If an employee at a company were to test positive for coronavirus they are supposed to immediately stop working and inform their employer. This, in turn, could lead to diminished profits as numerous workers may be unable to come in to work. In addition, businesses are greatly concerned with employees testing positive because this could cause the employers to face liability for failure to protect the health of their workers. *A Public Health Framework for COVID-19 Business Liability* suggests that ex post (after an exposure) fear of liability may deter businesses from proactively informing customers and workers that they have been exposed to the virus through the business's operations. The desire on the part of businesses to spare themselves from litigation may interfere with comprehensive contact-tracing efforts.⁹¹

⁸⁸ Samantha Artiga et al., *Disparities in Health and Health Care: Five Key Questions and Answers*, KAISER FAM. FOUND. (Mar. 4, 2020), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/disparities-in-health-and-health-care-five-key-questions-and-answers/>.

⁸⁹ Christie Aschwanden, *Contact Tracing, A Key Way to Slow COVID-19, Is Badly Underused by the U.S.*, SCI. AM. (July 21, 2020), <https://www.scientificamerican.com/article/contact-tracing-a-key-way-to-slow-covid-19-is-badly-underused-by-the-u-s/>.

⁹⁰ See Jennifer Steinhauer & Abby Goodnough, *Contact Tracing Is Failing in Many States. Here's Why*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/31/health/covid-contact-tracing-tests.html>.

⁹¹ Daniel Hemel & Daniel B. Rodriguez, *A Public Health Framework for COVID-19 Business Liability*,

Although there are obligations to do the greater good for the larger betterment of public health, there are also legitimate needs for a company to make profit and sustain themselves. This, in turn, causes them to turn away from making it public that customers or workers may have been exposed and the inevitable spread of the virus continues.

In California, for example, there are several claims that employers could potentially be exposed to under federal and state labor laws: paid leave, discrimination, wage and hour lawsuits, layoff notice, and workers' compensation.⁹² Hundreds of these cases have already been filed,⁹³ and with businesses struggling to stay afloat during the pandemic, it is no surprise that new regulations have begun backfiring. Panic cannot take precedent over employee rights and the regulations in place must be followed regardless of what employers believe is acting in the best interest of their employees.

D. Why Not Do the Crime if You Won't Do the Time?

The United States' legal system is one that is held with high esteem around the globe for its emphasis on impartiality, justice, and equality.⁹⁴ It is far from being the perfect legal system but is still recognized as one of the leaders in its field. Unfortunately, as other countries begin to recover socially and economically from the pandemic, America is still bogged down by thousands of new cases per day.⁹⁵ Social distancing has been touted from the beginning of the pandemic as one of the most effective ways of limiting the spread of the virus.⁹⁶ For most people this translated into staying at home as much as possible and limiting contact with others—an impossible order for those in jails. Prisoners are kept in cells in close proximity to another, take meals in common spaces, and are subject to constant overturn of people within the building due to visitors, guard changes, and prison releases/admittances. Since there is great potential for exposure in jails, if one person contracts the virus, then the likelihood of mass spreading is far more likely in prisons than in other

7 J. L. & BIOSCIENCES 1, 10 (2020).

⁹² See *COVID-19 lawsuits and claims on the rise: What practice owners need to know*, CDA (July 9, 2020), <https://www.cda.org/Home/News-and-Events/Newsroom/Article-Details/covid-19-lawsuits-and-claims-on-the-rise-what-practice-owners-need-to-know> (“California leads the nation with 32 employment lawsuits already filed.”).

⁹³ *COVID-19 Employment Litigation Tracker and Alerts*, FISHER PHILLIPS, <https://www.fisherphillips.com/covid-19-litigation> (last visited Jan. 5, 2021) (noting 1,326 cases filed from January 30, 2020 to December 30, 2020).

⁹⁴ See Devon Haynie, *U.S. Trails 17 Other Countries in Rule of Law Ranking*, U.S. NEWS (Oct. 20, 2016), <https://www.usnews.com/news/best-countries/articles/2016-10-20/us-is-no-18-in-global-rule-of-law-ranking>.

⁹⁵ See *Coronavirus in the U.S.: Latest Map and Case Count*, *supra* note 9.

⁹⁶ *Social Distancing: Keep a Safe Distance to Slow the Spread*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>.

environments.⁹⁷

According to data from the U.S. Marshals Service, there were 90,239 fugitives arrested during 2019.⁹⁸ The United States has had a global reputation for quite some time for having some of the highest incarceration rates⁹⁹ but this is now coming back negatively against public health. The pretrial detention center is:

often punitive, fraught with bias, produces unnecessarily high rates of detention, and carries a myriad of downstream consequences both for the accused and the community at large. In the context of the COVID-19 crisis, this pretrial detention system faces an exacerbated challenge: the health and safety of those in custody and those who staff U.S. jails and prisons.¹⁰⁰

With COVID-19 cases on the rise, American jails have been releasing prisoners in an attempt to ease the overcrowding problem in jails and prevent the rampant spread of coronavirus. In May of 2020, due to a statewide California emergency bail schedule that reduced bail to \$0 for most misdemeanor and some low-level felony offenses, jail populations have substantially decreased.¹⁰¹ Los Angeles County and Sacramento County jail populations decreased by over 30%, Orange County's jail population dropped by almost 45%, and other counties have released hundreds of people held pretrial.¹⁰²

The protocols in jails are different from those in prisons but jails are also releasing people. On June 16, 2020, the California Department of Corrections and Rehabilitation announced that "non-violent" offenders who had less than 180 days left on their sentence would be eligible for supervised release beginning July 1, 2020 and in July followed up with a statement that an estimated 8,000 more people could be released by the end of August 2020.¹⁰³ This is concerning. While America does have a problem with overcrowding and controversially higher incarceration rates, we are now releasing many prisoners who have been convicted of crimes. Perhaps in a few years, with

⁹⁷ Laura Hawks et al., *COVID-19 in Prisons and Jails in the United States*, 180 J. AM. MED. ASS'N INTERNAL MED. 1041, 1041 (2020).

⁹⁸ U.S. MARSHALS SERV. OFF. OF PUB. AFFS., FACT SHEET: FACTS AND FIGURES 2020 (2020), <https://www.usmarshals.gov/duties/factsheets/facts.pdf>.

⁹⁹ See Tyjen Tsai & Paola Scommegna, *U.S. Has World's Highest Incarceration Rate*, POPULATION REFERENCE BUREAU (Aug. 10, 2012), <https://www.prb.org/us-incarceration/>.

¹⁰⁰ Jenny E. Carrol, *Pretrial Detention in the Time of Covid-19*, at 1 (Nw. Univ. L. Rev. Online, Research Paper No. 3576163, 2020).

¹⁰¹ See Joseph Hayes & Heather Harris, *California's Jail Population Has Plummeted During COVID-19*, PUB. POL'Y INST. OF CAL. (May 8, 2020), <https://www.ppic.org/blog/californias-jail-population-has-plummeted-during-covid-19/>.

¹⁰² *Responses to the COVID-19 pandemic*, PRISON POL'Y INITIATIVE (Aug. 6, 2020), <https://www.prison-policy.org/virus/virusresponse.html>.

¹⁰³ *Id.*

the establishment of protocols and securing online systems, we will be able to have a fully comparable and secure virtual trial alternative. Since courts are facing limited hours this is extremely difficult to meet. Federal rights cannot be violated so instead it seems the selected alternative is to turn prisoners loose on the streets and allow them to be potential risks to public health and safety. There is also a valid concern raised that committing a crime, going through the judicial system, and being convicted of said crime, only to be freed again conveys the message that the punishment is not a hard standard.

Although some persons who are guilty and should be in jail serving time will be released, the COVID-19 pandemic also risks exacerbating a long-term issue of innocent defendants pleading guilty to get out of jail.¹⁰⁴ If they will be able to get out of jail soon after arriving for any variety of reasons this is much more appealing on emotional and financial levels. This muddles the lines between right and wrong, innocent and guilty, convicted and free, that have been drawn in our justice system. Rather than “don’t do the crime if you can’t pay the time,” it becomes “why not do the crime (or say you did) if you won’t do the time?”

III. The Future of Justice in a Post-COVID-19 American Legal System

There is no longer such thing as an established “norm.” The coronavirus dictates how each day will proceed. With each new day comes a new announcement from the courts, the governor, or the president regarding new limitations and procedures in response to the virus. According to experts, “it’s very feasible we’re going to see multiple city- or state-level outbreaks across the country in the next few weeks and months. They will start at different times and they will peak at different times.”¹⁰⁵ Since the coronavirus is so unpredictable and there is no cure yet the future is extremely unstable. Some countries’ numbers may have dropped, but China has faced a second wave and the United States’ numbers are still skyrocketing.¹⁰⁶ There is no 100% foolproof cure and unfortunate pushback against the vaccine. Even with the vaccine, people may still need boosters for it.¹⁰⁷ Dr. Fauci has

¹⁰⁴ Ryan Cannon, *Sick Deal: Injustice and Plea Bargaining During COVID-19*, 110 J. CRIM. L. & CRIMINOLOGY ONLINE 91, 104 (2020).

¹⁰⁵ See Andrew Joseph, *The coronavirus is washing over the U.S. These factors will determine how bad it gets in each community*, STAT (Apr. 1, 2020), <https://www.stat.com/2020/04/01/coronavirus-how-bad-it-gets-different-communities/>.

¹⁰⁶ Aristos Georgiou, *Asia Facing Second Wave of Coronavirus As China Records Most Cases in a Single Day Since April*, NEWSWEEK (July 29, 2020), <https://www.newsweek.com/asia-facing-second-wave-coronavirus-china-most-cases-single-day-april-1521265>; Peter Alexander & Corky Siemaszko, *Covid-19 cases are on the rise in all 50 states, NBC News data shows*, NBC (Nov. 17, 2020), <https://www.nbcnews.com/news/us-news/covid-19-cases-are-rise-all-50-states-nbc-news-n1248006>.

¹⁰⁷ See Aylin Woodward, *You’re Going to Need More than One Coronavirus Shot. One Dose of a Vaccine Probably Won’t Be Enough*, BUS. INSIDER (July 26, 2020), <https://businessinsider.com/coronavirus->

estimated that this virus is ten times worse than the common flu which kills thousands of Americans every year even with the vaccine options we already have.¹⁰⁸ If this is true, the United States is in for a lengthy, painful struggle. The longer it takes to recover and ensure public safety the more these initially temporal shifts will become permanent measures.

Nonetheless, the American justice system will prevail. Virtual technology, like Zoom, displays great promise in hosting the judicial process during court closures. There are still some fields of law that technology struggles to compensate for live experiences as seen by early experimental jury trials.¹⁰⁹ In particular, large scale criminal jury trials will face difficulty regardless of how much virtual technology exists. If you have a case involving Child Protective Services, criminal lawyers, bailiffs, court reporters, etc., then these complexities are not always compatible with technology. The more people who are involved in a case the more difficult it is to rely on fully virtual experiences. It is doable, but time will tell if this is a suitable “forever replacement” for live courthouses and hearings.

As countries around the world face off with multiple rounds of coronavirus outbreaks, it appears that COVID-19 will not be eradicated for a long time. The World Health Organization (“WHO”) Director-General¹¹⁰ has said “there’s no silver bullet at the moment and there might never be.” Though it is absolutely necessary to continue social distancing, the real question remains: “how do we move forward into the judicial system effectively, safely, and in alignment with our country’s foundational values of justice and equality?” We are living history right now, and the world will never be the same. The American judicial system is part of a wider, global puzzle, but its future will be dictated tremendously by the rest of the shifting targets in the aftermath of COVID-19. New Yorkers are moving out of the city in droves.¹¹¹ Their return is unknown, and the chances of them returning to the city and then taking the subway or entering a courthouse in person is doubtful. Now that it has been made clear how much assistance remote technology can provide to the process, it seems implausible that we will ever make a “full” return to the long-established judicial system norms and resources. Thus, the

vaccine-booster-follow-up-shots-needed-over-time-2020-7.

¹⁰⁸ See Denise Grady, *How Does the Coronavirus Compare With the Flu?* N.Y. TIMES (Mar. 27, 2020), <https://nytimes.com/article/coronavirus-vs-flu.html>.

¹⁰⁹ See Michael Fente, Research Paper, *Statutory and Constitutional Hurdles Confronting the Judicial System During the COVID-19 Pandemic*, AM. U. WASH. COLL. OF L. 34 (2020).

¹¹⁰ See Tedros Adhanom Ghebreyesus, *WHO Director-General’s opening remarks at the media briefing on COVID-19-3 August 2020*, WORLD HEALTH ORG. (Aug. 3, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid19---3-august-2020>.

¹¹¹ Melissa Klein, *New Yorkers keep moving out of the city to suburbs, other states*, N.Y. POST (Aug. 12, 2020), <https://nypost.com/2020/08/11/new-yorkers-flee-nyc-in-droves/>.

judiciary response to this pandemic is reshaping the future of the judicial system in the United States.¹¹²

Our post-coronavirus legal ecosystem will appear radically different from anything ever seen before. The current system may be altered constantly by new legislation and orders, but, in the entire history of the nation, we have never faced court closures like this. However, if we can continue to use the technological resources at hand then our ability to enact justice fairly and efficiently will increasingly thrive. Through virtual assistance and social evolution, trials and cases are certain to grow in complexity; but emerging generations of global legal leaders will undoubtedly be capable of meeting these heightening standards. In the meantime, all that can be done is to accept the gravity of the struggle, utilize the tools we already possess, and pull ourselves up to face the imminent permanent challenges of the new American judicial system. We are a country governed by laws and, if you come here, you will receive justice. This deliverance of justice may look differently than it has in the past, but the reliability and effect of the United States system of democracy will remain unchanged.

¹¹² See Fente, *supra* note 109, at 4.

