

**IN THE SUPREME COURT OF OHIO**

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<b>STATE OF OHIO,</b>	:	
	:	<b>On Appeal from the</b>
<b>Plaintiff-Appellee,</b>	:	<b>Logan County Court of Appeals,</b>
	:	<b>Third Appellate District</b>
<b>v.</b>	:	
	:	
<b>ELI Y. CARTER,</b>	:	<b>Supreme Court</b>
	:	<b>Case No. 2023-0156</b>
<b>Defendant-Appellant.</b>	:	

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**REPLY OF APPELLANT ELI Y. CARTER**

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**LOGAN COUNTY PROSECUTOR**  
Eric C. Stewart (0071094)  
Logan County Prosecutor's Office  
117 East Columbus Avenue, Suite 200  
Bellefontaine, Ohio 43311  
P: (937) 599-7272  
F: (937) 599-7271

Counsel for Plaintiff-Appellee

**SAMUEL H. SHAMANSKY CO., L.P.A.**  
SAMUEL H. SHAMANSKY (0030772)  
COUNSEL OF RECORD  
Donald L. Regensburger (0086958)  
523 South Third Street  
Columbus, Ohio 43215  
P: (614) 242-3939  
F: (614) 242-3999

Counsel for Defendant-Appellant

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## **REPLY**

The Court accepted jurisdiction in this matter to address whether a criminal defendant's rights to confrontation, due process, and a fair trial are violated where a witness is permitted to testify by remote means utilizing a speech-to-text captioning program in the absence of any important state interest, public policy, or case necessity. In response, the State contends that a "spike" in COVID infection rates, which had ended before Appellant's trial, was an adequate justification for the deprivation of his right to face-to-face confrontation. The Ohio Prosecuting Attorneys Association sets forth a substantively similar argument in its *amicus* brief. Both perpetuate the unsupported claim that Mullins' remote testimony was justified by some case-specific finding involving the spread of COVID. Appellee Brief, 7; *Amicus* Brief, 14. Appellee goes even further, presenting unsupported factual claims and dubious "research" based upon the feelings and preferences of thirty-five civil mock trial participants in Arizona. Appellee Brief, 19.

Despite Appellee's best efforts to confuse the issues, the trial court's failure to justify Mullins' remote testimony through rational, case-specific findings is readily apparent from the record. Accordingly, for the reasons discussed herein, as well as within his Merit Brief, Appellant respectfully submits that his convictions must be reversed and the case remanded for proceedings consistent with Ohio and federal law.

## **FACTS**

Appellant does not have any meaningful dispute with the assertions contained in Appellee's Statement of Facts. However, Appellant does take exception to several claims made by Appellee in the body of its argument, which substantively misrepresent the record as well as the nature of the purported "research" upon which the State relies.

While discussing the remote video technology utilized during Appellant’s trial, Appellee asserts that “Mr. Mullins’ testimony was via two way (sic) video as counsel for the State set up the remote transmission prior to the jury coming into the courtroom and verified it was two-way video. Everyone at the trial proceedings understood that.” Appellee Brief, 7. In making this assertion, Appellee conspicuously fails to reference any portion of the record supporting its claim. Moreover, the State makes no claim as to whether the purported two-way system permitted, much less required, the witness to view Appellant while testifying. These omissions come as no surprise because Appellee’s claims are unsupported by the record. *Tr. passim*. However, even if it were true that Counsel for the State “set up” the system, Appellee has engaged in no effort to supplement the record with that information. Thus, like Appellee’s analysis regarding the spread of COVID, its argument relies entirely upon facts that have never been made part of the record.

Simply put, the record fails to establish whether Mullins testified utilizing a two-way video system. Thus, Appellant has merely observed what is obvious: that the record provides insufficient factual support upon which to conclude that Mullins was required to keep Appellant in view while testifying. Appellant Brief, 7. Notably, this remains true even assuming that Appellee’s allegations about the video system are adopted in their entirety.

The State also disputes Appellant’s characterization of the arguments made on direct appeal, asserting that it “raised the issue [of health and safety during the COVID-19 pandemic] in depth in its initial brief.” Appellee Brief, p. 10. It is true that the State knowingly and intentionally misled the Third District through demonstrably false factual claims and the use of misrepresented COVID statistics outside the record.<sup>1</sup> It is also true that Appellee’s gross lack of candor forced

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<sup>1</sup> For example, Appellee claimed that the trial court found that remote testimony was necessary due to “the emergence of the COVID pandemic” and that, according to the CDC, there “was a

Appellant to engage in a lengthy fact-checking exercise in his Reply.<sup>2</sup> To the extent that Appellee mischaracterized the relevant COVID data on direct appeal, Appellant will concede that it “raised the issue in depth.”

The fact remains that it is impossible to conduct a legitimate analysis of the trial court’s case-specific findings as to the danger of COVID for one simple reason: the trial court made no such findings. Judgment Entry (Feb. 8, 2022). No matter how much that Entry is twisted, contorted, or otherwise misrepresented, the only references to COVID were that it had rendered remote testimony more common, that the pandemic “*along with other causes and weather* made travel by air uncertain,” and that Appellant had provided documentation that infection rates were down. *Id.* (Emphasis added.)

Finally, Appellant must devote at least some attention to Appellee’s reliance upon “recent research” by Dr. Karen Lisko and the Online Courtroom Project. Appellee uses these articles to challenge centuries of legal tradition and case law which establish that face-to-face confrontation is “essential to a fair trial in a criminal prosecution.” *Coy v. Iowa*, 487 U.S. 1012, 1015-1017, 108 S.Ct. 2798 (1988), citing *Pointer v. Texas*, 380 U.S. 400,404, 85 S.Ct. 1065 (1965).

The first cited article describes the outcomes of two civil mock trials, which included a grand total of thirty-five participants as jurors. Karen Lisko, *Bearing Witness To, Well, Witnesses: an Examination of Remote Testimony Versus In-court Testimony*, Vol. 51 Southwestern Law Review No. 1, p. 65 (2021), citing Pamela Gates, et al., *Virtual Juries: We can, but Should We?*

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sudden spike of COVID-19 cases in January and February of 2022.” Appellee Brief, Third District Court of Appeals, pp. 7-9.

<sup>2</sup> Pointing out that the Entry makes no reference to any potential danger associated with the spread of COVID, and further establishing that Appellee had misrepresented its COVID-related data from the CDC. Appellant Reply in Third District Court of Appeals, pp. 4-8

*And if So, How?*, ABA Litigation, Vol. 47 No. 4, Summer 2021, p. 3 (“We conducted two virtual jury selections with a total of 35 jurors.”). One mock trial was conducted in-person with social distancing. *Id.* The other was conducted with all parties, including jurors, participating remotely. *Id.* One of the witnesses was tasked with “conveying tearful emotion” while testifying in both cases. *Id.* She sat in the witness stand and was masked during the in-person trial, while sitting unmasked directly in front of a camera when testifying remotely. *Id.* The in-person jurors “felt” they could generally assess the witness’s emotions, while the remote jurors expressed a “stronger consensus” that they could readily see her emotions and assess her credibility. *Id.*, at 66.

Putting aside the constitutionality of a criminal trial being conducted entirely by remote means, and ignoring the difference between a masked and socially distanced in-person mock civil trial versus a criminal proceeding with no COVID-related precautions, i.e., this case, Appellant questions the validity of any research predicated upon the “feelings” of thirty-five people, particularly when those feelings involve their assessment of whether an actor has successfully conveyed “tearful” levels of melodrama.

The second article cited by Appellee<sup>3</sup> is similarly questionable. As an initial matter, the words “Preprint not peer reviewed” appear on every one of its twenty-six pages. In its Abstract, the paper directly acknowledges that “it is not a tightly controlled experimental study,” but rather a “survey” of a “remarkable natural experiment with one of our nation’s central democratic institutions.” Within the article itself, Professor Hans notes that “[g]iven the Clifford Symposium context, I examine civil juries, not criminal juries. Virtual criminal juries raise distinctive constitutional issues that are not pertinent to virtual civil juries.” *Id.*, p. 5. Even ignoring that this

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<sup>3</sup> Though this paper is available for download at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3860165](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3860165), a copy has been attached hereto for the Court’s convenience.

article expressly avoids any discussion of criminal trials and has yet to be peer reviewed, its only meaningful contribution to this Court’s analysis is that, in a mock trial conducted by the Online Courtroom Project, “some”—not even most or all—jurors felt it was easier to judge witness credibility remotely because they had a closer vantage of the witness than would have been available if looking across a courtroom. *Id.*, p. 18. Moreover, Appellee conspicuously omits some rather important language that immediately follows its quoted excerpt, to wit:

The 25 mock virtual jurors in our experiment made diverse comments about how the virtual jury trial experience compared to their real-world service in a jury trial. Many saw no difference in the virtual versus in-person jury experiences, as shown in Table 1. However, several who saw a difference tended to mention the value of in-person trials: “There’s less of that human connection” and “Body language was not as good and we had less invested in the outcome. Sitting in the same room as the people in the trial gave me more of a stake in how they were ultimately treated.” One juror worried that “Virtual could give a false sense of confidence compared to face to face court proceedings, from witnesses, to judge, to jury deliberation.”

*Id.* Appellant respectfully submits that Appellee’s reliance on these “research” papers, which have not been subjected to peer review, do not address criminal trials, provide little evidence that the benefits of remote testimony outweigh its downsides, and do not even attempt to address criminal defendants’ constitutional rights, is misplaced.

## **ARGUMENT**

The parties appear to agree that remote testimony must “(1) be justified, on a case-specific finding, based on important state interests, public policies, or necessities of the case, and (2) must satisfy the other three elements of confrontation – oath, cross-examination, and observation of the witness’s demeanor.” Appellant Brief, p.11, citing *Maryland v. Craig* 497 U.S. 836, 849, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990); Appellee Brief, p. 8, citing *Maryland* at 849-851. They diverge on whether the trial court in this matter made any case-specific findings which would have justified Mullins’ remote testimony. Finding no support in the record, Appellee relies on outside materials



to justify the trial court's decision. However, in so doing, it fundamentally misrepresents the factual and legal sources upon which it relies. Appellant submits that the trial court's Entry speaks for itself and provides no rational basis for remote testimony. However, even if Appellee's outside sources are applied to the trial court's decision, its ruling was still contrary to Ohio and federal law.

### **Insufficient Justification for Remote Testimony**

In arguing that Mullins' remote testimony was justified, Appellee first relies on the Eighth District's decision in *State v. Crawford*, No. 110986, 2022-Ohio-2673, 2022 WL 3099189 (Aug. 4, 2022) for the proposition that "allowing a witness to testify remotely via video does not violate a defendant's confrontation rights...under appropriate circumstances." Appellee Brief, 12. The State's reliance on this case is notable for several reasons.

First, *Crawford* provides no new interpretation of law with respect to remote testimony. In fact, it explicitly relies upon constitutional provisions and cases cited by Appellant in his Merit Brief. Compare, *Crawford* at ¶¶43-45, with Appellant Brief, pp.9-11. Second, the witness at issue in *Crawford* had been diagnosed with COVID and advised by a doctor to quarantine for fourteen days. *Id.*, at ¶20. Third, the trial court in *Crawford* engaged in a case-specific inquiry concerning the necessity of obtaining the witness' testimony via remote means based on her COVID diagnosis. *Id.*, at ¶46. Fourth, the record in *Crawford* demonstrated that the trial court further ensured that the witness was not relying upon or responding to another person in the room, using written notes, or utilizing anything other than her own faculties in responding to questions. *Id.*, at ¶49.

Every other case cited by the State essentially stands for the same proposition: that remote testimony may be permissible: *if necessary and based on a case-specific inquiry*. Appellant does not dispute this legal principle. In fact, he relies upon it. Appellant acknowledges that COVID-

related concerns might justify remote testimony based on a case-specific inquiry. However, a *generalized* concern over the spread of COVID clearly does not. See, e.g., *X.D.M. v. Juvenile Officer*, Mo.App. No. WD 84529, 2022 WL 2431680 (July 5, 2022); *State v. Tate*, 969 N.W.2d 378, 388-389 (Minn. App. 2022); *T.H. v. State*, 2<sup>nd</sup> Dist.Fla. No. 2D20-3217, 2022 WL 815047, 4-5 (Mar. 18, 2022); *C.A.R.A. v. Jackson Cty. Juvenile Office*, 637 S.W.3d 50, 65-66 (Mo. 2022); *Commonwealth v. Gardner*, Ky.App. No. 2020-CA-1383-MR, 2021 WL 3573304, \*3-5 (Aug. 13, 2021).

The issue presented by this case is simple and direct: did the trial court make any *case-specific findings* sufficient to justify Mullins' remote testimony? *Maryland v. Craig*, 497 U.S. 836, 849, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). Given that the trial court memorialized its findings in a written Entry, the answer to that question is not elusive. The trial court first made two generalized findings: (1) COVID had led to video testimony becoming more common, and (2) that the pandemic, along with "other causes and weather," made air travel uncertain. Judgment Entry (Feb. 8, 2022). The only *case-specific finding* made by the trial court was that "[w]eather is unpredictable and could delay or prohibit [Mullins] from reaching Logan County to testify in person." *Id.*

In an effort to confuse this issue, Appellee has repeatedly referenced the "January spike," which refers to a significant number of new COVID cases in early 2022. Appellee Brief, 10-12. In so doing, the State clearly hopes that the Court will (1) conflate the spread of COVID during "the spike" with its spread around the time of Appellant's trial, and (2) assume that any such concern was shared by the trial court. Naturally, Appellee's argument provides no explanation for the absence of any finding related to the danger of spreading COVID in the trial court's Entry. It also

provides no explanation for the absence of COVID-related safety measures being put in place during Appellant's trial. *Tr. passim*.

Most important, this vague claim about some residual risk from the "January spike" is directly contradicted by the contents of the Entry itself, which clearly and unequivocally demonstrates that the trial court was aware of the substantially lower rate of COVID infection immediately preceding Appellant's trial. Judgment Entry (Feb. 8, 2022); *see also*, Defendant's Memorandum Contra (Feb. 7, 2022) ("Ohio cases are down 90% from the January spike and are currently lower than they have been at any point since August of 2021...Minnesota [has] similar and substantial marked rates of decline.").

In short, the State asks this Court to assume that the trial court made a case-specific finding that Mullins' remote testimony was necessary to prevent the spread of COVID in Appellant's case. It did not. The State suggests that the existence of COVID creates some underlying case-specific basis for remote testimony. It does not. For these reasons, and for those discussed in his Merit Brief, Appellant respectfully submits that the trial court's decision deprived him of his right to confrontation. As such, his convictions must be reversed for proceedings consistent with Ohio and federal law.

### **Inadmissible Testimony**

In its response to the second branch of Appellant's argument, Appellee repeatedly asserts that "Appellant has not shown any prejudice" associated with Mullins' remote testimony. Appellee Brief, 17-18. In support of this claim, Appellee substantively argues that the trial court instructed Mullins to rely upon counsels' verbal questions and "Appellant cannot show [that the instruction was] disobeyed." *Id.* Putting aside any argument about the vagueness of the trial court's order,

which did not expressly prohibit the use of the program, Appellee's reliance on an insufficient record neatly illustrates the larger issue presented by this case.

Under normal circumstances, any violation of the trial court's order could have readily been discovered during Mullings' testimony. Everyone in the courtroom would have been able to see him looking down at his phone to use its speech-to-text captioning program. Naturally, the ability to confirm that a witness has followed the trial court's instructions and has not relied on outside sources of information are just two of the many benefits of face-to-face confrontation.

However, because the trial court allowed Mullins to testify remotely, and to do so using a phone that utilized the very speech-to-text transcription software at issue, there is no way for Appellant to prove that Mullins did not follow the trial court's order. Equally important, there is no way for Appellee to prove that he did. Appellant respectfully submits that any decision by a trial court which prohibits a party from making a complete and accurate record is inherently prejudicial and constitutes grounds for reversal. Accordingly, Appellant submits that his convictions must be reversed for proceedings consistent with Ohio and federal law.

### **Prejudice**

The State asserts that Appellant has failed to present any evidence that remote video testimony is prejudicial. Appellee Brief, p. 19. In so doing, the State explicitly ignores the fifteen preceding pages of Appellant's Merit Brief, which include citations to the Ohio and United States Constitutions, the Ohio Rules of Evidence, and the Ohio Revised Code. Appellant's Merit Brief pp. 1-15. More importantly, the State asks this Court to blind itself to hundreds of years of legal precedent, not to mention practical and procedural legal theory, and to instead embrace the feelings of thirty-five mock trial participants. Appellee Brief, p. 19. Specifically, the State alleges that remote testimony is functionally equivalent to in-person testimony, perhaps even preferable,

because “some jurors [on that panel] who had previously sat on juries” felt they could better judge the credibility of an actor appearing remotely rather than in person. *Id.*, at 20.

In making this argument, Appellee curiously fails to mention that these “studies” explicitly refuse to broach the issue of confrontation in criminal cases.<sup>4</sup> The State further omits that this “research” has not been peer reviewed, that the subjects had concerns about remote testimony, and that even the authors regularly equivocate about the benefits and drawbacks of remote proceedings. As such, the State’s request that the Court give these articles any significant consideration in a criminal context completely defies common sense.

Equally concerning, the briefs submitted by Appellee and the Ohio Prosecuting Attorney’s Association both claim that Appellant was not prejudiced by Mullins’ remote testimony because other witnesses testified at trial. Appellee Brief, p. 18; Amicus Brief, p. 20. While the prejudicial impact of one witness might be limited where other witnesses assert the same operative facts, that is not the rule where, such as here, the witness at issue presented unique testimony. Moreover, despite Appellee’s claim that there is “no evidence” that the jury relied upon Mullins’ testimony, the record clearly reflects that Appellant was convicted of *in loco parentis* consensual sexual conduct. Appellant Brief, p. 20. Such convictions were consistent only with Mullins’ testimony and contrary to that of every other witness. *Id.*

Finally, the Appellee argues that there can be no possible prejudice associated with Mullins’ testimony because he was subject to “thorough cross-examination.” Appellee Brief, p.

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<sup>4</sup> When discussing the general applicability of conducting trials by remote means, the Online Courtroom Project acknowledged the following: “We don’t imagine that any online court solution is a perfect solution for any court or any case. Notably, there are more constitutionally challenging and complex issues in criminal cases.” Online Jury Trials: Summary and Recommendations, p. 7. [https://www.onlinecourtroom.org/\\_files/ugd/850355\\_1977b7d61f524fa3b67ea7e992168253.pdf?index=true](https://www.onlinecourtroom.org/_files/ugd/850355_1977b7d61f524fa3b67ea7e992168253.pdf?index=true).

18. Specifically, Appellee claims that improperly admitted testimony is not prejudicial if subjected to cross-examination that is “beneficial” to a defendant’s case. *Id.* This position is inconsistent with Ohio law.

As recognized by this Court, a violation of an accused’s right to confrontation is not prejudicial where there is “sufficient independent evidence of an accused’s guilt to render the improperly admitted statements harmless beyond a reasonable doubt.” *State v. Moritz*, 63 Ohio St.2d 150, 407 N.E.2d 1268 (2017), paragraph two of the syllabus. As previously stated, Mullins was the only witness whose testimony was consistent with Appellant’s convictions. As a result, regardless of any arguable “benefit” realized during his cross-examination, the fact remains that his improperly admitted testimony on direct was not harmless beyond a reasonable doubt. Accordingly, Appellant submits that his convictions must be reversed for proceedings consistent with Ohio and federal law.

### **CONCLUSION**

Rather than fairly addressing the factual circumstances surrounding Appellant’s Proposition of Law, the State has elected to ignore the content of the trial court’s Entry and rely on misrepresented materials that have nothing to do with decision or issues raised in this appeal. The law is clear: a criminal defendant may only be deprived of his or her right to face-to-face confrontation after the trial court makes a case-specific finding of necessity. The facts are clear: the trial court made no such finding before permitting Mullins to testify by remote means during Appellant’s trial.

Neither the existence of COVID nor the possibility of travel delays, without more, justify depriving Appellant of his constitutional rights to confrontation, due process, and a fair trial. Accordingly, because Mullins’ remote testimony was admitted in blatant violation of Appellant’s

constitutional rights, he respectfully submits that his convictions must be reversed, and the matter remanded for proceedings consistent with Ohio and federal law.

Respectfully submitted,

/s/ Samuel H. Shamansky  
**SAMUEL H. SHAMANSKY CO., L.P.A.**

Samuel H. Shamansky (0030772)  
Donald L. Regensburger (0086958)  
523 South Third Street  
Columbus, Ohio 43215  
P: (614) 242-3939  
F: (614) 242-3999  
shamanskyco@gmail.com

Counsel for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was duly served upon Eric C. Stewart, Logan County Prosecuting Attorney, 117 East Columbus Avenue, Suite 200, Bellefontaine, Ohio 43311, on August 21, 2023, by electronic transmission.

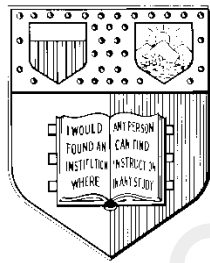
/s/ Samuel H. Shamansky  
**SAMUEL H. SHAMANSKY**

## **APPENDIX**



# CORNELL LAW SCHOOL

## LEGAL STUDIES RESEARCH PAPER SERIES



## Virtual Juries

**Valerie P. Hans**

Cornell Law School  
Myron Taylor Hall  
Ithaca, NY 14853-4901

Cornell Law School research paper No. 21-16

This paper can be downloaded without charge from:  
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## Virtual Juries<sup>1</sup>

Valerie P. Hans<sup>2</sup>

### Abstract

The introduction of virtual or remote jury trials in response to the COVID-19 pandemic constitutes a remarkable natural experiment with one of our nation's central democratic institutions. Although it is not a tightly controlled experimental study, real world experiences in this natural experiment offer some insights about how key features of trial by jury are affected by a virtual procedure. This article surveys the landscape of virtual jury trials. It examines the issues of jury representativeness, the adequacy of virtual jury selection, the quality of decision making, and the public's access to jury trial proceedings. Many have expressed concern that the digital divide would negatively affect jury representativeness. Surprisingly, there is some preliminary evidence that suggests that virtual jury selection procedures lead to jury venires that are as diverse, if not more diverse, than pre-pandemic jury venires. Lawyers in a demonstration project reacted favorably to virtual voir dire when it was accompanied by expansive pretrial juror questionnaires and the opportunity to question prospective jurors. A number of courts provided public access by live streaming jury trials. How a virtual jury trial affects jurors' interpretations of witness testimony, attorney arguments, and jury deliberation remain open questions.

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<sup>1</sup> Paper prepared for presentation at Civil Litigation in a Post-COVID World the 27<sup>th</sup> Clifford Symposium on Tort Law and Social Policy, DePaul College of Law. Webinar, June 3-4, 2020. Research described in the paper was funded by National Science Foundation grant SES-1536238: "Quantitative Judgments in Law: Studies of Damage Award Decision Making" to Valerie P. Hans and Valerie F. Reyna, and by Cornell Law School. Many thanks for helpful comments on civil juries and virtual trials from Zachary Bend, Kevin Clermont, Paula Hannaford-Agor, Richard Jolly, and Robert Peck. Krystia Reed, Vivian Rotenstein, Valerie Reyna, and the Cornell University students who have been conducting a virtual jury experiment with me have contributed immensely to my thinking about the challenges and the benefits of virtual juries. I also am grateful for the research assistance of Jacob Sayward, Director for Collections, Faculty & Scholarly Services, Cornell Law Library.

<sup>2</sup> Valerie P. Hans is the Charles F. Rechlin Professor of Law, Cornell Law School, Myron Taylor Hall, Ithaca, NY 14853. Phone: 607-255-0095. Email: valerie.hans@cornell.edu.

## Virtual Juries

With the introduction of virtual jury trials in response to the COVID-19 pandemic, we are in the midst of a remarkable experiment with one of our nation's long-standing democratic institutions. Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*, famously observed: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>3</sup> This national experiment with different forms of trial by jury is not an experiment in the sense of a tightly controlled research study. Nonetheless, real world experiences in this natural experiment, foisted upon us by a terrible set of circumstances, offer some insights about how key features of trial by jury are affected by a virtual procedure. This article surveys the landscape of virtual jury trials, examining what we know thus far about jury representativeness, the jury selection process, decision making quality, and public access for virtual jury trials.

### Background

The worrisome news about the dramatic increase in infections, hospitalizations, and deaths due to COVID-19 reached a crescendo in the middle of March, 2020. Many public-facing institutions in the United States, including businesses, government offices, and universities, shut down.

That week in March, my research assistants and I had scheduled several in-person mock juries for the upcoming weekend for an ongoing experiment on decision making in tort cases.<sup>4</sup> Residents from Ithaca and the surrounding communities would come to the Law School, watch a videotaped tort trial, and deliberate in six-person groups to arrive at verdicts and damage awards in the case. The study was going well, until it wasn't. On March 13, a national emergency was declared and Cornell University's president announced the closure of the university. Faculty scrambled to get out of their offices with essential teaching and research materials and our distraught students packed up and left town. Our experience in Ithaca was repeated countless times around the country and the globe.

Most courts closed during this difficult early period. The National Center for State Courts identified courts' common responses to the pandemic, including suspension of in-person proceedings, deadline extensions, limited entrance to courthouses, and restriction of jury trials. Many courts encouraged videoconferences or teleconferences instead of in-person proceedings.<sup>5</sup> As they began to get back to business, a number of courts transformed themselves into virtual

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<sup>3</sup> *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932).

<sup>44</sup> Krystia Reed, Valerie P. Hans, Vivian Rotenstein & Valerie Reyna, *Guiding Jury Damage Award Decision Making in Virtual versus In-Person Civil Juries: Experimental Evidence* (ongoing research project, Cornell Law School, 2021).

<sup>5</sup> National Center for State Courts, *5 of the most common efforts state courts are taking to combat the coronavirus*, [https://www.ncsc.org/\\_data/assets/image/0017/13058/coronavirus.png](https://www.ncsc.org/_data/assets/image/0017/13058/coronavirus.png). For federal courts, see *Court Orders and Updates During COVID-19 Pandemic*, <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>.

courtrooms holding remote hearings, with participants logging on to teleconferences or online platforms from their homes. The U.S. Supreme Court began holding oral arguments by telephone.<sup>6</sup> The U.S. Tax Court used ZoomGov to conduct hearings and trials in cases in which petitioners challenged IRS rulings.<sup>7</sup> State courts in Texas shifted overnight to virtual hearings for a number of matters, including Family Court, broadcasting them on YouTube.<sup>8</sup>

Understandably, as many of us needed to get up to speed in this brave new virtual world, there were and continue to be technological challenges and mishaps. The video of the Texas lawyer who was displayed as a cat during his court appearance created some welcome levity.<sup>9</sup> Even Supreme Court justices encountered problems, with one justice getting kicked off the teleconference when he received another call and another justice forgetting to unmute herself before speaking.<sup>10</sup>

There have also been some pleasant surprises. A number of judges and lawyers touted the benefits of virtual proceedings that allowed the continuation of court operations and legal practice, especially given the context of the pandemic.<sup>11</sup> Obvious in retrospect, remote proceedings appear to have provided much easier access for many participants. Elizabeth Thornburg supervised a Texas virtual court observation project in May and June of 2020, and observed:

We idealize the courthouse. We thought clearly the online hearing is going to be a poor substitute for the real courthouse in terms of access. What I didn't think through is there are a number of people, and this was noticeable in the family court hearings, who have a hard time getting to the courthouse . . . . It turns out that it's easier for certain people to testify or participate in a hearing on Zoom . . . . The judge told me a story about a woman who participated in a hearing wearing her Walmart uniform sitting in the Walmart dressing

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<sup>6</sup> Erwin Chemerinsky, *Chemerinsky: SCOTUS Should Embrace Technology Reforms Prompted by Pandemic*, ABA J. (May 28, 2020), <https://bit.ly/3iYTAOk>.

<sup>7</sup> See Zoomgov Proceedings, United States Tax Court, <https://www.ustaxcourt.gov/zoomgov.html> (offering guidance about the Court's virtual proceedings, including video examples).

<sup>8</sup> See also Texas Courts, *Texas Court Holds First US Jury Trial via Videoconferencing* (May 22, 2020), <https://www.youtube.com/watch?v=u6lnI7FZRoc>; Elizabeth Thornburg, *Observing Online Courts: Lessons from the Pandemic*, SMU Dedman School of Law Legal Studies Research Paper No. 486, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3696594](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696594) (updated Oct. 22, 2020).

<sup>9</sup> Daniel Victor, *'I'm Not a Cat,' Says a Lawyer Having Zoom Difficulties*, N.Y. TIMES, February 9, 2021, <https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html>.

<sup>10</sup> Robert Barnes, *Supreme Court takes modest but historic step with teleconference hearings*, WASH. POST (May 4, 2020), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-teleconference-hearings-bookingcom/2020/05/03/f5902bd6-8d76-11ea-a9c0-73b93422d691\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-teleconference-hearings-bookingcom/2020/05/03/f5902bd6-8d76-11ea-a9c0-73b93422d691_story.html); Associated Press, *AP Courtside: Who Flushed? Phone Arguments' Unresolved Issue*, AP NEWS (May 6, 2020), <https://bit.ly/clAOF7R>.

<sup>11</sup> Herbert B. Dixon, Jr., *The Legal Profession's Rediscovery of Teleconferencing*, 59 JUDGES' J. 37 (2020).

room on her break. She was able to participate in this hearing that affected her life without losing work. It has increased access for a number of citizens of Texas.<sup>12</sup>

Despite the embrace of remote technology for other court proceedings, jury trials seemed to be a sticking point for many courts throughout the country. And for good reason. A typical jury trial includes a group of strangers, recruited randomly from the community, who are asked to sit in close proximity to others to observe a trial in a courtroom, and then are required to deliberate with other jurors in a small closed room. These features of a typical jury trial offered many challenges for in-person proceedings that had to be conducted observing health protocols such as social distancing and masking. And was it really safe to conduct jury trials, when the science behind COVID transmission was still developing?

Even if jury trials could be conducted safely, would the trial itself be diminished? How could a jury adequately assess the credibility of masked witnesses who were now farther away from the jurors because of social distancing? How could lawyers establish rapport, or get feedback about whether the jury was confused or responding negatively to legal arguments, if most of the jurors' faces were covered up? Despite these concerns, pausing in-person civil jury trials was likely to produce multiple consequences, including substantial case backlogs, pressures to settle cases under unfavorable terms, moving to arbitration, and defaulting to a bench trial.<sup>13</sup>

The other option was to move the jury trial online. Before the pandemic, many courts had already experimented with online hearings and other legal proceedings; the pandemic accelerated the practice.<sup>14</sup> But again, jury trials seemed to be a bridge too far. How could lawyers and judges learn what they needed to know about prospective jurors who appeared as a square on a screen to be able to exercise peremptory and for-cause challenges? For that matter, how does one craft a persuasive opening statement to a group of squares on a screen? Or instruct a virtual jury? Even

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<sup>12</sup> D. Todd Smith & Beth Thornburg, *Lessons Learned from Online Court Proceedings* (audio interview), TEXAS APPELLATE LAW PODCAST (Nov. 26, 2020), <https://www.butlersnow.com/2020/11/lessons-learned-from-online-court-proceedings-beth-thornburg/>. See also Thornburg, *Observing Online Courts*, *supra* note 8.

<sup>13</sup> See, for example, Holly Boyer & Kevin Nguyen, *Benefits Of A Bench Trial In This COVID-19 Era*, ADVOCATE (Dec. 2020), <https://www.advocatemagazine.com/article/2020-december/benefits-of-a-bench-trial-in-this-covid-19-era> (describing hazards of in-person jury trials and the attractions of bench trials as an alternative); Am. Arbitration Assn, *The Arbitration Solution to COVID-19-Stalled Court Litigation* (Mar. 25, 2021), [https://adr.org/litigation-to-arbitration?utm\\_source=website-adr&utm\\_medium=mosaic&utm\\_campaign=website-litigation-to-arbitration](https://adr.org/litigation-to-arbitration?utm_source=website-adr&utm_medium=mosaic&utm_campaign=website-litigation-to-arbitration) (encouraging corporate counsel and litigators to convert their stalled cases to arbitration hearings).

<sup>14</sup> Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY, 877-78, 883-86 (2010) (describing the expansion of videoconferenced hearings in legal proceedings (at 977-78); and the Cook County, Illinois implementation expanding videoconferenced bail hearings (at 883-86)); Fredric I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 VAND. J. ENT. & TECH. L. 301, 302-04 (2021) (describing pre-pandemic technological advances in the nation's courtrooms, including remote appearances).

more pressing, how could one ensure an engaged jury and a secure jury deliberation when online jurors would not be meeting in person?

When I asked our symposium sponsor and eminent civil trial attorney Robert Clifford if he had to choose, which one he would prefer – an in-person socially distant and masked jury or a virtual jury – he refused to choose between what he saw as two bad alternatives.<sup>15</sup>

As impossible as it seemed initially, as of this writing, the vast majority of courts have reopened to some degree, and have responded to the pandemic challenge with different approaches. Some proceeded with in-person jury trials, conducted with enhanced health and safety protocols.<sup>16</sup> Others opted for virtual jury trials, the subject I focus on in this article.<sup>17</sup> Given the Clifford Symposium context, I examine civil juries, not criminal juries. Virtual criminal juries raise distinctive constitutional issues that are not pertinent to virtual civil juries.<sup>18</sup>

Susan Bandes and Neal Feigenson insightfully note that the pandemic offers an opportunity, albeit one with many more negatives than positives, to identify the key features of courtroom proceedings. They observe that “the questions raised by the pandemic affect the whole range of legal proceedings and interactions . . . . These questions are not merely tangential; they implicate many of the core beliefs undergirding the U.S. system of justice, including the whole notion of ‘a day in court’ as the promise of a synchronous, physically situated event.”<sup>19</sup> Bandes and Feigenson focus on the essential, necessary features of the courtroom trial and consider how these might be affected and transformed by virtual trials.

This article surveys some key issues and summarizes what courts have done to adapt to the pandemic by instituting virtual jury trials. What has been the experience with virtual jury trials?

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<sup>15</sup> Robert A. Clifford, Valerie P. Hans & Richard Jolly, *Jury Trials in the Era of COVID19*, Civil Justice Research Initiative webinar (May 22, 2020), <https://civiljusticeinitiative.org/berkeley-boosts-jury-trials-in-the-era-of-covid-19/>.

<sup>16</sup> The Oregon experience was presented in the National Center for State Courts, Jury trial webinar (May 22, 2020). Jury trials proceeded in Oregon with socially distant jurors sitting in the gallery area, not the jury box.

<sup>17</sup> Sozi Tulante, Kimberly Branscome & Emily Van Tuyl, *Demystifying The Virtual Civil Jury Trial Experience*, LAW360 (April 29, 2021) (describing the use of virtual jury trials in civil cases), <https://www.law360.com/articles/1379757/demystifying-the-virtual-civil-jury-trial-experience>.

<sup>18</sup> See discussion *infra* in section entitled “Evaluating Virtual Juries: Fundamental Requirements of Trial by Jury in Civil Cases.” Nonetheless, a number of courts have reviewed the constitutional issues in virtual criminal proceedings and concluded that they pass constitutional muster and may proceed. For example, consider *Vazquez Diaz v. Commonwealth*, 487 Mass. 336 (2021) (Supreme Judicial Court of Massachusetts finding that virtual suppression hearing did not violate defendant’s due process rights); *State v. Vega-Larregui*, 2021 WL 1652563 (N.J. Apr. 28, 2021) (Supreme Court of New Jersey holding that virtual grand jury proceedings during pandemic consistent with constitutional protections).

<sup>19</sup> Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFFALO L. REV. 1275, 1280 (2020).

How have courts, lawyers, and jurors responded to the virtual trial? Have virtual jury trials in civil cases been up to the task of deciding legal disputes fairly, impartially, and in a procedurally just way? I raise questions about jury representativeness, the adequacy of virtual jury selection, the quality of decision making, and the public's access. When possible, I address these questions with the limited but useful information from our real world experiment with virtual court proceedings.

Writing about virtual jury trials in the spring of 2021, I recognize that this is a swiftly changing landscape. At the time of this writing, many courts have announced plans to reopen their courthouses and return to in-person jury trials.<sup>20</sup> Virtual jury trials may be with us for only a short period of time, or virtual proceedings may continue into the future. While they are here, let's learn what we can from them.

### **Evaluating Virtual Juries: Fundamental Requirements of Trial by Jury in Civil Cases**

In assessing the landscape of virtual civil jury trials, we can start by identifying the requirements for a constitutionally sound and effective jury trial in a civil case. What features should we examine to determine whether virtual jury trials measure up?

The U.S. Constitution and state constitutions lay out a roadmap for evaluating whether criminal jury trials meet constitutional requirements. Therefore, courts can readily analyze whether virtual jury trials in criminal cases undermine these essential components.

The Massachusetts Supreme Court's decision in *Vazquez Diaz v. Commonwealth* offers a good recent example.<sup>21</sup> The question posed to the court was whether a proposed suppression hearing to be conducted via Zoom because of the COVID-19 pandemic violated the defendant's federal and state constitutional rights.<sup>22</sup> The Supreme Court followed the roadmap laid out by previous federal and state cases, observing that due process was a "flexible" concept that might vary with the context. Reviewing the specific rights of the criminal defendant, to wit, the right to be present; the right to confront witnesses; the right to a public trial; and the right to effective assistance of counsel, the court concluded that virtual proceedings were not a per se violation of these rights. If the trial court's Zoom hearing allows the defendant "to listen to the evidence, adequately observe the witnesses who testify at the hearing, and privately consult with his attorney at any time," then it can "effectively safeguard the defendant's right to be present," the Massachusetts Supreme Court concluded.<sup>23</sup> And the defendant's right to a public trial was met by a Superior Court standing order that allowed public access to the virtual proceedings through Zoom or telephone lines.<sup>24</sup>

Civil jury trials do not offer such a straightforward road map. The Seventh Amendment to the U.S. Constitution, which guarantees the right to a civil jury, has not been held to apply to the states,

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<sup>20</sup> National Center for State Courts, Coronavirus and the Courts website, <https://www.ncsc.org/newsroom/public-health-emergency> (click on Statewide Jury Trial Restrictions link).

<sup>21</sup> *Vazquez Diaz v. Commonwealth*, 487 Mass. 336 (2021).

<sup>22</sup> *Id.* at 1-2, slip op.

<sup>23</sup> *Id.* at 11, slip op.

<sup>24</sup> *Id.* at 31, slip op.

reflecting an apparent reluctance to constitutionalize civil procedure.<sup>25</sup> John Leubsdorf argues that this is one of the reasons that there is a comparative absence of constitutional law doctrine regulating the procedures for civil actions.<sup>26</sup> Instead, according to the Supreme Court, what is preserved is the “the substance of the common law right of trial by jury, as distinguished from mere matters of form or procedure.”<sup>27</sup>

In evaluating civil proceedings, Kevin Clermont points to the due process clauses of the Fifth and Fourteenth Amendments, noting that “procedural due process . . . aims to assure a basically fair procedure when the government acts. . . . For example, to authorize governmental action significantly impairing a person’s protected interest, procedural due process normally requires adequate notification and the opportunity to be heard at proceedings before a neutral decisionmaker.”<sup>28</sup> But, what process is due? To assess this, the Supreme Court employs a balancing test, weighing “(1) the value, or importance, of the interest at stake; (2) the probability of an erroneous deprivation if the procedural safeguard in question is not provided; and (3) the cost of, or the burden imposed by, that safeguard.”<sup>29</sup> Clermont points out that the Constitution only

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<sup>25</sup> U.S. Const. Amend. VII; *Gasparini v. Center for Humanities*, 518 U.S. 415, 418 (1996) (“Seventh Amendment...governs proceedings in federal court, but not in state court.”); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (observing that the Court “has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment”). See discussion in NANCY S. MARDER, *THE JURY PROCESS* 39-45 (2005).

<sup>26</sup> John Leubsdorf, *Constitutional Civil Procedure*, 63 *TEX. L. REV.* 579, 579 (1984) (questioning why the Supreme Court’s constitutional jurisprudence has been so dominant in criminal and administrative procedure but has left civil procedure “relatively untouched.”) Of the limited number of decisions regulating state civil procedure, the Supreme Court has held that timely notice and an implied right of defense (by providing an opportunity for a hearing or another safeguard) are required. But, as Leubsdorf notes, “the Court has never extended this right to defend to situations in which the defendant was hampered but not barred or virtually barred from presenting his claim before the court.” *Id.* at 582. He observes that aside from a few exceptions, “Here the trail ends. The researcher may find some fugitive dicta, but he will discover no further Supreme Court constitutional holdings regulating civil procedure in state courts.” *Id.* at 583. He thinks this is mistaken: “fair procedures for the assessment of civil legal claims are special. The text of the Constitution, the functions of civil litigation within the constitutional structure, and the robust case law requiring fair procedures in criminal and administrative proceedings all support vigorous judicial protection of civil procedural rights.” *Id.* at 587.

<sup>27</sup> *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935).

<sup>28</sup> KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* 514-17 (6<sup>th</sup> ed. 2021) [add exact page for quotation]. With respect to due process, Tom Tyler draws on a substantial body of empirical research to identify the critical determinants of perceptions about what constitutes fair procedure. They are: (1) having voice, the opportunity to present one’s story; (2) being treated with dignity and respect; (3) the decision maker’s neutrality and transparency; and (4) the decision maker’s trustworthiness. We can consider these features, too, as we evaluate the virtual jury trials. TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

<sup>29</sup> CLERMONT, *supra* note 28, at 514-17. [add exact page for quotation]



requires the minimum, so “the risk of harm would have to considerably exceed the costs before amounting to a constitutional violation, rather than merely bad policy.”<sup>30</sup>

There is one other key principle for civil jury trials that is worth noting. A civil jury must be drawn from a cross-section of the community. The assumption is that, over time and over juries, a representative pool of community citizens will result in generally representative trial juries. The Seventh Amendment does not mention a cross-sectional requirement, in contrast to the Sixth Amendment, which does. However, several other sources support a cross-section requirement in civil trials. The Equal Protection clause of the Fourteenth Amendment prohibits discrimination on the basis of membership in protected classes, such as a juror’s race, ethnicity, and gender.<sup>31</sup> The federal Jury Selection and Service Act of 1968 established statutory rights to a civil jury drawn from a representative cross-section of the community, and many states followed suit with similar provisions.<sup>32</sup> Thus, a question we can ask is whether the transformation of jury trials into a virtual form leads to venires that fail to represent the community. If so, whether proceeding with virtual civil trials although cognizant of their nonrepresentative potential would meet the requirement of purposeful discrimination is another matter.

### **Real-World Experiences with Virtual Civil Juries**

Beginning in the summer of 2020, courts slowly began to explore the possibility of holding civil jury trials online. Pioneering judges, lawyers, court administrators, and trial consultants collaborated to develop procedures and learned from the successes and challenges of the earliest instances of virtual juries.

1. In May 2020, Judge Emily Miskel of the Collin County District Court, Texas, presided over the first fully virtual jury trial in the U.S. It was a nonbinding summary jury trial

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<sup>30</sup> *Id.* at 514-17 [need exact page for quotation]. Kevin Clermont suggested another way to identify important elements of civil proceedings, which is to look at how the U.S. courts treat foreign judgments. U.S. courts will not recognize or enforce foreign judgments decided in proceedings that depart from key elements of U.S. procedural due process. See CHARLES T. KUTUBY, JR. & LUKE A. SOBOTA, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS* (2017); Stacey I. Strong, *General Principles of Procedural Law and Procedural Jus Cogens*, 122 PENN. ST. L. REV. 347, 389-90 (2018) (identifying content of general principles of procedural law). Kutuby and Sobota identified six principles of procedural fairness: notice and jurisdiction; judicial impartiality and independence; equality and the right to be heard; condemnation of fraud and corruption; allowing the presentation of evidence and identifying the burdens of proof; and following the principle of *res judicata*. Notice, jurisdiction, and *res judicata* aside, one would want virtual civil jury trial procedures that protect the impartiality and independence of the judge and jury, that allow for both parties a full and equivalent opportunity to present their cases. Might the virtual format interfere with these principles, raising concerns about procedural due process?

<sup>31</sup> U.S. Const. Amend. VII.

<sup>32</sup> NANCY GERTNER, JUDITH H. MIZNER & JOSHUA DUBIN, *THE LAW OF JURIES* 35 (11th ed. 2020). The Jury Selection and Service Act of 1968 was codified as 28 U.S.C.A. §§ 1861 to 1878 (1988).

concerning an insurance dispute.<sup>33</sup> As Judge Miskel explained, “it’s a non-binding process, so if the whole thing went down in flames, nobody would be hurt.”<sup>34</sup> Although the summary jury trial result is confidential, Judge Miskel confirmed that the trial was completed successfully.<sup>35</sup> Texas has continued to expand its virtual courtroom; an upbeat overview of its virtual jury trials may be found on the Texas Courts Youtube channel.<sup>36</sup>

2. In June 2020, the Online Courtroom Project conducted an online demonstration project, a virtual civil jury trial of a slip and fall case.<sup>37</sup> In a two-day trial, all conducted remotely, lawyers undertook virtual voir dire and jury selection (done in conjunction with an extensive pretrial juror questionnaire), followed by opening statements, the presentation of evidence, closing arguments, and judicial instructions. Both a virtual jury and a shadow jury listened to the evidence and deliberated. The virtual jury did not reach a verdict in the time allotted; the shadow jury quickly reached a unanimous verdict.
3. Also in June 2020, the Civil Jury Project at NYU School of Law conducted a mock Zoom jury trial.<sup>38</sup> The aim was to demonstrate the conduct of jury trials via Zoom, to identify parts that succeeded or fell short, and to obtain feedback from participants. The mock jurors were NYU law students. The trial included all phases, starting with jury selection and ending with a virtual deliberation. Participants were on the whole positive about the experience but had a variety of specific suggestions for improvement, including giving jurors an opportunity to get to know one another prior to deliberation.<sup>39</sup>
4. The nation’s first virtual and binding jury trial appears to have been the July 2020 trial of *Ocampo v. Aamco Transmissions, Inc., et al.*, in the Superior Court of Alameda County, California. The defendant objected and appealed unsuccessfully. The asbestos trial proceeded via Zoom, and resulted in a defense verdict.<sup>40</sup>
5. In August of 2020, Florida held its first virtual and binding civil jury trial in the case of *Griffin v. Albanese Enterprise, Inc.*, as part of a pilot program launched that first pandemic summer. The jury decided only damages in a case of injuries suffered by the plaintiff at the

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<sup>33</sup> Carl Smith, *Virtual Justice: A Texas County Forges Path During Crisis*, GOVERNING, a publication of Government Technology (Sept. 18, 2020), <https://www.govtech.com/public-safety/virtual-justice-a-texas-county-forges-path-during-crisis.html>. See also Texas Courts, *Texas Court Holds First US Jury Trial via Videoconferencing* (May 22, 2020), <https://www.youtube.com/watch?v=u6lnI7FZRoc>.

<sup>34</sup> Smith, *Virtual Justice*, *supra* note 33.

<sup>35</sup> *Id.*

<sup>36</sup> Texas Courts, *Virtual Jury Trials During COVID-19 Pandemic* (Sept. 10, 2020), <https://www.youtube.com/watch?v=FDdHfJHR2SY>.

<sup>37</sup> Online Courtroom Project Advisory Board, *Online Jury Trials: Summary and Recommendations*, ONLINE COURTROOM PROJECT (July 15, 2020), [https://6a1ab614-8a16-459a-b02b-6cb58b4e4148.filesusr.com/ugd/850355\\_1977b7d61f524fa3b67ea7e992168253.pdf?index=true](https://6a1ab614-8a16-459a-b02b-6cb58b4e4148.filesusr.com/ugd/850355_1977b7d61f524fa3b67ea7e992168253.pdf?index=true) (hereinafter *Online Jury Trials*).

<sup>38</sup> Michael Pressman, *A Report on the Civil Jury Project’s Mock Zoom Jury Trial* (June 8, 2020), <https://civiljuryproject.law.nyu.edu/a-report-on-the-civil-jury-projects-mock-zoom-jury-trial/>.

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

<sup>40</sup> *Ocampo v. Aamco Transmissions Inc. et al.*, Case No RG19041183, Superior Court of California, Alameda County.

hands of nightclub bouncers. The jury awarded more than the plaintiff's attorney had requested during closing arguments.<sup>41</sup> A second jury trial, *Mathis v. Argyros*, a breach of contract case that resolved a fee dispute between an attorney and a client, completed the pilot project.<sup>42</sup>

6. In September of 2020, the U.S. District Court for the Western District of Washington conducted a virtual civil jury trial in the case of *Dallo v. Holland America Line, N.V., LLC*. The case involved a woman who was knocked down by a crew member, suffering brain injury. The judge said that despite a few technical problems, the case proceeded well. "We lost a couple of jurors for a couple of minutes a couple of different times, but, by and large, I thought it was as well tried a case as we'd have in court."<sup>43</sup> The (winning) plaintiff's attorney said, "The jury was also terrific. They were quickly able to learn the special Zoom program used by the Court and focus on the evidence."<sup>44</sup> He acknowledged the occasional technical difficulties, and also thought it was problematic that jurors did not have "an opportunity to meet or talk to other jurors prior to deliberations."<sup>45</sup>
7. In a summary of early experimentation with virtual juries, Washington state's King County Superior Court must be mentioned. King County has been perhaps the most prolific court in the nation in holding virtual jury trials.<sup>46</sup> Judge Sean O'Donnell reported that as of March 2021, the King County Superior Court had conducted more than 300 virtual civil trials, including a substantial number of civil jury trials.<sup>47</sup>

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<sup>41</sup> Griffin v. Albanese Enterprise, Inc., No 16-2019-CA-1555 (Fla. Cir. Ct., Aug. 10, 2020), <https://pages.cvn.com/duval-county-florida-remote-trial-program>. See also *The Key to Pulling Off the Fourth Circuit's Virtual Jury Trial Was the Court Tech Officers Who Served As "Remote Bailiffs,"* THE FLORIDA BAR (Aug. 13, 2020), <https://www.floridabar.org/the-florida-bar-news/the-key-to-pulling-off-the-fourth-circuits-virtual-jury-trial-was-the-court-tech-officers-who-served-as-remote-bailiffs/>. The binding jury trials were preceded by mock jury trials to gather information that informed the structure and procedure of the binding jury trials. See *Remote Civil Jury Trial Pilot Project, Fourth Judicial Circuit, A Report to Chief Justice Charles T. Canady*, Florida Supreme Court 5-18 (October 2, 2020), <https://www.jud4.org/Top-Navigation/Court-Administration/Fourth-Judicial-Circuit-Remote-Civil-Jury-Trial> (link goes to page with links to project report and links to the video streams of the two virtual jury trials conducted as part of the pilot project) (hereinafter *Remote Civil Jury Trial Pilot Project*).

<sup>42</sup> *Mathis v. Argyros* (Fla. Cir. Ct., Sept. 29, 2020), <https://pages.cvn.com/mathis-vs-argyros-remote-trial-stream>.

<sup>43</sup> *Injured Cruise Passenger Wins \$1.35 Million in Virtual Trial (2)*, BLOOMBERG LAW (Oct. 8, 2020), <https://news.bloomberglaw.com/litigation/injured-cruise-passenger-awarded-1-35-million-in-virtual-trial>.

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

<sup>45</sup> *Id.*

<sup>46</sup> *The Online Courtroom Now and Post-Pandemic: Skills and Tools for Remote Advocacy*, Webinar, NITA & Online Courtroom Project (Apr. 23, 2021), <https://www.nita.org/webcasts/s71LEC136>.

<sup>47</sup> Matt Markovich, *King County Court shifts to virtual trials, potentially changing future of courtrooms*, KOMO NEWS, March 4, 2021, <https://komonews.com/news/local/king-county-superior-court-shifts-to-virtual-trials-chips-away-at-massive-case-backlog>.

Following these early experiences with virtual civil jury trials, other federal and state courts around the country have planned and in some cases conducted their own virtual civil jury trials.<sup>48</sup>

## The Selection of Virtual Juries

### Background: Concerns about COVID-19 and Technology

As noted above, the civil jury must be drawn from a representative cross-section of the community. From the start of the pandemic, commentators worried about the ability of courts to assemble representative juries under these difficult conditions. A national poll of U.S. registered voters in June 2020 underscored some of the new challenges the pandemic created for putting together representative jury panels.<sup>49</sup> The National Center for State Courts (NCSC) commissioned the poll, which inquired into participants' views about serving on a jury during the pandemic. More than half of those surveyed mentioned one or more obstacles to reporting for jury duty, including childcare, elder care, or health conditions.<sup>50</sup> The respondents' gender and age were linked to the likelihood of experiencing obstacles, with 41% of men under the age of 50 and 52% of women in the same age range reported one of these obstacles.<sup>51</sup> The obstacles were greater for older men and women, with 57% of men aged 50 or above and 65% of women in the same age range reporting obstacles.<sup>52</sup> Interestingly, when survey participants were asked whether they felt more comfortable with in person or remote jury service, 44% said remote, 23% said in person, and 32% replied that it made no difference.<sup>53</sup>

A survey of 83 judicial advisors to the NYU School of Law Civil Jury Project found that all of the judges agreed when asked whether they had noted an increase in requests to be excused for hardships by potential jurors. Indeed, and not surprisingly, the vast majority also said that they used a more generous standard for excusing jurors during the pandemic.<sup>54</sup>

Although it spares citizens the close contact of in-person service, virtual jury participation requires access to technology and sufficient ability to use it competently. The NCSC poll, which recruited

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<sup>48</sup> Tulante et al., *supra* note 17.

<sup>49</sup> *State of the State Courts in A Post Pandemic World*, slides presented at a NCSC webinar on 3/26/2020 and updated on 6/18/2020. The link to slides reporting the poll results: <https://nationalcenterforstatecourts.app.box.com/s/n7w8zu89tbayfjr0qz6h7mn6nrg0x6qh/file/680542851103>.

<sup>50</sup> *Id.* at Slide 6.

<sup>51</sup> GBAO, *Jury Trials in a (Post) Pandemic World – National Survey Analysis (Memo from GBAO to National Center for State Courts (June 22, 2020)*, [https://www.ncsc.org/data/assets/pdf\\_file/0006/41001/NCSC-Juries-Post-Pandemic-World-Survey-Analysis.pdf](https://www.ncsc.org/data/assets/pdf_file/0006/41001/NCSC-Juries-Post-Pandemic-World-Survey-Analysis.pdf) (hereinafter *Jury Trials in a (Post) Pandemic World*).

<sup>52</sup> *Id.* at 2.

<sup>53</sup> *State of the State Courts in a Post Pandemic World*, *supra* note 49, Slide 13.

<sup>54</sup> Michael Pressman, *Results from Our Survey of Judicial Advisors Regarding Juror Demographics*, Civil Jury Project at NYU School of Law (no date, but probably summer 2020), <https://civiljuryproject.law.nyu.edu/results-from-our-survey-of-judicial-advisors-regarding-juror-demographics/>.

participants both online and by phone, discovered that 85% of the respondents subscribed to the internet at their homes, and 95% of respondents had a cell phone (with 85% having a smartphone). Only 2.4% of the respondents said that they had no home internet and no cell phone.<sup>55</sup> In addition, the poll showed that respondents' age was related to their access, with 70% of those 65 and older saying they had internet access at home; 64% of these older respondents had smartphones. But recall that they were recruited online and by phone, so that could underestimate the percentage of U.S. jury-eligible citizens in different age groups without internet or cellphone access.

Regular usage of video conferencing services may lead to greater competence and greater comfort. Here as well, the NCSC poll revealed big age differences. As of June 2020, about half of the respondents (52%) but just 30% of seniors (65+) had regularly used video conferencing services offered by Zoom WebEx, Skype, or Google.<sup>56</sup> Non-college-educated men reported low levels of regular use (32%), in contrast to substantially higher levels for college-educated women (73%), women under 50 (72%), and those under age 30 (69%).<sup>57</sup>

The NCSC poll is a snapshot taken in June of 2020, at a relatively early point in the pandemic. With the widespread availability of vaccination for adults in the U.S. in 2021, the impact of COVID-19 on individuals' health has shifted, and may shift again in the months ahead. As of this writing, the majority of people in older age groups are fully vaccinated,<sup>58</sup> and as a consequence, their willingness to serve and their relative preference for virtual versus in-person jury service may have changed.

States that have conducted virtual jury trials invariably include alternative options for those without access to reliable internet or without the necessary computer technology, including participating at alternate locations such as courthouse kiosks or library carrels, and loaning tablets or laptop computers to jurors who do not have the devices.<sup>59</sup>

Jurisdictions have also routinely conducted training and "tech checks" for jurors (and for the parties) prior to virtual jury service. For example, the Remote Civil Jury Trial Pilot Project in the Fourth Judicial District of Florida sent prospective jurors an email containing a link to the jury selection questionnaire and Zoom information they would need to participate in the remote jury selection.<sup>60</sup> The juror questionnaire included questions about the prospective juror's technology access. Subsequent emails contained detailed information about installing and using Zoom, including specific techniques that would be necessary to participate as a juror.<sup>61</sup> During the pilot

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<sup>55</sup> *Id.* at Slide 12.

<sup>56</sup> *Jury Trials in a (Post) Pandemic World*, *supra* note 51, at 3.

<sup>57</sup> *Id.*

<sup>58</sup> The Centers for Disease Control track COVID-19 vaccinations by demographic characteristics <https://covid.cdc.gov/covid-data-tracker/#vaccination-demographic>.

<sup>59</sup> The Florida, Texas, Washington state, and California virtual jury trials all offered alternatives to potential jurors who did not have access to the necessary technology.

<sup>60</sup> *Remote Civil Jury Trial Pilot Project*, *supra* note 41.

<sup>61</sup> *Id.* at 58-64 (describing email communications and instructions sent to prospective jurors and trial jurors).

jury trials, a group of “remote bailiffs” were available to troubleshoot problems that jurors encountered.<sup>62</sup>

### **The (Limited) Evidence Thus Far on the Representativeness of Virtual Juries**

Because of the differential impact of the pandemic as a function of gender, age, race, and ethnicity, and the specific concerns expressed in the poll that varied by individual characteristics such as age, gender, and race/ethnicity, it would not be surprising if pandemic-era jury pools did not fully represent the population.

We do not have a lot of systematic information about the representativeness of pandemic-era jury pools, whether in-person or virtual service is anticipated. However, judges have reported encouraging observations and have shared data indicating that at least some jurisdictions have seen increases in their responses to jury summonses.<sup>63</sup> King County Court Presiding Judge Rogers was quoted in March of 2021 that “the jury pool is far more diverse than it used to be and that’s a really good thing.”<sup>64</sup> His colleague, Superior Court Judge Matthew Williams, agreed that the jury pools showed “increased diversity.”<sup>65</sup> Judge Emily Miskel in Collin County, Texas reported that the local response to jury summons was dramatically higher: “Before the COVID-19 pandemic, the yield on jury summons was 45 percent for in-person trials. With virtual juries, 86 percent of persons summoned have indicated an ability to serve.”<sup>66</sup> In Florida, 150 summonses were sent to recruit jurors for the first virtual (non-pilot) civil jury trial, and 87 responded (a 58% response rate, compared to the typical 50% response rate).<sup>67</sup> Florida Judge Jennifer Bailey remarked in a webinar on remote advocacy that the jury venires were “at least as diverse as pre-pandemic, or even more.”<sup>68</sup>

The agreement among judges that they are observing similar or greater diversity, and the higher response rates to jury summonses, are something of a surprise, given the many difficulties and disruptions posed by the pandemic. One reason might be simply that during the pandemic, more people have been at home to receive their jury summons. But the poll numbers also suggest that a significant number of citizens do prefer remote jury service (at least during a pandemic) and anticipate easier access and less disruption than in-person service.

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<sup>62</sup> *The Key to Pulling Off the Fourth Circuit's Virtual Jury Trial Was the Court Tech Officers Who Served As "Remote Bailiffs," supra note 41.*

<sup>63</sup> See discussion and sources cited in Tulante et al., *supra* note 17.

<sup>64</sup> Matt Markovich, *King County Court shifts to virtual trials, potentially changing future of courtrooms*, KOMO NEWS, March 4, 2021, <https://komonews.com/news/local/king-county-superior-court-shifts-to-virtual-trials-chips-away-at-massive-case-backlog>.

<sup>65</sup> *The Online Courtroom Now and Post-Pandemic, supra note 46.*

<sup>66</sup> Esquire Deposition Solutions, LLC, *Advice on Virtual Jury Trials from Online Pioneers*, JDSUPRA, Jan. 5, 2021, <https://www.jdsupra.com/legalnews/advice-on-virtual-jury-trials-from-3033796/>.

<sup>67</sup> *The Key to Pulling Off the Fourth Circuit's Virtual Jury Trial Was the Court Tech Officers Who Served As "Remote Bailiffs," supra note 41.*

<sup>68</sup> *The Online Courtroom Now and Post-Pandemic, supra note 46.*

Comments that I gathered during a recent virtual mock jury study reinforce the value of the ease with which people are able to participate in online proceedings.<sup>69</sup> Out of 150 mock jurors, 25 had also served previously as sworn jurors. My collaborators and I asked them to comment on the advantages and disadvantages of virtual jury compared to their real-world jury experience. Table 1 shows that a common response was noting the ease of participation: “can continue with trial and keep jurors safe (due to C-19);” and “advantage in your own home.” This benefit was particularly important to one of our jurors, who wrote: “As a disabled person being able to attend to my needs while also being able to attend this event was a huge advantage. I truly hope we as a society start making more use of the advances technology give us where accessibility is concerned.”

The Florida pilot project surveyed prospective jurors who participated in remote jury selection. The vast majority (80%) expressed a preference for remote jury selection rather than in-person jury selection.<sup>70</sup> They described it as efficient and effective.<sup>71</sup> Circuit Court Judge Bruce Anderson, who led the Florida pilot project, concluded: “Based upon the feedback of the participating stakeholders, and our experience conducting this pilot program, it is my opinion that a hybrid process consisting of a remote jury selection and an in-person jury trial would be a workable solution that balances the competing concerns of public health and the need to continue the civil justice system.”<sup>72</sup>

A final note on virtual juries and representativeness. Even if civil litigants might be able to demonstrate that pandemic-era virtual jury selection resulted in a dramatically unrepresentative jury venire, whether a successful challenge could be mounted is doubtful, considering the balancing test that courts would use. Even before the pandemic, challenges to the venire in civil cases were infrequent and victories even rarer.<sup>73</sup> Litigants challenging the representativeness of the venire in a civil case must show purposeful discrimination. Yet they rarely have knowledge of legal actors’ motives, and many lack access to basic information about the demographic characteristics of the jury pool that would be necessary to mount a challenge. Federal courts acknowledge litigants’ rights to review jury selection records, but not all state courts do so.<sup>74</sup> Combined with these inherent difficulties, a challenge on the grounds of decreased representativeness of jury pools during the pandemic would face a high bar.<sup>75</sup>

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<sup>69</sup> Reed et al., *supra* note 44.

<sup>70</sup> *Remote Civil Jury Trial Pilot Project*, *supra* note 41, at 106.

<sup>71</sup> *Id.*

<sup>72</sup> *Remote Civil Jury Trial Pilot Project*, *supra* note 41, at xviii.

<sup>73</sup> Valerie P. Hans, *Challenges to Achieving Fairness in Civil Jury Selection*, paper to be presented at Juries, Voir Dire, Batson, and Beyond: Achieving Fairness in Civil Jury Trials, Pound Civil Justice Institute’s 2021 Forum for State Appellate Court Judges (July, 2021).

<sup>74</sup> Nina W. Chernoff, *No Records, No Rights: Discovery and the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719 (2016). *See also* Nina W. Chernoff & Joseph B. Kadane, *Preempting Jury Challenges: Strategies for Courts and Jury System Administrators*, 33 JUST. SYS. J. 47 (2012).

<sup>75</sup> Michael Pressman, *The Challenge of Achieving a Representative Cross-Section of the Community for Jury Trials During the Pandemic*, Civil Jury Project at NYU School of Law (no date), <https://civiljuryproject.law.nyu.edu/3200-2/>. A challenge might have a greater likelihood of success in criminal trials because of the standard used; *see* Oscar Bobrow & Lois Heaney, A

## Efficacy of Virtual Voir Dire

Recognizing that virtual voir dire during jury selection on Zoom might not allow attorneys the same opportunity to explore prospective jurors' attitudes and biases, a number of judges appear to be more inclined to allow extensive juror questionnaires that include a range of case-relevant questions.<sup>76</sup> Such questionnaires can be extremely useful. Information about prospective jurors' backgrounds can be obtained outside the online format, in advance, and as a result can make the online questioning more specifically targeted. Expanded questioning on case-relevant backgrounds, attitudes, and experiences has a better chance of uncovering biases that will influence case outcomes.<sup>77</sup> Washington state Judge Williams, for example, reported that in his jurisdiction, a pretrial juror questionnaire is sent to all jurors online, with alternatives for people without the appropriate technology, and may include case-specific questions. In his view, this permits lawyers to have more focused and effective voir dire.<sup>78</sup>

The Online Courtroom Project demonstration project reported that attorneys had a favorable reaction to the online questionnaires that prospective jurors completed prior to voir dire; the attorneys said that the information allowed them to prepare more completely. The attorneys reported that they "were able to adequately view jurors and their responses in order to make cause and peremptory challenges."<sup>79</sup> Interestingly, both the judge and the attorneys thought that "the jurors were more candid and forthright in their responses because they were in the comfort of their own homes, and that a view into a juror's home gave attorneys additional insights into the juror."<sup>80</sup> So, the demonstration project pointed to a more efficient and effective voir dire, at least one that was conducted in conjunction with the use of an extensive pretrial questionnaire.

## Quality of Decision Making

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*Response to Michael Pressman's "The Challenge of Achieving a Representative Cross-Section of the Community during the Pandemic,"* Civil Jury Project at NYU School of Law (no date), <https://civiljuryproject.law.nyu.edu/a-response-to-michael-pressmans-the-challenge-of-achieving-a-representative-cross-section-of-the-community-for-jury-trials-during-the-pandemic/>.

<sup>76</sup> *The Online Courtroom Now & Post- Pandemic*, *supra* note 46.

<sup>77</sup> Jessica M. Salerno, John C. Campbell, Hannah J. Phalen, Samantha R. Bean, Valerie P. Hans, Daphna Spivack & Lee Ross, *The Impact of Minimal versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases* (2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3733136](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733136) (showing that extended voir dire questions predicted biases that affected case outcomes, whereas demographic variables and minimal questions did not); Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1181-82 (2003) (arguing for the use of juror questionnaires and extended voir dire questioning as more effective ways to identify juror biases).

<sup>78</sup> *The Online Courtroom Now & Post- Pandemic*, *supra* note 46.

<sup>79</sup> *Id.* at 8.

<sup>80</sup> *Id.*



As a scientific matter, an ideal way to test how virtual and in-person juries compare would be to hold the exact same trial in person and also remotely. We do not want to subject our citizens to double trials in the real world, of course. Experimental researchers have developed the technique of simulated or mock juries to approximate the scientific ideal. Some mock juries would participate in person, and other mock juries would participate remotely, but both would see the same trial. One could then compare reactions of jurors to in-person versus virtual trials.

Two such experimental studies, the project I had undertaken with collaborators before the pandemic closed it down,<sup>81</sup> and the other by a research team led by Jessica Salerno,<sup>82</sup> are underway at the moment. Both comparative studies were the product of the pandemic, which caused both of these in-person research studies to halt last year. In our research project, the same videotaped trial presented to mock jurors we recruited to participate in person was also shown to mock jurors who participated via Zoom. Both of these studies are ongoing, so no final results from these two experimental studies are available yet. Although the two experiments will not answer all the pressing questions about the experience and impact of virtual juries, they do offer the potential of some controlled comparisons.<sup>83</sup>

In the meantime, it is worth examining the real world experiences that courts have had with virtual juries.

### **Jurors' Reactions to Virtual Trial Witnesses and Evidence**

Referring back to the principles for evaluating the adequacy of civil jury trials, we see the importance of having virtual civil jury trial procedures that allow litigants on both sides an equal and full opportunity to present their cases, and that ensure the impartiality and independence of the jury. Considering the adequacy of virtual procedures for litigants' presentation of their cases, Bandes and Feigenson identified a number of potential concerns about how virtual jury trials might affect the jurors' comprehension and interpretation of witness evidence and responses to the parties. One might imagine both positive and negative effects. The virtual world offers a much closer view of people's faces and upper bodies than would be the case in a typical courtroom. But being able to observe an individual witness in the full context of the courtroom environment could

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<sup>81</sup> Reed et al., *supra* note 44.

<sup>82</sup> Jessica M. Salerno, Hannah J. Phalen, Janice Nadler, Nicholas J. Schweitzer & Susan A. Bandes, *The Impact of Gruesome Photographs and Jury Instructions on Deliberating Jurors' Emotions and Verdicts* (ongoing research project, Arizona State University, 2021). And perhaps more will come to light.

<sup>83</sup> For example, in our research project, a videotaped trial was presented to both in-person and virtual mock jurors, so important questions about how jurors interpret live versus videotaped testimony cannot be answered. However, the project will be able to compare in-person versus virtual mock jury deliberation. Reed et al., *supra* note 44.

also be useful.<sup>84</sup> Although, as one judge quipped, “It’s rare to make a credibility judgment from the waist down!”<sup>85</sup>

A virtual trial could undermine jurors’ ability to assess witness demeanor. Bandes and Feigenson describe the “tenacious and deeply held” belief in the power of a person’s demeanor to offer clues about their veracity.<sup>86</sup> But they note that this strong belief in the insights to be gained from observing and assessing demeanor is “heavily reliant on dubious folk knowledge.”<sup>87</sup> Social science research on demeanor has largely debunked its value as a reliable cue for veracity.<sup>88</sup> Yet, soundly or not, many of us will rely on nonverbal cues to make inferences about credibility.

One feature of videoconferencing platforms is that most people have reduced eye contact. Instead of looking at the camera, they gaze at the other individuals pictured on the screen. And connectivity problems or the awkwardness of speaking on Zoom might lead to delays in a witness’s response to an attorney’s questions. Averting one’s gaze and hesitation in responding have long been perceived as indicia of lying.<sup>89</sup> Videoconference participants may also experience greater cognitive load, interfering with their ability to present themselves effectively. Thus, compared to an in-person presentation, virtual presentation of a witness’s testimony might lead to reduced credibility.

A related concern is the possibility that a virtual trial will lead jurors to feel less empathy for the litigants. Being in the same courtroom, observing a defendant and a plaintiff over the course of days, seeing them testify in person and respond to others’ testimony, may lead jurors to develop a more personal connection and empathetic response, whether it is to the plaintiff’s pain and suffering from an injury or to the defendant’s concern about being sued.

The report about the first Florida pilot jury trial reached a positive conclusion about juror attention: “Overall, the jurors were attentive and focused on the case. They seemed to be as attentive as an in-person trial, perhaps more so.”<sup>90</sup> When potential juror inattention (a juror appeared to be typing something and watching another screen) came to the attention of the court, the trial judge was notified and repeated instructions about paying attention and refraining from the use of other devices during the trial. The juror was reportedly “attentive thereafter.”<sup>91</sup>

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<sup>84</sup> Mary R. Rose et al., *Goffman on the Jury: Real Jurors’ Attention to the “Offstage” of Trial*, 35 LAW & HUM. BEHAV. 310 (2010).

<sup>85</sup> Judge Matthew Williams, remarks in *The Online Courtroom Now and Post-Pandemic*, *supra* note 46.

<sup>86</sup> Bandes & Feigenson, *supra* note 19, at 1284.

<sup>87</sup> *Id.* at 1284.

<sup>88</sup> See excellent discussion in Bandes & Feigenson, *supra* note 19, at 1284-92. See also, Jeremy Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157 (1993).

<sup>89</sup> Gordon D. Hemsley & Anthony N. Doob, *The Effect of Looking Behavior on Perceptions of a Communicator’s Credibility*, 8 J. APPLIED SOC. PSYCHOL. 136 (1978) (eye gaze associated with decreased perception of truth telling).

<sup>90</sup> *Remote Civil Jury Trial Pilot Project*, *supra* note 41, at 26.

<sup>91</sup> *Id.*

Jurors in the Florida pilot project were surveyed following their jury service. They were overall quite positive about the experience, with all of the jurors agreeing that they were able to clearly hear the judge, attorneys, and witnesses.<sup>92</sup> A followup survey asked jurors whether they agreed or disagreed with the statement, “I would prefer to serve on another remote civil jury trial rather than an in-person jury trial.” Of the 19 jurors who responded, ten agreed, three disagreed, and the remainder were neutral.<sup>93</sup>

The Online Courtroom Project’s demonstration mock jury discovered that the jurors had little difficulty viewing witness testimony and exhibits. Interestingly, “some jurors who had sat on previous juries felt it was easier to judge witness credibility because they had a closer view of the witness rather than looking across a courtroom.” Likewise, some mock jurors who had served in person also reported that they could see the documents more clearly in the virtual demonstration trial.<sup>94</sup> And they could see each other. As one juror remarked, “It was really nice being able to see the other jurors face-to-face. Usually, we would be sitting side-by-side, not able to look at each other.”<sup>95</sup>

The 25 mock virtual jurors in our experiment made diverse comments about how the virtual jury trial experience compared to their real-world service in a jury trial. Many saw no difference in the virtual versus in-person jury experiences, as shown in Table 1. However, several who saw a difference tended to mention the value of in-person trials: “There’s less of that human connection” and “Body language was not as good and we had less invested in the outcome. Sitting in the same room as the people in the trial gave me more of a stake in how they were ultimately treated.” One juror worried that “Virtual could give a false sense of confidence compared to face to face court proceedings, from witnesses, to judge, to jury deliberation.”

Although the reports from these field studies and demonstration projects are on the whole positive, they all mention without exception that they experienced technical problems. For example, in the Alameda County Superior Court jury trial, Judge Jo-Lynne Lee observed, “Our experience was that the jurors were, for the most part, very attentive” but jurors occasionally missed testimony when they lost their internet connection. When that happened, the trial was paused until the juror was able to reconnect, and the court reporter read back the missed testimony.<sup>96</sup>

The technical problems were usually able to be resolved with the intervention of the judge or technical support staff, such as the “remote bailiffs” in the Florida project. How interruptions to the flow of the trial due to these technical problems affect the processing and interpretation of

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<sup>92</sup> *Remote Civil Jury Trial Pilot Project*, *supra* note 41, at 107. Full results were available from the first trial conducted during the pilot project, but the report presented only limited results from the second trial (they were not yet available).

<sup>93</sup> *Remote Civil Jury Trial Pilot Project*, *supra* note 41, at 111.

<sup>94</sup> *Online Jury Trials*, *supra* note 37, at 8.

<sup>95</sup> *Online Jury Trials*, *supra* note 37, at 40.

<sup>96</sup> Quoted in Ryan Davis, *A Tale Of Two Zoom Trials*, LAW360 (Mar. 8, 2021), <https://www.law360.com/articles/1355213/a-tale-of-two-zoom-trials>.

evidence is not yet known. Research does suggest that when attorneys experience technical problems in the courtroom, it negatively affects jurors' perceptions of the attorneys' competence.<sup>97</sup>

### **Virtual Jury Deliberations**

Jury deliberation is a crucial aspect of trial by jury. Although courts had some pre-pandemic experience with videotaped and remote trial testimony, there was no precedent for virtual jury deliberation.

The impact on the jury starts even before deliberation. The virtual jurors meet on Zoom, and do not have the extensive social interaction during a trial that is characteristic of in-person jury trials. As one of our virtual mock jurors noted: "I think there tended to be a little more socialization with an in-person jury (say, during breaks or lunch)." The lack of prior social interaction might cut different ways. It might increase deliberation time, as jurors start discussion by exchanging personal information. It might decrease individual jurors' willingness to compromise on a verdict. Or, as one of our virtual mock jurors noted, "jurors may speak up more freely given the impersonal nature of virtual interaction."

The Online Courtroom Project's demonstration mock jury also concluded that the participants were able to deliberate successfully. They reported that "Jurors had a vigorous discussion, with most of the jurors speaking up. Jurors felt comfortable talking with one another, and they indicated in debriefing discussions that they found it easy to use Zoom and the technology did not hinder their connection."<sup>98</sup> Most jurors (90%) reported that they felt well connected to the other juror participants; for example, as one explained, seeing one another face-to-face generated a "newfound level of connection that you wouldn't find in a brick and mortar courtroom."<sup>99</sup>

The 25 virtual mock jurors who had also served on in-person juries had mixed views about the virtual jury deliberation experience. Table 1 shows that many saw little difference. Of those who reported a difference, they went both ways. Several were quite positive, noting that "it was easier in a virtual environment to see who was contributing and not contributing. It was nice to be able to see everyone at once!" and "I feel that over ZOOM we are a closer group. Closer physically. Faces up close and personal." Others pointed to disadvantages over Zoom: "delays and taking turns were more awkward, people can walk away or be less adherent to participating (avoiding talking, being off screen etc.)."

In the process of running our comparison experiment, one apparent difference we have noticed is a lower amount of simultaneous talking and fewer interruptions in the virtual as opposed to in-

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<sup>97</sup> Research studies have linked lawyer favorability ratings to technology problems.

<sup>98</sup> *Online Jury Trials*, *supra* note 37, at 18.

<sup>99</sup> *Online Jury Trials*, *supra* note 37, at 44, 55. However, the report also noted that one juror participant fell asleep, and there was no way to rouse him. Of course, sleeping jurors are not limited to Zoom, but how to wake a sleeping juror up remains a challenge. Ryan J. Winter & Jon Carbone, *Judicial Notebook: Would Somebody Please Wake Up Juror Number Five?*, 41(8) APA MONITOR 6 (Sept. 2010), <https://www.apa.org/monitor/2010/09/jn>.

person mock jury deliberations.<sup>100</sup> The mock jurors, though, expressed divergent views (see Table 1): “People will not interrupt each other (as often) when seated in the same room” yet also “Virtual there’s less interrupting each other; I have found people take more time listening to each other in the virtual.”

## Public Access

A final issue to consider virtual jury trials relates to the public’s access. The right to a public and transparent courtroom trial has long been a taken-for-granted feature of our justice system. Closing the courthouse doors during a pandemic, and pausing legal proceedings temporarily, were reasonable responses to the potential health problems caused by in-person activity in the midst of the pandemic. Once legal proceedings resumed, however, many courts relied on technology to allow the all-important public access to the courts.

One important issue that Bandes and Feigenson raise is that a virtual courtroom experience is not identical to being in the physical courtroom. The majesty and grandeur of many courtrooms can convey the importance and seriousness of the occasion to those who are physically present. And there is the absence of “off-stage” behavior that Mary Rose and colleagues mention. All that is absent from a virtual proceeding.

In some instances, public access to courtroom proceedings, including jury trials, has expanded compared to pre-pandemic levels. In addition to the telephonic arguments of the U.S. Supreme Court that are now available, the U.S. Tax Court live streams trial sessions, allowing anyone to listen to the live audio of the proceedings.<sup>101</sup> As I noted above, the Texas courts also livestreamed many of their court proceedings.

The Florida virtual jury pilot project arranged for the jury trials in their entirety to be broadcast over the Courtroom View Network (CVN), with the provision that the jurors’ faces would be blurred in accordance with a local administrative order that prohibits the recording or photographing of jurors.<sup>102</sup> Thus, even though the media and members of the public were not able to enter the courthouse, the broadcasting of the trials offered public access to the jury trials.

In sum, public access to civil jury trials has not been lost; on the contrary, in some instances, it has been expanded. What is more, the courts were forced by circumstance to develop a technological framework for public access, which may bode well for a continuation of this expanded public access.

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<sup>100</sup> This became apparent in transcribing the deliberations. In face-to-face deliberations, it is very common for people to interrupt and to talk over one another, yet also attend to nonverbal cues that help with turn-taking. Interruptions seem to be more visible on Zoom.

<sup>101</sup> The proceedings are available through live streaming at [https://www.ustaxcourt.gov/remote\\_proceedings.html](https://www.ustaxcourt.gov/remote_proceedings.html). The audio proceedings are not archived, however. The Texas courts have taken the same approach to live streaming, but they remove the recording to the legal proceeding once it has concluded.

<sup>102</sup> *Remote Civil Jury Trial Pilot Project*, *supra* note 41, at v; 78-79.

## Conclusion

There is still much to learn about the phenomenon of virtual juries. Courts have struggled mightily to adapt the civil jury, the seemingly most in-person of all legal proceedings, to the demands of the pandemic. Thanks to the energy and diligence of courts, judges, lawyers, trial consultants, and most importantly jurors, prospective jurors have been questioned and selected, virtual jury trials have proceeded, and virtual jury deliberations have led to binding verdicts in civil cases.

Data suggest that remote videoconferencing and audioconferencing have increased litigants' access to the courts. The decisions of a number of courts to live stream or record proceedings, including jury trials, have increased access to court proceedings by members of the public as well. Many of the jurors who participated in pilot or early virtual jury trials also evaluated the experience positively.<sup>103</sup>

Judges have also been generally positive, sometimes to their own surprise. Judge Anderson, who led the Florida pilot project, observed that although he was initially excited about presiding over a virtual jury trial, his enthusiasm was “tempered by visions of a remote courtroom experience that could resemble binge-watching the introduction of Hollywood Squares and The Brady Bunch and my fears that jury selection could be reduced to a Zoom Happy Hour.”<sup>104</sup> Nonetheless, he concluded that the pilot project was a success. As noted earlier, judges in Texas and Washington state who have presided over virtual jury trials have also expressed enthusiasm and largely positive evaluations of the experience.

We should be mindful that the judges who have embraced the challenge of virtual jury trials may well be unrepresentative of the judiciary in their enthusiasm for remote proceedings and their technical acumen. Initiatives to introduce cameras in the courtroom have stalled multiple times in federal courts and many state courts, reflecting significant pockets of past resistance. And lawyers, including our own Robert Clifford, continue to express concern that a virtual jury trial is a poor vehicle for effective advocacy on behalf of their clients.

Even so, the introduction of virtual jury trials in response to the pandemic has introduced a new approach to civic participation in legal decision making. There is much to learn about whether and how virtual civil jury trials differ from their in-person equivalents. I have discussed the representativeness of virtual juries, the impact on evidence interpretation and decision making, the nature of virtual jury deliberation, and public access. Trial by jury also has educational and civic engagement effects. We do not know whether participation as a virtual juror boosts subsequent civic engagement as in-person jury service does.<sup>105</sup> Jury trials also help to legitimize the court

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<sup>103</sup> Keep in mind the Rosenthal effect, a psychological phenomenon demonstrated in research studies, whereby the positive expectations of the experimenter can inadvertently lead study participants to confirm these expectations. Being told they are participating in a landmark pilot project that is very important, jurors might report having more positive views about the experience.

<sup>104</sup> *Remote Civil Jury Trial Pilot Project*, *supra* note 41, at xii.

<sup>105</sup> JOHN GASTIL, E. PIERRE DEESS, PHIL WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010)

system; will virtual jury trials be accepted as legitimate by the litigants and the public? As courts resume in-person trials, it will be interesting to see whether the alternative of a virtual jury trial becomes increasingly appealing to some litigants and their lawyers, or whether they will quickly reject virtual options when in-person participation becomes advisable. The jury, as they say, is still out.

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(finding that jury service in criminal trials increases subsequent voting rates); Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 710-12 (2014) (finding civic engagement effects in civil jury service).

**Table 1. Perceived advantages and disadvantages of the virtual jury, compared to juror's own in-person jury experience.**

**Ease of access: Advantages of virtual jury**

As a disabled person being able to attend to my needs while also being able to attend this event was a huge advantage. I truly hope we as a society start making more use of the advances technology give us where accessibility is concerned.

Advantage in your own home.

Advantages: can continue with trial and keep jurors safe (due to C-19).

Being able to do it remotely from home.

Virtual jury you don't have to wear pants (kidding). You can have your own home brewed coffee by your side vs. some mock jury coffee or maybe they don't even have coffee during it.

I didn't have to drive anywhere and find parking!

**Trial and deliberation experience: Advantages of virtual jury**

I feel that over ZOOM we are a closer group. Closer physically. Faces up close and personal.

It was easier in a virtual environment to see who was contributing and not contributing. It was nice to be able to see everyone at once!

More collaborative-smaller group with all participating very well.

Jurors may speak up more freely given the impersonal nature of virtual interaction.

Virtual there's less interrupting each other I have found people take more time listening to each other in the virtual.

Physically more comfortable so easier to focus than on hard wooden chairs.

I liked being able to take notes.

Foreman might have some control to mute or wrangle jurors if necessary?

I'm unsure. The virtual trial was much shorter, so there is that!

**Trial and deliberation experience: Comments about the similarity of virtual and in-person jury experiences**



I thought using ZOOM was a very similar experience. I honestly would have to say there were neither an advantage or disadvantage.

It was really just the same. Good discussions and very open minded jurors.

Not really any advantage over being in person.

I'm not sure there were any advantages to the virtual jury.

Personally, I don't feel there was much of an advantage or disadvantage in deliberating.

I served on a grand jury, and the experience was very similar in the deliberations.

Seemed about the same, but had there been more jurors it would have been more difficult.

### **Trial and deliberation experience: Disadvantages of virtual jury**

Body language was not as good and we had less invested in the outcome. Sitting in the same room as the people in the trial gave me more of a stake in how they were ultimately treated.

I feel that the immediacy and tangibility of the testimony, judge and attorneys is important.

There's less of that human connection.

Virtual could give a false sense of confidence compared to face to face court proceedings, from witnesses, to judge, to jury deliberation. A person's life is affected by jury decision, whether they are the plaintiff or defendant. I believe in person may result in more accurate (?) outcome.

I think it helps to be in the presence of others, to read non-verbal cues and facial expressions. My view of folks in this experience was limited by the lighting in their room and the camera angle.

I think there tended to be a little more socialization with an in-person jury (say, during breaks or lunch) ... it is also a little easier to sense when to speak without interrupting someone else.

In person deliberating is more conducive to actual discussion. Zoom meetings are awkward and it is difficult to know when to express an opinion without interrupting others.

People will not interrupt each other (as often) when seated in the same room.

Disadvantages: delays and taking turns were more awkward, people can walk away or be less adherent to participating (avoiding talking, being off screen etc.).

Live jury is able to ask questions and discuss more fluidly.

Less diversity of backgrounds. Shorter deliberation virtually.

The only possible advantage we had in person is not outside issues like internet connection.

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Note. Comments come from 25 participants in a virtual jury experiment who also had experience as sworn jurors. Virtual jury participants were asked, “For those who previously served on a (real) jury, what were the advantages and disadvantages of the virtual jury, compared with your in-person jury experience?” Source: Krystia Reed, Valerie P. Hans, Vivian Rotenstein & Valerie Reyna, Guiding Jury Damage Award Decision Making in Virtual versus In-Person Civil Juries: Experimental Evidence (ongoing research project, Cornell Law School, 2021).