

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

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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.<sup>1</sup> Due to a tragic combination of government mismanagement,<sup>2</sup> misinformation from some members of the media,<sup>3</sup> and perhaps bad luck,<sup>4</sup> the virus continues to spread throughout the country.<sup>5</sup> Presently, the death toll has reached 144,953 as of July 21, 2020 in the United States alone.<sup>6</sup> Without major changes from our governments and our 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. Without a jury trial, many criminal cases simply cannot be resolved consistently with constitutional requirements. Despite this necessity, courts at all

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<sup>1</sup> Jacob Gershman, *A Guide to State Coronavirus Reopenings and Lockdowns*, WALL ST. J. (May 20, 2020 1:47PM ET), <https://www.wsj.com/articles/a-state-by-state-guide-to-coronavirus-lockdowns-11584749351>.

<sup>2</sup> *Tracking our COVID-19 Response*, COVID EXIT STRATEGY, [https://www.covidexitstrategy.org/?fbclid=IwAR0QhgRtpEfjxtEMIXwyMq44Dx8\\_9WU1PI4T5KeLpw1PaYGmHF19MIR9GU](https://www.covidexitstrategy.org/?fbclid=IwAR0QhgRtpEfjxtEMIXwyMq44Dx8_9WU1PI4T5KeLpw1PaYGmHF19MIR9GU) (updating regularly); Andy Kroll, *COVID-19 Is Surging. Donald Trump's Response Is Shrinking*, ROLLING STONE (June 30, 2020 7:00AM ET), <https://www.rollingstone.com/politics/politics-features/trump-coronavirus-pandemic-spike-texas-florida-california-pence-fauci-white-house-1022172/>; Tom Dart, *'We opened too quickly': Texas becomes a model for inadequate Covid-19 response*, THE GUARDIAN (June 27, 2020 9:39AM EDT), <https://www.theguardian.com/us-news/2020/jun/27/we-opened-too-quickly-texas-becomes-model-inadequate-coronavirus-pandemic-response>.

<sup>3</sup> Benjamin Bell and Fergal Gallagher, *Who is spreading COVID-19 misinformation and why*, ABC NEWS (May 26, 2020 3:03PM), <https://abcnews.go.com/US/spreading-covid-19-misinformation/story?id=70615995>; See also Ella Torres, *30-year-old dies after attending 'COVID party' thinking virus was a 'hoax'*, ABC NEWS (July 11, 2020 10:14AM), <https://abcnews.go.com/US/30-year-man-dies-attending-covid-party-thinking/story?id=71731414>.

<sup>4</sup> See 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>.

<sup>5</sup> See, e.g., Debra Cassens Weiss, *A slew of federal and state courts suspend trials or close for coronavirus threat*, ABA J. (March 18, 2020 9:45AM CDT), <https://www.abajournal.com/news/article/a-slew-of-federal-and-state-courts-jump-on-the-bandwagon-suspending-trials-for-coronavirus-threat>.

<sup>6</sup> *COVID-19 Coronavirus Pandemic – United States*, WORLDOMETER, <https://www.worldometers.info/coronavirus/country/us/> (updating regularly).

levels have largely ceased all in-person proceedings, including criminal jury trials.<sup>7</sup> While this loss especially hurts the accused,<sup>8</sup> 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 its criminal justice system works for them. However, the cancellation of in-person court appearances was clearly necessary as a public health and safety response. Courts that refused to enact these measures placed its participants at an unnecessary risk of illness or death.<sup>9</sup>

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 the following two options: (1) trials that are both in-person and compliant with social distancing policies and (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. Part II of this Essay 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. It concludes that plans to reintegrate jury trials into a society enduring the COVID-19 pandemic should be viewed with extreme caution. While criminal jury trials are necessary to a functional criminal justice system and society, and

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<sup>7</sup> Barry J. McMillon, *Federal Jury Trials and COVID-19*, CONGRESSIONAL RESEARCH SERVICE (April 20, 2020), <https://crsreports.congress.gov/product/pdf/IN/IN11346>; *Criminal Justice System Responses to COVID-19*, NATIONAL CONFERENCE OF STATE LEGISLATURES (April 21, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/criminal-justice-and-covid-19.aspx>.

<sup>8</sup> In-custody defendants 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., Carroll, Jenny Elizabeth, *Pretrial Detention in the Time of COVID-19*, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, NORTHWESTERN UNIVERSITY LAW REVIEW ONLINE (2020, FORTHCOMING) (April 14, 2020), <https://ssrn.com/abstract=3576163>.

<sup>9</sup> See Rochelle Olson, *First Hennepin County jury trial since pandemic results in quarantine for judge, staff*, STARTRIBUNE (June 11, 2020 5:17AM), <https://www.startribune.com/first-hennepin-county-jury-trial-since-pandemic-results-in-quarantine-for-judge-and-her-staff/571165002/>; 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>.

ultimately must resume, their constitutionality and their fairness to all participants must be assured before they do so.

#### I. IN-PERSON AND SOCIALLY DISTANCED JURY TRIAL

Many courts are considering the resumption of in-person criminal jury trials. 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.<sup>10</sup> Indeed, there is an historical precedent for such plan. In 1918 while enduring the Spanish Flu, some courts in the United States held hearings outdoors and employed measures similar to those proposed today to conduct jury trials in-person.<sup>11</sup>

Presently, in Harris County, Texas, the third-largest county in the United States, the courts are attempting to proceed with a plan to continue with in-person and socially distanced jury selection. Known as the “NRG Plan,” jury selection for trials is expected to resume on September 1, 2020,<sup>12</sup> at NRG Arena, a 10,000 person capacity arena in Houston. Potential jurors would be required to wear masks and have their temperatures checked before entering, those selected will continue to be subject to testing, and hand sanitizer will be provided.<sup>13</sup> Outside of Harris County, other plans involve hiring an epidemiologist to guide reopening,<sup>14</sup> requiring

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<sup>10</sup> See Anna Offit, *It's time to build a pandemic-proof, juror-friendly trial*, THE HILL (May 15, 2020 7:30PM EDT), <https://thehill.com/opinion/judiciary/498035-its-time-to-build-a-pandemic-proof-juror-friendly-trial>.

<sup>11</sup> See Michael Waters, *Could a trial by one's peers still work when all one's peers are WFH?*, WIRED (May 21, 2020 12:33PM), <https://www.wired.com/story/video-chat-juries-and-the-future-of-criminal-justice/>.

<sup>12</sup> Eighteenth Emergency Order Regarding the COVID-19 State of Disaster, Misc. No. 20-90-80, at ¶ 6 (Tex. June 29, 2020), <https://www.txcourts.gov/media/1448109/209080.pdf>.

<sup>13</sup> See Robert Arnold, *Harris County continues to grapple with a huge backlog of criminal cases*, CLICK2HOUSTON (July 1, 2020 11:02PM), <https://www.click2houston.com/news/investigates/2020/07/02/harris-county-continues-to-grapple-with-a-huge-backlog-of-criminal-cases/>.

<sup>14</sup> See Erika Bolstad, *Jury Trials Begin Again, Carefully*, PEW TRUSTS (May 29, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/05/29/jury-trials-begin-again-carefully>.

witnesses to wear transparent masks,<sup>15</sup> and one even requires prosecutors to wear face shields to all jury trials.<sup>16</sup> In a recent federal trial, jurors sat spread out in the gallery and were required to wear face shields.<sup>17</sup>

Short of waiting until the pandemic is over, in-person and socially distanced criminal jury trials raise a host of issues. First, jurors do not want to be there.<sup>18</sup> 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.<sup>19</sup> 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 fair cross-section of his community.<sup>20</sup> While most jury pools include some who have no interest in participating, if the pool comprises only or disproportionately 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 as to 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

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<sup>15</sup> See Mark Dinzeo, *Judge Orders Transparent Masks for Witnesses in Criminal Trial*, COURTHOUSE NEWS SERVICE (July 16, 2020), <https://www.courthousenews.com/judge-orders-transparent-masks-for-witnesses-in-criminal-trial/>.

<sup>16</sup> See Chris Williams, *Orange County Prosecutors Required to Wear Face Shields*, SPECTRUM NEWS (June 16, 2020 3:01PM ET), <https://spectrumlocalnews.com/tx/austin/news/2020/06/16/orange-county-prosecutors-required-to-wear-face-shields->.

<sup>17</sup> See Angela Morris, *Jury Trials Are Back in Texas. Here's What You Should Know*, LAW.COM (June 8, 2020 3:39PM), <https://www.law.com/texaslawyer/2020/06/08/jury-trials-are-back-in-texas-heres-what-you-should-know/>.

<sup>18</sup> See Mark Curriden, *Harris County juries projected to be whiter, more conservative as pandemic persists*, HOUSTON CHRONICLE, <https://www.houstonchronicle.com/business/article/harris-county-jury-white-male-conservative-covid-15380341.php> (last updated July 3, 2020 5:49PM).

<sup>19</sup> *Id.*

<sup>20</sup> See *Taylor v. Louisiana*, 419 U.S. 522 (1975) (federal cases); *Duren v. Missouri*, 439 U.S. 357 (1979) (state cases).

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.<sup>21</sup>

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 TRIAL BY VIDEO CONFERENCE

In the months since the COVID-19 pandemic began, video conference technology like Zoom has gone from largely unheard of and sparingly used to one of the primary mediums of communication for most of the world.<sup>22</sup> From December 2019 to March 2020, the number of daily participants in Zoom meetings increased from 10 million to 300 million.<sup>23</sup> Unfortunately, even outside of the context of a criminal jury trial, Zoom and similar technology can be highly challenging, especially in regards to security and privacy concerns,<sup>24</sup> and more importantly, psychological issues.<sup>25</sup> Extended use of this technology can lead to increased anxiety, alienation,

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<sup>21</sup> Letter to Harris County Judge and Commissioners from Harris County Criminal Lawyers Association (July 12, 2020) (on file at <https://hccla.org/wp-content/uploads/2020/07/CommCt-7-12-20.pdf>).

<sup>22</sup> See Ansoor Iqbal, *Zoom Revenue and Usage Statistics (2020)*, BUSINESS OF APPS (June 23, 2020), <https://www.businessofapps.com/data/zoom-statistics/>.

<sup>23</sup> *Id.*

<sup>24</sup> See Tom Warren, *Zoom grows to 300 million meeting participants despite security backlash*, THE VERGE (April 23, 2020 5:58AM), <https://www.theverge.com/2020/4/23/21232401/zoom-300-million-users-growth-coronavirus-pandemic-security-privacy-concerns-response>.

<sup>25</sup> See Kate Murphy, *Why Zoom is Terrible*, N.Y. TIMES (April 29, 2020), <https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html>.

and exhaustion in users.<sup>26</sup> Perhaps worse, depending on how the speaker appears on camera, the viewer may incorrectly perceive the speaker as “uninterested, shifty, haughty, servile or guilty.”<sup>27</sup> Studies show that Zoom can irreparably harm a lunch date; the stakes in a criminal jury trial are obviously greater.

Within the context of a criminal jury trial, video conference technology may be even worse. The accused may not be able to consent to a virtual criminal jury trial. In *United States v. Bethea*,<sup>28</sup> 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.”<sup>29</sup> Furthermore, Fed. R. Crim. P. 43(a)(2) clearly states that a defendant’s appearance is required at “every trial stage.”<sup>30</sup> 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*,<sup>31</sup> the Supreme Court granted a limited exception to the accused’s right to confront his

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> 888 F.3d 864 (7th Cir. 2018). However, pursuant to the CARES Act, 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 Act, Pub. L. No. 116-136, §§ 15002(b)(2)(A), (b)(4), 134 Stat. 281, 528-29 (2020).

<sup>29</sup> *Id.* at 867. Rule 43(b)-(c) allows for a limited exception to the rule that a defendant’s physical appearance is required at trial. Specifically, a defendant’s in-person appearance is not required where the defendant is an organization represented by counsel, for misdemeanors, for conferences or hearings on questions of law, and for sentencing corrections. See FED. R. CRIM. P. 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.* at § (c).

<sup>30</sup> See FED. R. CRIM. P. 43(a)(2).

<sup>31</sup> 497 U.S. 836 (1990). Professor David M. Wagner maintains that *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Id.* at 68-69.), “contains dicta incompatible with *Maryland v. Craig* and portends [*Craig*’s] downfall.” See David M. Wagner, *The End of the*

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.”<sup>32</sup> However, the facts and circumstances from *Craig* are drastically different from most criminal jury trials. Specifically, the victim in *Craig* was a six-year-old victim of sexual assault.<sup>33</sup> While there is a codified history of the criminal justice system granting unique protections to victims of sexual assault,<sup>34</sup> the exception created in *Craig* has rarely been granted to any other type of witness.<sup>35</sup> 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. Even where that prong is met, the “reliability” prong could likely only be met where the witness may be clearly observed via video conference by everyone in the court, is placed under oath, and is subject to cross-examination.<sup>36</sup>

Interested parties are also apt to confront technical or logistical issues. Indigent defendants and witnesses, as well as small or solo law firms, and smaller or rural counties, are likely to have issues with consistent access to high-speed internet.<sup>37</sup> When the accused and his

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“Virtually Constitutional “? *The Confrontation Right and Crawford v. Washington as a Prelude to Reversal of Maryland v. Craig*, 19 REGENT L. REV. 2, 472-76 (2007).

<sup>32</sup> *Craig*, 497 U.S. at 850.

<sup>33</sup> *Id.* at 840.

<sup>34</sup> See, e.g., FED. R. EVIDENCE 412-15; TEX. CODE CRIM. P. 56.021 (rights of victim of sexual assault or abuse, indecent assault, or trafficking).

<sup>35</sup> See, e.g., *U.S. v. de Jesus-Casteneda*, 705 F.3d 1117 (9th Cir. 2013) (Holding that a confidential informant may testify in-person while in disguise. *Id.* at 1120.); *Harrell v. Butterworth*, 251 F.3d 926 (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. *Id.* at 931.); *Rivera v. State*, 381 S.W.3d 710 (Tex. App.—Beaumont 2012) (Holding that active duty soldiers may testify remotely when overseas. *Id.* at 712-13.).

<sup>36</sup> Additionally, in states where their constitutions require face-to-face interactions between witnesses and the accused, courts have also denied any use of remote testimony. See, e.g., *Commonwealth v. Ludwig*, 594 A.2d 281 (Pa. 1991). But see, *State v. Sweidan*, 461 P.3d 378 (Wash. Ct. App. 2020) (Holding that a witness caring for a critically ill relative may testify remotely despite contrary language in the state constitution. *Id.* at 384-92.).

<sup>37</sup> See Matt Reynolds, *Could Zoom trials become the norm during the coronavirus pandemic?*, ABA J. (May 11, 2020 8:00AM CDT), <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic>.

attorney are in separate physical locations, they will be unable to meaningfully confer with each other.<sup>38</sup> Courts will have to ensure that the public has access to these proceedings – a feat that has remained difficult.<sup>39</sup>

Prosecutors and defense attorneys may also face legitimate ethical concerns. Prosecutors have an ethical duty to “seek justice.”<sup>40</sup> Defense attorneys have a duty to act in the best interest of their clients.<sup>41</sup> 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. 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. 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 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. However, in most situations, a thoughtful prosecutor or defense attorney would likely choose to wait until the pandemic subsides or jury trials can safely proceed in-person and without social distancing.

In practice, the limited results 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.<sup>42</sup> One juror’s Zoom crashed twice.<sup>43</sup> And another expressed concern that the

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<sup>38</sup> *Id.* This may deny the accused of assistance of counsel, yet another Sixth Amendment violation.

<sup>39</sup> *Id.*

<sup>40</sup> NATIONAL PROSECUTION STANDARDS, § 1-1.1 Primary Responsibility (NAT’L DIST. ATTORNEYS ASS’N 2009).

<sup>41</sup> MODEL RULES OF PROF’L CONDUCT, Preamble & Scope, ¶ 9 (AM. BAR ASS’N, 1983).

<sup>42</sup> See Michael Shammas, *A Report on the Civil Jury Project’s Mock Zoom Jury Trial*, CIVIL JURY PROJECT (June 8, 2020), <https://civiljuryproject.law.nyu.edu/a-report-on-the-civil-jury-projects-mock-zoom-jury-trial/>.

<sup>43</sup> *Id.*



lack of juror bonding could impact deliberations.<sup>44</sup> In a civil summary jury trial conducted in Collin County, Texas, one juror left to take a phone call.<sup>45</sup> During another civil trial, jurors appeared to sleep, exercise, or tend to their children.<sup>46</sup> 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 least twelve minutes.<sup>47</sup> These results are not conducive to a fair and constitutional jury trial.<sup>48</sup>

### CONCLUSION

Jury trial options amid the COVID-19 pandemic pose different yet similarly problematic burdens on those who participate in the criminal jury system. However, the solution cannot be to cancel all criminal jury trials until the pandemic ceases months or even years from now.<sup>49</sup> 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 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, however, any jury trial conducted during the pandemic is likely to entail that the accused waive at least some of his Sixth Amendment rights,

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<sup>44</sup> *Id.*

<sup>45</sup> See supra note 11.

<sup>46</sup> See Debra Cassens Weiss, *Potential jurors exercised, curled up on bed during virtual voir dire, motion says in asbestos case*, ABA J. (July 22, 2020 2:42pm CDT), [https://abovethelaw.com/2020/07/fun-with-mute-buttons-civil-rights-violation-edition/?fbclid=IwAR3s1KLZoXhnl8K0ImJNZo\\_EeFvOhbrdFtX-KNyUP2-TbGO2Q8zN44e121A](https://abovethelaw.com/2020/07/fun-with-mute-buttons-civil-rights-violation-edition/?fbclid=IwAR3s1KLZoXhnl8K0ImJNZo_EeFvOhbrdFtX-KNyUP2-TbGO2Q8zN44e121A).

<sup>47</sup> See Joe Patrice, *Fun With Mute Buttons: Civil Rights Violation Edition!*, Above the Law (July 21, 2020 3:01pm), [https://abovethelaw.com/2020/07/fun-with-mute-buttons-civil-rights-violation-edition/?fbclid=IwAR3s1KLZoXhnl8K0ImJNZo\\_EeFvOhbrdFtX-KNyUP2-TbGO2Q8zN44e121A](https://abovethelaw.com/2020/07/fun-with-mute-buttons-civil-rights-violation-edition/?fbclid=IwAR3s1KLZoXhnl8K0ImJNZo_EeFvOhbrdFtX-KNyUP2-TbGO2Q8zN44e121A).

<sup>48</sup> 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 triggering a much harsher sentence, initiate deportation proceedings, or deny the constitutional right to vote or bear arms.

<sup>49</sup> See Brian Resnick, *This Covid-19 mystery will help determine when the pandemic ends*, VOX (May 15, 2020 10:33AM EDT), <https://www.vox.com/science-and-health/2020/5/15/21256282/immunity-duration-covid-19-how-long>.

and 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. And they should be in-person and compliant with social distancing standards. While a video conference option is available, it should be avoided unless the defendant, who 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 their 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.