


8-28-2020

And Justice for None: How COVID-19 Is Crippling the Criminal Jury Right

Brandon Marc Draper
University of Houston Law Center

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/bclr>

 Part of the [Courts Commons](#), [Criminal Procedure Commons](#), [Law and Society Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Brandon Marc Draper, *And Justice for None: How COVID-19 Is Crippling the Criminal Jury Right*, 62 B.C. L. Rev. E.Supp. 1.-1 (2021), <https://lawdigitalcommons.bc.edu/bclr/vol62/iss9/1>

This Essay is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

AND JUSTICE FOR NONE: HOW COVID-19 IS CRIPPLING THE CRIMINAL JURY RIGHT

BRANDON MARC DRAPER*

Abstract: The jury trial is the cornerstone of the criminal justice system in the United States. Amid the COVID-19 pandemic, however, access to fair and constitutional jury trials has largely come to a halt. Courts correctly decided to stop all jury trials and other in-person proceedings as the nation learned more about a new and deadly virus. Nevertheless, this decision denied access to an important constitutional right. In response, some courts employed video conference technology such as Zoom and WebEx to conduct arraignments, general court appearances, and some pretrial hearings. Six months into the pandemic, some criminal courts are beginning to consider and test two adaptations of jury trials to attempt to meet the needs of the system: (1) trials that are both in-person and compliant with social distancing policies and (2) trials conducted exclusively via video conference. This Essay argues that at best, these solutions are grossly unfair to all of those who participate in the criminal justice system. At worst, they likely violate the Sixth Amendment rights of the accused and create ethical concerns for prosecutors, defense attorneys, judges, and jurors. Yet, even with these legitimate concerns, courts should attempt to mitigate the risks and resume jury trials that are both in-person and compliant with social distancing policies to provide the criminal justice system with the best opportunity to ensure fair jury trials.

INTRODUCTION

COVID-19 has had a devastating impact on virtually all aspects of life. To help minimize its destruction, many parts of the country closed businesses and schools and enacted strict social distancing guidelines.¹ Due to a tragic combination of government mismanagement,² misinformation from some members

© 2021, Brandon Marc Draper. All rights reserved.

* B.A., SUNY at Binghamton, J.D., University of Maryland Francis King Carey School of Law. Brandon Marc Draper is a former prosecutor and a current Assistant County Attorney in Harris County, Texas. Mr. Draper is also the Assistant Director of Interscholastic Mock Trial at the University of Houston Law Center, where he teaches Advanced Trial Advocacy. The author thanks Maxwell L. Stearns and Tifenn Drouaud for helpful comments on an earlier draft. He also thanks Meg Green and the editorial staff at the *Boston College Law Review*.

¹ Jacob Gershman, *A Guide to State Coronavirus Reopenings and Lockdowns*, WALL ST. J., <https://www.wsj.com/articles/a-state-by-state-guide-to-coronavirus-lockdowns-11584749351> [<https://perma.cc/T94V-BCPY>] (May 20, 2020).

² See, e.g., Tom Dart, *'We Opened Too Quickly': Texas Becomes a Model for Inadequate Covid-19 Response*, THE GUARDIAN (June 27, 2020), <https://www.theguardian.com/us-news/2020/jun/27/we-opened-too-quickly-texas-becomes-model-inadequate-coronavirus-pandemic-response> [<https://perma.cc/AP3V-PQKA>]; Andy Kroll, *COVID-19 Is Surging. Donald Trump's Response Is Shrinking*,

of the media,³ and perhaps bad luck,⁴ the virus continues to spread throughout the country.⁵ As of August 15, 2020 the death toll had surpassed 172,000 in the United States alone.⁶ Without major changes from our governments and citizens, that number is only expected to grow.

One particularly unfortunate loss amid the COVID-19 pandemic has been access to fair and constitutional criminal jury trials.⁷ Without a jury trial, many criminal cases simply cannot meet constitutional requirements. Despite this necessity, courts at all levels have largely ceased all in-person proceedings, including criminal jury trials.⁸ Although this loss especially hurts the accused,⁹ it also causes great harm to victims, prosecutors, defense attorneys, judges, jurors, and the public. After all, in a functioning society, citizens need to know that the criminal justice system works for them. The cancellation of in-person court appearances, however, was clearly necessary as a public health and safe-

ROLLING STONE (June 30, 2020), <https://www.rollingstone.com/politics/politics-features/trump-coronavirus-pandemic-spike-texas-florida-california-pence-fauci-white-house-1022172/> [<https://perma.cc/W3QB-ZGGE>]; *Tracking Our COVID-19 Response*, COVID EXIT STRATEGY, <https://www.covidexitstrategy.org/> [<https://perma.cc/8CHU-HNRL>].

³ See, e.g., Christopher Ingraham, *New Research Explores How Conservative Media Misinformation May Have Intensified the Severity of the Pandemic*, WASH. POST (June 25, 2020), <https://www.washingtonpost.com/business/2020/06/25/fox-news-hannity-coronavirus-misinformation/> [<https://perma.cc/4ZKC-3EV4>]; Caroline Modarressy-Tehrani & Louise McLoughlin, *They Thought COVID-19 Was a Hoax, Until They Fell Ill*, NBC NEWS (Aug. 8, 2020), <https://www.nbcnews.com/news/us-news/they-thought-covid-was-hoax-until-they-fell-ill-n1236183> [<https://perma.cc/Z7TC-CFJA>].

⁴ See, e.g., Hannah Beech et al., *The Covid-19 Riddle: Why Does the Virus Wallop Some Places and Spare Others?*, N.Y. TIMES (May 3, 2020), <https://www.nytimes.com/2020/05/03/world/asia/coronavirus-spread-where-why.html> [<https://perma.cc/A48M-PWVB>].

⁵ See, e.g., Ed Yong, *How the Pandemic Defeated America*, THE ATLANTIC, <https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191/> [<https://perma.cc/URS7-4PYL>] (Aug. 4, 2020).

⁶ COVID-19 Coronavirus Pandemic Statistics for the United States, WORLDOMETER, <https://www.worldometers.info/coronavirus/country/us/> [<https://perma.cc/F3C6-JPQF>].

⁷ Debra Cassens Weiss, *A Slew of Federal and State Courts Suspend Trials or Close for Coronavirus Threat*, A.B.A. J. (Mar. 18, 2020), <https://www.abajournal.com/news/article/a-slew-of-federal-and-state-courts-jump-on-the-bandwagon-suspending-trials-for-coronavirus-threat> [<https://perma.cc/ALF9-D9BQ>].

⁸ Barry J. McMillion, *Federal Jury Trials and COVID-19*, CONG. RSCH. SERV. (Apr. 20, 2020), <https://crsreports.congress.gov/product/pdf/IN/IN11346> [<https://perma.cc/4TQH-CMLV>]; *Criminal Justice System Responses to COVID-19*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 21, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/criminal-justice-and-covid-19.aspx> [<https://perma.cc/4HXN-NEY5>].

⁹ Defendants in custody are particularly at risk. If they waive their speedy trial right to ensure their jury right, they are likely to endure punishments that far outweigh their alleged crimes. See, e.g., Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 59, 62 (2020), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1291&context=nulr_online [<https://perma.cc/49LQ-AGAP>] (noting that detainees are more likely to have “high risk” preexisting conditions and it is unrealistic they will be able to engage in social distancing, increasing their likelihood of contracting COVID-19 while awaiting trial).

ty response. Courts that refused to enact these measures placed their participants at an unnecessary risk of illness or death.¹⁰

As the country continues to navigate its way through the COVID-19 pandemic, many courts are now trying to resume with their schedule of criminal jury trials. Presently, courts are considering some version of either (1) trials in-person and compliant with social distancing policies or (2) trials conducted exclusively by video conference. Part I of this Essay discusses the perceived constitutionality of in-person and socially distanced jury trials, in addition to the fairness and ethical concerns created by such guidelines.¹¹ Part II discusses the inherently unconstitutional nature of a jury trial by video conference. Part II also discusses the technological, administrative, and social issues associated with video conference technology.¹² It concludes that plans to reintegrate jury trials into a society enduring the COVID-19 pandemic should be viewed with extreme caution. Although criminal jury trials are necessary to a functional criminal justice system and society, and ultimately must resume, their constitutionality and fairness to all participants must be assured before they do so.

I. IN-PERSON AND SOCIALLY DISTANCED JURY TRIALS

Many courts are considering the resumption of in-person criminal jury trials rather than waiting until the pandemic ends. As outlined by Professor Anna Offit, such trials should impose social distancing guidelines for potential jurors, allow for staggered arrival times of summoned jurors to avoid overcrowding, and adapt juror seating to utilize the entire courtroom instead of limiting them to the jury box.¹³ Indeed, there is a historical precedent for such a plan: in 1918, while enduring the Spanish Flu, some courts in the United States held hearings outdoors to allow for social distancing and ventilation.¹⁴

In Harris County, Texas, the third-largest county in the United States, the courts are attempting to implement a plan to proceed with in-person and so-

¹⁰ See, e.g., Rochelle Olson, *First Hennepin County Jury Trial Since Pandemic Results in Quarantine for Judge, Staff*, STAR TRIB. (June 11, 2020), <https://www.startribune.com/first-hennepin-county-jury-trial-since-pandemic-results-in-quarantine-for-judge-and-her-staff/571165002/> [<https://perma.cc/Y8XY-MUA3>]; Cory Shaffer, *An Ohio Judge Determined to Hold a Trial, a Defendant Removed from the Courtroom with Coronavirus Symptoms Illustrate Perils of Pandemic-Era Trials*, CLEVELAND.COM (May 1, 2020), <https://www.cleveland.com/court-justice/2020/05/an-ohio-judge-determined-to-hold-a-trial-a-defendant-removed-from-the-courtroom-with-coronavirus-symptoms-illustrate-perils-of-pandemic-era-trials.html> [<https://perma.cc/P7XK-SC4S>].

¹¹ See *infra* notes 13–25 and accompanying text.

¹² See *infra* notes 26–55 and accompanying text.

¹³ Anna Offit, *It's Time to Build a Pandemic-Proof, Juror-Friendly Trial*, THE HILL (May 15, 2020), <https://thehill.com/opinion/judiciary/498035-its-time-to-build-a-pandemic-proof-juror-friendly-trial> [<https://perma.cc/86HY-967P>].

¹⁴ Michael Waters, *Video-Chat Juries and the Future of Criminal Justice*, WIRED (May 21, 2020), <https://www.wired.com/story/video-chat-juries-and-the-future-of-criminal-justice/> [<https://perma.cc/MZM4-CAW9>].

cially distanced jury selection at NRG Arena, a 10,000-person capacity venue in Houston.¹⁵ Known as the “NRG Plan,” jury selection for trials will resume no earlier than October 1, 2020.¹⁶ Potential jurors will be required to wear masks and have their temperatures checked before entering, those selected will continue to be subject to screening for symptoms, and hand sanitizer will be provided.¹⁷ Nationally, other plans involve hiring an epidemiologist to guide reopening (Massachusetts),¹⁸ requiring witnesses to wear transparent masks (San Francisco),¹⁹ and even mandating prosecutors to wear face shields during all jury trials (Orange County, North Carolina).²⁰ In a recent federal trial, jurors sat spread out in the gallery and were required to wear face shields.²¹

Health concerns aside, in-person and socially distanced criminal jury trials raise a host of other issues. First, jurors do not want to be there.²² If jurors are angry and/or concerned for their safety, it is hard to expect them to thoughtfully deliberate prior to rendering a verdict. A rushed deliberation that leads to an inappropriate verdict risks harming the accused, the victim, and the system at large.

Second, the jurors who do participate are more likely to be white and more conservative.²³ If the former is true, the accused may have a legitimate claim for a violation of his Sixth Amendment right to a jury that represents a

¹⁵ See Robert Arnold, *Harris County Continues to Grapple with a Huge Backlog of Criminal Cases*, CLICK2HOUSTON (July 1, 2020), <https://www.click2houston.com/news/investigates/2020/07/02/harris-county-continues-to-grapple-with-a-huge-backlog-of-criminal-cases/> [<https://perma.cc/47MA-FEU9>].

¹⁶ Twenty-Second Emergency Order Regarding the COVID-19 State of Disaster, Misc. No. 20-9095, ¶ 6 (Tex. Aug. 6, 2020), <https://www.txcourts.gov/media/1449564/209095.pdf> [<https://perma.cc/33BK-RR5X>]. The emergency order postponed implementation of the NRG Plan by one month. See *id.* Additionally, the order allows for a limited number of remote or socially distanced jury proceedings and instructs the Office of Court Administration to submit a report with recommendations for future proceedings. *Id.* ¶¶ 7–8.

¹⁷ Arnold, *supra* note 15.

¹⁸ Erika Bolstad, *Jury Trials Begin Again, Carefully*, PEW TRS. (May 29, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/05/29/jury-trials-begin-again-carefully> [<https://perma.cc/4Q32-Y74Q>].

¹⁹ Maria Dinzeo, *Judge Orders Transparent Masks for Witnesses in Criminal Trial*, COURTHOUSE NEWS SERV. (July 16, 2020), <https://www.courthousenews.com/judge-orders-transparent-masks-for-witnesses-in-criminal-trial/> [<https://perma.cc/MC67-9M2Z>].

²⁰ Chris Williams, *Orange County Prosecutors Required to Wear Face Shields*, SPECTRUM NEWS (June 16, 2020), <https://spectrumlocalnews.com/tx/austin/news/2020/06/16/orange-county-prosecutors-required-to-wear-face-shields-> [<https://perma.cc/DQ92-YHC3>].

²¹ Angela Morris, *Jury Trials Are Back in Texas. Here's What You Should Know*, LAW.COM (June 8, 2020), <https://www.law.com/texaslawyer/2020/06/08/jury-trials-are-back-in-texas-heres-what-you-should-know/> [<https://perma.cc/E3CU-6ULN>].

²² Mark Curriden, *Harris County Juries Projected to Be Whiter, More Conservative as Pandemic Persists*, HOUS. CHRON., <https://www.houstonchronicle.com/business/article/harris-county-jury-white-male-conservative-covid-15380341.php> [<https://perma.cc/B4QU-RM4B>] (July 3, 2020).

²³ *Id.*

fair cross-section of his community.²⁴ Although most jury pools include some who have no interest in participating, if the pool comprises a disproportionate number of potential jurors who do not want to participate or who will per se violate the rights of the accused, the accused have little incentive to exercise their jury right.

Third, even if such trials could be constitutional, it remains unclear whether they could be fair. For example, the Harris County Criminal Lawyers Association (HCCLA), the largest local criminal defense bar in the United States, recently expressed its view that no criminal jury trial that correctly applied social distancing standards amid the pandemic could be fair to any of the parties. Specifically:

Even if a proper venire panel could be assembled, the NRG Plan makes jury selection impossible. Social distancing which must be maintained between each individual venire member will mathematically require panels to be so spread out neither a judge, a prosecutor, nor a defense attorney can adequately canvass the area while asking questions in the manner required to select a fair and impartial jury. Furthermore, the NRG Plan for face masks and/or shields required of venire members will make it virtually impossible to hear answers to questions or judge facial expressions in response to those questions. The idea of a Constitutionally guaranteed fair and impartial jury with due process of law under these circumstances is completely absurd.²⁵

Ultimately, in-person and socially distanced criminal jury trials have the potential to violate the Sixth Amendment rights of the accused and are otherwise unfair to all who participate. Under those circumstances, most parties will reasonably be unwilling to proceed.

II. JURY TRIALS BY VIDEO CONFERENCE

In the months since the COVID-19 pandemic began, video conference technology like Zoom has gone from being largely unheard of and sparingly used to becoming one of the primary mediums of communication for most of

²⁴ See *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (holding that the Sixth Amendment requires a jury to be drawn from a fair cross-section of the community in a federal case); see also *Duren v. Missouri*, 439 U.S. 357, 370 (1979) (holding that the fair-cross section requirement applies to state cases).

²⁵ Letter from Mark Thiessen, President, Harris Cnty. Crim. Laws. Ass'n to Harris Cnty. J. Hidalgo and the Cmm'rs of the Ct. (July 12, 2020), <https://hccla.org/wp-content/uploads/2020/07/CommCt-7-12-20.pdf> [<https://perma.cc/FCV4-MNQD>].

the world.²⁶ From December 2019 to April 2020, the number of daily participants in Zoom meetings increased from 10 million to 300 million.²⁷ Unfortunately, even outside of the context of a criminal jury trial, Zoom and similar technology platforms can be highly challenging, as they present security and privacy concerns,²⁸ and more importantly, psychological issues.²⁹ Extended use of this technology can lead to increased anxiety, alienation, and exhaustion in users.³⁰ Perhaps worse, depending on how the speaker appears on camera, the viewer may incorrectly perceive the speaker as “uninterested, shifty, haughty, servile or guilty.”³¹ Studies of virtual dating participants suggest a heightened focus on superficial characteristics and missed social cues; the stakes in a criminal jury trial are obviously greater.³²

Within the context of a criminal jury trial, video conference technology may be even worse. First, the accused may not be able to consent to a virtual criminal jury trial. In *United States v. Bethea*, the Seventh Circuit Court of Appeals held that, in accordance with Federal Rule of Criminal Procedure 43(a), a trial court “has no discretion to conduct a guilty plea hearing by video conference, even with the defendant’s permission.”³³ Furthermore, Rule 43(a)(2) clearly states that a defendant’s appearance is required at “every trial stage.”³⁴

²⁶ Mansoor Iqbal, *Zoom Revenue and Usage Statistics (2020)*, BUS. APPS, <https://www.businessofapps.com/data/zoom-statistics/> [<https://perma.cc/W767-6A79>] (July 20, 2020).

²⁷ *Id.*

²⁸ Tom Warren, *Zoom Grows to 300 Million Meeting Participants Despite Security Backlash*, THE VERGE (Apr. 23, 2020), <https://www.theverge.com/2020/4/23/21232401/zoom-300-million-users-growth-coronavirus-pandemic-security-privacy-concerns-response> [<https://perma.cc/U4R3-2ZUV>].

²⁹ Kate Murphy, *Why Zoom Is Terrible*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html> [<https://perma.cc/8FUT-NJ88>].

³⁰ *Id.*

³¹ *Id.*

³² See Sheril Kirshenbaum, *Dating Over Zoom? Don’t Be Surprised if Those Online Sparks Fizzle in Person*, THE CONVERSATION (May 28, 2020), <https://theconversation.com/dating-over-zoom-dont-be-surprised-if-those-online-sparks-fizzle-in-person-138899> [<https://perma.cc/7T9H-3JPF>] (noting that online daters disproportionately value superficial characteristics).

³³ 888 F.3d 864, 867 (7th Cir. 2018); see FED. R. CRIM. P. 43(a) (requiring the defendant’s presence at the plea, as well as at every trial stage and sentencing). Rule 43 allows for a limited exception to the requirement that a defendant’s physical appearance is required at trial. See FED. R. CRIM. P. 43(b)–(c). Specifically, a defendant’s in-person appearance is not required when the defendant is an organization represented by counsel, for misdemeanors, for conferences or hearings on questions of law, and for sentencing corrections. *Id.* 43(b). A defendant’s continued in-person appearance is not required when he initially appeared and is then voluntarily absent, during the sentencing phase of noncapital cases, and when the defendant has been warned and removed for disruptive behavior. *Id.* 43(c). Pursuant to the CARES Act, however, during the COVID-19 pandemic a federal judge may accept a felony plea and sentence by video or teleconference when the accused consents upon consulting with counsel and “the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice.” Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 15002(b)(2)(A), (b)(4), 134 Stat. 281, 528–29 (2020).

³⁴ FED. R. CRIM. P. 43(a)(2).

Thus, based on the Federal Rules of Criminal Procedure and available caselaw, any trial exclusively conducted via video conference that resulted in a guilty verdict may be a per se error subject to reversal.

Perhaps most importantly, any criminal jury trial by video conference would likely force the accused to waive his Sixth Amendment right to confront his accusers. In *Maryland v. Craig*, the Supreme Court granted a limited exception to the accused's right to confront his accuser in-person, holding that the right "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."³⁵ The facts and circumstances in *Craig*, however, are drastically different from most criminal jury trials. Specifically, the victim in *Craig* was a six-year-old survivor of sexual assault.³⁶ Although there is a codified history of the criminal justice system granting unique protections to victims of sexual assault,³⁷ the exception created in *Craig* has rarely been granted to other types of witnesses.³⁸ To be sure, the nature of the COVID-19 pandemic almost certainly fulfills the "necessary to further an important public policy" prong of *Craig*, especially where the witness at issue is suffering from COVID-19.³⁹ Even where that prong is met, however, the "reliability" prong could likely only be met where the witness is clearly observed via video conference by everyone in the court, placed under oath, and subject to cross-examination.⁴⁰

³⁵ 497 U.S. 836, 850 (1990). Professor David M. Wagner maintains that *Crawford v. Washington* "contains dicta incompatible with *Maryland v. Craig* and portends [*Craig*'s] downfall." David M. Wagner, *The End of the "Virtually Constitutional"?: The Confrontation Right and Crawford v. Washington as a Prelude to Reversal of Maryland v. Craig*, 19 REGENT U. L. REV. 469, 470, 472–76 (2006); see *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004) ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."). *But see* *United States v. Carter*, 907 F.3d 1199, 1206 n.3 (9th Cir. 2018) ("The vitality of *Craig* itself is questionable in light of the Supreme Court's later decision in *Crawford* . . . But . . . '*Crawford* did not overturn *Craig*.' We thus remain bound by *Craig* until the Supreme Court 'see[s] fit to reconsider [it], regardless of whether subsequent cases have raised doubts about [its] continuing vitality.'" (citations omitted) (first quoting *United States v. Cox*, 871 F.3d 479, 492–95 (6th Cir. 2017) (Sutton, J., concurring); and then quoting *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam))).

³⁶ *Craig*, 497 U.S. at 840.

³⁷ See, e.g., FED. R. EVID. 412–415 (providing rights of victims in sexual offense and child molestation cases); TEX. CODE CRIM. P. 56.021 (enumerating the rights of a victim of sexual assault or abuse, indecent assault, stalking, or trafficking).

³⁸ See, e.g., *United States v. de Jesus-Casteneda*, 705 F.3d 1117, 1120 (9th Cir. 2013) (holding that a confidential informant may testify in person while in disguise); *Harrell v. Butterworth*, 251 F.3d 926, 931 (11th Cir. 2001) (holding that robbery victims could testify via satellite transmission where one was in poor health, and both resided in Argentina and were unwilling to return to the United States); *Rivera v. State*, 381 S.W.3d 710, 712–13 (Tex. App. 2012) (holding that active duty soldiers may testify remotely when overseas).

³⁹ *Craig*, 497 U.S. at 850.

⁴⁰ Additionally, in states where their constitutions require face-to-face interactions between witnesses and the accused, courts have denied any use of remote testimony. See, e.g., *Commonwealth v.*

Interested parties are also apt to confront technical or logistical issues. Indigent defendants and witnesses, small or solo law firms, and smaller or rural counties are likely to have issues with consistent access to high-speed internet.⁴¹ When the accused and his attorney are in separate physical locations, they will be unable to meaningfully confer with each other.⁴² Courts will have to ensure that the public has access to these proceedings—a feat that has remained difficult.⁴³

In practice, the limited results from virtual proceedings have been troubling. A study conducted by New York University's Civil Jury Project notably found that the jurors had issues with focusing over a long period of time.⁴⁴ One juror's Zoom crashed twice.⁴⁵ Another expressed concern that the lack of juror bonding could impact deliberations.⁴⁶ In a civil summary jury trial conducted in Collin County, Texas, one juror left to take a phone call.⁴⁷ During another civil trial, jurors appeared to sleep, exercise, or tend to their children.⁴⁸ Thus far in the pandemic, hackers have interrupted and caused delays by uploading pornographic images and obscene language in both criminal and civil Zoom hearings.⁴⁹ And during a criminal Zoom hearing that lasted for a total of forty-eight minutes, a judge allegedly muted the defense attorney eight times for at

Ludwig, 594 A.2d 281, 282, 285 (Pa. 1991) (holding that use of a closed-circuit television system for testimony of a child sex abuse victim violated the defendant's right to confront the witness under the state's constitution). *But see* State v. Sweidan, 461 P.3d 378, 384–92 (Wash. Ct. App. 2020) (holding that a witness caring for a critically ill relative may testify remotely despite contrary language in the state constitution).

⁴¹ Matt Reynolds, *Could Zoom Jury Trials Become the Norm During the Coronavirus Pandemic?*, A.B.A. J. (May 11, 2020), <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic> [<https://perma.cc/E3AH-X5KZ>].

⁴² *Id.* This may deny the accused of assistance of counsel, yet another Sixth Amendment violation. *See* U.S. CONST. amend. VI.

⁴³ Reynolds, *supra* note 41.

⁴⁴ Michael Pressman, *A Report on the Civil Jury Project's Mock Zoom Jury Trial*, CIV. JURY PROJECT (June 8, 2020), <https://civiljuryproject.law.nyu.edu/a-report-on-the-civil-jury-projects-mock-zoom-jury-trial/> [<https://perma.cc/6FHU-Q8W8>].

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Waters, *supra* note 14.

⁴⁸ Debra Cassens Weiss, *Potential Jurors Exercised, Curled Up on Bed During Virtual Voir Dire, Motion Says in Asbestos Case*, A.B.A. J. (July 22, 2020), <https://www.abajournal.com/news/article/potential-jurors-exercised-curled-up-on-bed-during-virtual-voir-dire-motion-says> [<https://perma.cc/487H-U8L5>].

⁴⁹ Carlie Porterfield, *Twitter Hacking Court Hearing Gets 'Zoombombed' with Porn*, FORBES (Aug. 5, 2020), <https://www.forbes.com/sites/carlieporterfield/2020/08/05/twitter-hacking-court-hearing-gets-zoombombed-with-porn/#15c88d8fadd3> [<https://perma.cc/Y6X3-6M3Z>]; Paul Venema, *Bexar County Court Hearing Streamed on Zoom Hacked with Porn*, KSAT (Aug. 10, 2020), <https://www.ksat.com/news/local/2020/08/10/bexar-county-court-hearing-streamed-on-zoom-hacked-with-porn/> [<https://perma.cc/M9DG-7462>].

least twelve minutes.⁵⁰ These results are not conducive to a fair and constitutional jury trial.⁵¹

Prosecutors and defense attorneys may also face legitimate ethical concerns. Prosecutors have an ethical duty to “seek justice.”⁵² Defense attorneys have a duty to act in the best interest of their clients.⁵³ Prosecutors may decide that they cannot seek justice in any trial format that is likely to confuse jurors, or cause jurors to unnecessarily doubt the credibility of the victim, expert, or other witness.⁵⁴ Similarly, defense attorneys may conclude that they cannot represent the best interests of their clients in a medium where they cannot clearly gauge the feelings of the jury or where they may unknowingly miss key testimony due to a technological glitch.⁵⁵ Of course, there are certainly some situations where a prosecutor or defense attorney would be willing to proceed to jury trial by video conference despite the problems such a trial creates. These likely include cases involving defendants charged with particularly heinous crimes supported by overwhelming evidence or with unbelievable victims that lack meaningful corroboration. In most situations, however, a thoughtful prosecutor or defense attorney would likely choose to wait until the pandemic subsides or jury trials can safely proceed in-person without social distancing.

CONCLUSION

Jury trial options amid the COVID-19 pandemic pose different yet similarly problematic burdens on those who participate in the criminal jury system. The solution, however, cannot be to cancel all criminal jury trials until the pandemic ceases months or even years from now.⁵⁶ After all, even though most criminal cases do not result in a trial, the fact that a trial is a possibility causes prosecutors, defense attorneys, and the accused to thoughtfully evaluate the

⁵⁰ Joe Patrice, *Fun with Mute Buttons: Civil Rights Violation Edition!*, ABOVE THE LAW (July 21, 2020), <https://abovethelaw.com/2020/07/fun-with-mute-buttons-civil-rights-violation-edition/> [<https://perma.cc/KS7D-NUG8>].

⁵¹ Should the accused opt for a bench trial by video conference, the result might be just as dire. If the judge is known to be harsh against defendants charged with the crime alleged, the accused is unlikely to receive a fair result. Stakes remain high even in low-level felony or misdemeanor cases, where collateral consequences for a conviction may include a parole or probation violation that triggers a much harsher sentence, initiates deportation proceedings, or denies the constitutional right to vote or bear arms.

⁵² See NAT'L PROSECUTION STANDARDS, § 1-1.1 (NAT'L DIST. ATTY'S ASS'N 2009) (providing that “[t]he primary responsibility of the prosecutor is to seek justice”).

⁵³ See MODEL RULES OF PRO. CONDUCT pmb. ¶ 9 (AM. BAR ASS'N 1983).

⁵⁴ See Murphy, *supra* note 29 (describing that viewers may perceive speakers as untrustworthy over video conferencing).

⁵⁵ See Pressman, *supra* note 44 (highlighting that a juror's Zoom crashed during a proceeding).

⁵⁶ See Brian Resnick, *This Covid-19 Mystery Will Help Determine When the Pandemic Ends*, VOX, <https://www.vox.com/science-and-health/2020/5/15/21256282/immunity-duration-covid-19-how-long> [<https://perma.cc/X2ZJ-XRK8>] (May 15, 2020).

merits of each case and work vigorously towards an appropriate result. This possibility similarly allows judges to better manage and control their dockets, and provides victims and the community with the assurance that justice will be served. Ultimately, any jury trial conducted during the pandemic is likely to entail the accused waiving at least some of his Sixth Amendment rights, and require that victims, prosecutors, defense attorneys, and judges proceed with the knowledge that such trials lack crucial elements of fairness provided by pre-pandemic trials.

Despite these grim circumstances, criminal jury trials must proceed. They should be in-person and compliant with social distancing standards. Although a video conference option is available, it should be avoided unless the defendant, on advice of counsel, wishes to proceed on that basis. To ensure that these in-person trials are both constitutional and fair to all participants, prosecutors should explain to victims and witnesses the legitimate concerns created by such trials and prepare them to testify in these conditions. Defense attorneys should additionally explain to their clients the rights they are likely waiving by proceeding in these circumstances. Judges should ask all parties to state in writing and on the record that they understand these issues and remain willing to proceed. Together, they should seek to empanel jurors who can be fair and impartial to the parties in these trying times. If we enact these measures, the results will not be perfect. But if we do nothing, we will ensure that justice delayed is justice denied.

Preferred citation: Brandon Marc Draper, *And Justice for None: How COVID-19 Is Crippling the Criminal Jury Right*, 62 B.C. L. REV. E. SUPP. I-1 (2021), <http://lawdigitalcommons.bc.edu/bclr/vol62/iss9/1/>.

The purpose of the *Boston College Law Review's Electronic Supplement* is to provide a platform to publish shorter and topical pieces—without the constraints usually imposed on content published in print journals—and, thereby, to give authors the opportunity to connect with a wider audience in a more timely manner.