Zooming In: Courtrooms and Defendants’ Rights during the COVID-19 Pandemic

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Abstract
COVID-19 placed unprecedented strains on criminal court systems, necessitating moves to digital platforms with little preparation. To study the influence of virtual courtrooms on defendant rights (e.g. effective assistance of counsel, speedy and public trials, among others), we qualitatively analyzed the journals of 44 student court watchers, documenting their observations of online court proceedings in a single state in the Northeastern United States. We find that virtual courtrooms are highly disorganized and fraught with technical malfunctions, compromising defendants’ appearances online, and impeding their ability to confer with counsel and address the court. Defendants with less access to digital platforms and incarcerated individuals are disproportionately impacted. Further, court actors tend to treat virtual court in a casual manner and are often unprepared to litigate cases, resulting in undue delays, and extended periods of pre-trial detention. Policy recommendations to improve technologies and administrative procedures are discussed.

Keywords
COVID-19, defendant’s rights, grounded theory, technology, virtual courtrooms
Introduction

A Zoom exchange between lawyer Rod Ponton and Judge Roy Ferguson made headlines in February 2021 when Ponton appeared on-screen as a cat during a hearing in the 394th District Court of Texas. Ponton was using his assistant’s computer whose daughter changed the filter settings prior to this call. The public learned about the mishap when it was posted to the court’s YouTube page (Victor, 2021). After nearly a year of Zoom connectivity during COVID-19, the public appreciated the levity. Judge Ferguson tweeted about the situation for educational purposes: “These fun moments are a by-product of the legal profession’s dedication to ensuring that the justice system continues to function in these tough times. Everyone involved handled it with dignity, and the filtered lawyer showed incredible grace. True professionalism all around!” (Ferguson, 2021). Other court participants have experienced similar blunders from not realizing their camera or microphone was on, to funny screen names, to unusual virtual backgrounds (Morris, 2021). In this case, “Lawyer Cat” was comic relief but how many people knew that the hearing was about “a man who attempted to leave the U.S. with contraband cash” (West-Knights, 2021)? The purpose for the hearing—even the defendant himself—was missing from news coverage. While the mishap was certainly funny, the stakes of appearing in virtual court are high for defendants whose lives are on the line.

Pre-COVID 19, U.S. court systems often failed to protect defendant rights and court remedies/relief for procedural transgressions by police and prosecutors were frequently elusive. For example, cases were rarely dismissed for speedy trial violations (Shestokas, 2014) and motions to suppress evidence based on unreasonable searches or seizures typically resolved in favor of the prosecution (Jacobi, 2011; Uchida and Bynum, 1991). Further, scholarly studies have demonstrated profound inequities in criminal case processing in the courts, disadvantaging minorities and poor defendants; among other areas, disparities have been documented in sentencing (Albonetti, 1997; Doerner and Demuth, 2010; Everett and Wojtkiewicz, 2002; Feldmeyer and Ulmer, 2011; Steffensmeier and Demuth, 2000), plea bargaining (Berdejó, 2018; Metcalfe and Chiricos, 2018), and pre-trial detention (Donnelly and MacDonald, 2018). While these problems pervaded the criminal justice system before the pandemic, the challenges of working in virtual courtrooms placed added weight on already-shaky court foundations.

Like Judge Ferguson, we applaud the dedication of many actors (i.e. judges, prosecutors, defense attorneys) who kept courts functioning during extraordinarily difficult times. Over eighteen months into the COVID-19 pandemic, now is the time to ask: How are we doing? How has the move to virtual courtrooms impacted defendant rights and the court’s ability to ensure that criminal cases are processed efficiently and fairly (e.g. speedy trials, effective assistance of counsel)? Have virtual settings negatively affected certain defendants (i.e. based on race or socioeconomic status) more than others? In what ways? Do
virtual courtrooms amplify structural system challenges (e.g. timely case resolution, racial inequities)? A review of court functioning around the world shows the United States is not an outlier in questioning how COVID-19 impacted the justice system.

In this paper, we explore how virtual courtrooms affect criminal case processing and impact a defendant’s constitutional rights. To do this, we drew data from journals \((n = 44)\) written by student documentarians who observed virtual courtroom proceedings in two community engaged learning classes offered at a Minority-Serving, Hispanic-Serving, public liberal arts university in New Jersey, a northeastern state in the U.S. Both courses were offered in Fall 2020 during the height of the COVID-19 pandemic: (1) A graduate level course titled “The Judicial System,” offered by the Criminal Justice Department \((n = 26)\) and (2) an undergraduate honors course titled “Trial Advocacy and the American Legal System,” offered by the university’s honors program \((n = 18)\).

Similar to court watchers—who observe courtroom proceedings to collect data, raise awareness of systemic issues, and increase accountability and transparency (Court Watch NYC, 2021)—our students observed approximately 9 h of virtual proceedings between September 2020 and November 2020 to enhance their understanding of criminal procedure and case processing. In total, our data include 396 h of courtroom observations \((9 \text{ h per student} \times 44 \text{ students})\). While students had access to proceedings across the state, the majority observed virtual courtrooms in densely populated, racially, economically, linguistically, and culturally diverse counties in New Jersey. With high working poor populations of color, they have disproportionately experienced the twin pandemics of police hyper-surveillance and COVID-19. These locales were an ideal site to observe the effects of the digital divide within marginalized communities.

In this article, we describe their observations and analyze their implications. After discussing our methodologies, we review the literature on “the digital divide” (i.e. digital inequities based on race, socioeconomic status, region, and other factors) and the influence of COVID-19 on the courts in the United States and across the world. We then share the results from 44 student journals. We conclude the paper with a discussion on the impact of virtual courtrooms on defendant rights and the implications for the future in an age of digitization.

**Methodological Considerations**

Due to the COVID-19 pandemic, most court cases were conducted virtually and proceedings were often live-streamed. Links to the virtual courtrooms were organized by county. While certain proceedings continued (e.g.s. detention hearings, sentencing proceedings, first appearances, pleas, among others), other hearings and trials were conducted on a more limited basis during this time frame. We provided students with links and instructions for public access to the proceedings and they viewed the proceedings independently. Students documented their observations in journals and included their related opinions and perceptions.

Toward the end of the semester, we presented students with consent forms, requesting permission to use their journals in this study. We informed students that participation in the study was voluntary, that they may withdraw at any time, and that their decision to participate or decline to participate would not affect their grade in the class. 26 of the
34 graduate students and 18 of the 23 undergraduate students consented to have their journals included in the study. The study was approved by our university’s Institutional Review Board. Journal data were coded by hand. We employed an inductive, grounded theory approach to develop theoretical categories that “place the data into a more general or abstract framework” (Maxwell, 2005: 97). Emerging themes include defendants being silenced in the virtual courtroom, lack of preparedness by court actors, and the prevalence of postponements in the virtual courtroom, among others.

Several methodological limitations merit mention. First, while our study captures perceptions of rights violations in virtual courtrooms, the student observers did not have a pre-pandemic, in-person benchmark to compare/assess their reflections. Consequently, it is difficult in certain areas (e.g. lack of preparedness of courtroom actors) to parse out the precise impact of the virtual setting from traditional in-person settings. However, many of the issues discussed are unique to virtual courtrooms (e.g. technological issues) and we were able to highlight distinctions with most others. Second, observations were made across multiple counties in New Jersey. While this limited the scope of the project, New Jersey counties are quite racially, economically, and geographically diverse from one another. Future studies should evaluate geographical differences among a diverse array of jurisdictions. Finally, as some courtrooms do not livestream their proceedings, students were limited to those accessible through publicly available court links.

**Digital Divide: “The Great Separation” in the United States**

2020 was “the great separation” because we were disconnected from our loved ones, communities, routines, plans, and sometimes futures. To bridge the gap caused by COVID-19, we experienced “the widespread digitization of the world” (Mbembe, 2020); however, many do not have access to stable or affordable connective technologies. There was a digital divide pre-pandemic and COVID-19 exacerbated digital inequalities (Beaunoyer et al., 2020; Robinson et al., 2015). In 2018, 24 million Americans (roughly 7% of the U.S. population) did not have access to high-speed internet, which is an improvement over the 14% of U.S. residents who did not use the internet in 2014 (Bronzino et al., 2021; Robinson et al., 2015). Despite the seeming ubiquity of smartphones, “in 2019, 29% of adults with household incomes below $30,000 did not own a smartphone” (Bannon and Keith, 2021: 1889). Factors such as region, age, literacy, housing, and socio-economic class affect access to the digital world. For instance, “51.6% of rural U.S. residents had 250/25 megabits per second (Mbps) [a ratio that reflects download to upload speeds] internet access in 2018 compared to 94% urban residents”, a connectivity that would “support a household with four devices under the Federal Communications Commission’s definition of moderate usage” (Lai and Widmar, 2021: 459). In contrast, rural users, including many on tribal lands, were not prepared to “pivot” online. Similarly, when COVID-19 stay-at-home orders began, low-income households may not have had the budget to upgrade devices or internet/data plans (Beaunoyer et al., 2020: 2). Households that use technology in diverse ways simultaneously (i.e. devices that are being used to work from home, remotely educate, attend tele-health appointments, stream entertainment, and socially connect, etc. at the same time by different users) created additional demands on WIFI or data capability. If these homes
were in poorly networked areas, so-called “digital deserts” (Beaunoyer et al., 2020: 5), or in high population density neighborhoods where users are competing for network/cell service, they were taxed even more with limited resources.

There are numerous consequences of digital exclusion. For example, much has been written about the effect of the digital divide on education (Baum et al., 2014; Francis and Weller, 2021; Lai and Widmar, 2021). In their study on class, race, and remote learning, Francis and Weller (2021) found that even though Latinx/Hispanic and Black students spent more time on remote learning than their peers, they were “less likely to have reliable access to remote devices” (15). According to Francis and Weller, this creates a racial achievement gap that will worsen wealth inequality between Latinx/Hispanic, Black, and White populations. Scholars have also found that the digital divide may impact physical and mental health (Beaunoyer et al., 2020; Spanakis et al., 2021). Those with limited internet access had “lower levels of e-Health literacy” making them “more vulnerable to COVID-19 contamination or propagation because they have a harder time accessing, understanding and applying protective measures” (Beaunoyer et al., 2020: 4).

Issues associated with the digital divide also apply to the justice system (Baldwin et al., 2020; Bannon and Keith, 2021; Bergeron, 2021; Lederer, 2021; Schiffer, 2020). Poor connectivity leads to frozen screens and slurred audio. Some people may give up altogether: there are already instances of judgments against people for failure to appear in court; yet it is unclear if lack of technological capability was the reason a person did not show up, which is a real possibility as some are choosing to disconnect their internet or data service to save money during the pandemic (Bannon and Keith, 2021; Lederer, 2021). There are additional variables to consider too. People who need translators may be at a disadvantage when asked to use remote technology (Bannon and Keith, 2021). Similarly, virtual courts may not be accessible to disabled people, who may require tools such as closed captioning or screen readers to participate (Bannon and Keith, 2021; Lederer, 2021; Lindsay, 2020). While virtual courts were a stop-gap measure for ensuring the justice system continued during the COVID-19 pandemic, it is not a panacea. The digital divide revealed and exacerbated accessibility problems within the system.

**COVID-19 and Courts Around the World**

Despite efforts to make the best out of the situation, COVID-19 led to postponements around the world as courts ground to a halt; however, the justice system could not stop completely (Krans et al., 2020). The pandemic required lawyers, judges, defendants, witnesses, and other court actors to adopt innovative methods. Some U.S. courts used wedding facilities, nightclubs, movie theaters, and resorts to host socially distanced proceedings (Murphy, 2021). When in-person gatherings were impossible, virtual technology was used. Videoconferencing is not new in the U.S. court system; remote witnesses or interpreters have been used in immigration hearings, family disputes, and cases involving child victims for years (Bannon and Keith, 2021; Lederer, 2021). Bail, plea, eviction, and sentencing hearings have used remote proceedings in the past. When COVID-19 arrived, some courts relied on existing technology, while others used Coronavirus Aid Relief and Economic Security (CARES) Act funding to enhance their technological capability. Some states even allowed certain matters to be settled
remotely that previously required in-person attendance. With defendants’ consent, select courts have livestreamed proceedings, conducted bench trials, resolved civil matters, and even assembled grand juries remotely.

There is an international digital divide because some countries were ready to go virtual while others struggled. For example, Australia, Brazil, England and Wales, Finland, and Indonesia began technologizing their courtrooms before COVID-19 (Krans et al., 2020). Pre-pandemic, Singapore was an exemplar for digitized courtrooms: not only was everything available online, but participants arrived to court with electronic notebooks that plugged into connective sockets for easy projection and sharing of digital material (Hasan and Mia, 2021: 10). These countries were better prepared than countries like Bangladesh, which faced systems “[that] are not largely up-to-date, have no internet access, video conferencing management, e-cause list, online submission system, modern database etc. which cause[d] delay, mismanagement, corruption, [and] unnecessary expenses” (Hasan and Mia, 2021). In fact, countries that relied on hard-copy documentation, like Canada, were especially strained by this transition (Krans et al., 2020). Moreover, countries that have rolling electricity blackouts could not offer consistent virtual court proceedings (Hasan and Mia, 2021).

Jurisdictions had to get creative. The Scottish Courts and Tribunals Service live-streamed trials into local cinemas so that juries could socially distance (Rossner et al., 2021) while Norway solved the problem of public access by streaming hearings online or making recordings available upon request (Krans et al., 2020). The UK had already conceived of a “distributed court”, based on a Dutch model, where judges were in the physical courtroom but all other actors were present via “screens placed in appropriate positions that replicate a classic courtroom setup” (Rossner and Tait, 2021: 4). When compared to the COVID-19 virtual model of multiple boxes on a single screen (e.g. Zoom “Brady Bunch” effect), Rossner and Tait (2021) found that a distributed court communicates greater equality amongst the remote participants. To better prepare defendants, legal aid hotlines appeared in Québec (Canada). Unfortunately, equity was compromised elsewhere like in Germany where increased court fees during COVID-19 disproportionately affected class-marginalized Germans (Krans et al., 2020).

Courtrooms and court officials had to be staged for the camera. While some countries (e.g. Italy, Austria, Argentina) used authoritative symbols such as crucifixes, swords, or coat of arms in the background of state actors, others (e.g. New Zealand, Sweden, Denmark, and the Netherlands) used artwork to convey alternate understandings of justice (Rossner et al., 2021). In many ways, the care (or lack thereof) that went into ensuring defendants appeared favorably reflects a country’s values. The effort made by state actors in the UK and Australia to conduct pre-proceeding camera, microphone, and WIFI checks, as well as offering tips to defendants about lighting and backgrounds (Rossner et al., 2021), is lacking in many countries (including the U.S.) around the world.

Overall, virtual courtrooms benefit certain courtroom actors more than others. Judges and lawyers cited reduced travel as the greatest advantage of remote proceedings (Baldwin et al., 2020; Bannon and Keith, 2021; Bergeron, 2021; Rossner and Tait, 2021; Schiffer, 2020). For lawyers, time spent waiting for court to start or driving considerable distances between courthouses (especially in expansive states or rural/tribal communities) could now be used in other ways. Being able to Zoom in from home
allowed some lawyers the luxury of “having case files, relevant precedent, and exhibits at the ready on their desk when they typically would be unable to lug all of those materials to the podium” (Bergeron, 2021: 205). Hasan and Mia (2021) argue that e-judiciaries would greatly reduce corruption in Bangladesh where cases and documents pile up on lawyer and courtroom desks to the detriment of the whole process. Further, they believe that electronic recordings of witness depositions that can be easily recalled will shrink the time between a deposition and a proceeding making it less likely that a case will be thrown out. This is especially important in jurisdictions where witnesses may have left the country. Remote court may be convenient for others too. Warner (2020) reports that parents’ attendance in U.S. family court increased due to the near-elimination of travel, time-off, and childcare burdens while Bannon and Keith (2021) note that remote court increased the capability of many people to attend eviction hearings.

While most of the pro-technology arguments have been raised by judges and lawyers, all stakeholders have not been consulted (Bannon and Keith, 2021); in fact, Jenia Iontcheva Turner found that 72% of defense attorneys expressed negative sentiments about virtual court whereas only 5% of judges and prosecutors felt similarly negative about this delivery method in Texas alone (2020: 257). Further, in their survey of trainings and webinars held to educate the legal profession about how to use this technology, Bannon and Keith discovered that only four sessions included defense attorney facilitators (2021: 1911). These findings indicate that the system is working well for some but not for others. This finding is consistent with research in other countries such as Indonesia that finds defendants are at more of a disadvantage when it comes to virtual courts (Jamila et al., 2021).

Results

As detailed below, we observed numerous themes related to defendant rights in virtual courtroom proceedings conducted during the pandemic. Among others, some of the relevant U.S. rights include the right to effective assistance of counsel (see Strickland v. Washington, 1984), the right to be informed of pending charges and evidence (see United States v. Cruikshank, 1876; United States v. Simmons, 1878; Bartell v. United States, 1913), the right to a speedy trial (see Barker v. Wingo, 1972; Shestokas, 2014; Tracz, 2019), and rights related to pre-trial detention.1

Appearance and Unfair Disadvantages

The most common global concern about virtual court proceedings is the unfair interpretations that deliberating bodies may reach about participants. Appearance and body language are important factors for courtroom success, but how do these translate across a computer screen? Maintaining a professional appearance via clothing, backgrounds, and/or Zoom names, despite litigating or appearing from home, is important to create positive first impressions (Bailey, 2020; Baldwin et al., 2020; Bannon and Keith, 2021; Fortin, 2020; Lartey, 2020; Lederer, 2021; Moran, 2021; Rossner and Tait, 2021). Unfortunately, the ability to appear professional from home is not equally accessible and the stakes are important. Will law firms that can afford good lighting and crisp backgrounds be more favored, for instance (Schiffer, 2020)? Since judges like to see eye
contact and read body language, how will they interpret those who forget to look straight at the device camera rather than into the eyes of the screen participants? And what about those who forget to mute/unmute themselves (Warner, 2020)? Without pre-proceeding technology and appearance checks, like that given in the UK and Australia (Rossner and Tait, 2021), these factors may influence judge or jury decisions.

More than ¾ of the student observers expressed concern that incarcerated defendants are disadvantaged by their appearances in the virtual courtroom: “The fact that the virtual courtroom shows these incarcerated individuals in the prison setting, wearing the restraints and uniform, impacts the presumption of innocence given to all. This is impacting the rights of the defendant and could also impact the outcome of the trial” (25). Further, several students noted that the prison setting, displayed in the Zoom box, could be detrimental. Students noticed that most incarcerated defendants were brought into booths, however a couple of students observed a defendant participating in the virtual courtroom from their prison cell. While prison garb and handcuffs are issues in in-person courtroom settings as well as virtual settings, students noted additional COVID-19 related issues impacting defendants’ appearances. For example, several students were concerned that requiring incarcerated defendants to wear face masks during virtual court proceedings may disadvantage them:

The defendant spoke while wearing a face mask. I understand that the pandemic makes it necessary to wear a face mask—especially in jail. However, I imagined what the fate of the defendant would be during trial with such limitations. The demeanor and facial expressions of the defendant matters while testifying and it becomes worrisome how these can be reduced when speaking with a face mask on (30).

Beyond masks, a few students were concerned that virtual settings decrease empathy for defendants: “It is difficult to empathize or see someone on a personal level through a computer screen” (10).

**Representation and Silenced Defendants**

Effective assistance of one’s counsel is fundamental to fair and just proceedings (see *Strickland v. Washington*, 1984). The Supreme Court has further held that some decisions are reserved for the defendant personally, even when he, she, or they is represented by counsel; these decisions include whether to plead guilty, waive a jury, testify in one’s own defense, or forego an appeal (*McCoy v. Louisiana*, 2018). The ability of an attorney to confer with his, her, or their client is complicated in the virtual world. Lawyers and clients cannot whisper or pass notes to one another as they would in-person. While there are alternate methods (such as breakout rooms in Zoom or texting offline), it is unclear whether lawyers are using these effectively (Bannon and Keith, 2021).

A prevalent theme among students is that defendants appeared confused and uninformed. In several instances, defendants had yet to be afforded an opportunity to consult with an attorney and were overwhelmed by the process:
The defendant was very confused and kept asking what had happened and why he wasn’t being released. The judge told him that his lawyer would get in touch with him and that he needed to leave. The judge got very annoyed and just wanted to continue, not wasting his time with this individual. This got me very mad because this is a person who has a right to know what is going on and what occurred (28).

About half of the students reported at least one instance where the defendant did not understand the court’s rulings, the nature of the proceedings, or the results:

The defendant was never made aware or given the chance to participate. They only knew of what happened when the judge told them at the end if they were free to go or not. Even when release was granted, the defendant many times asked the judge if they were free to go since they were not aware of what just had happened (29).

Students documented intense defendant frustrations due to a lack of communication with their attorneys or not yet being assigned an attorney: “The defendant did have an emotional response when he could not reach his attorney. He was very much frustrated. I could see that the electronic nature of hearings and meetings due to the pandemic caused some conflict.” Another student noted:

The defendant entered the pod very frustrated. The public defender present was not assigned to his case and he did not have anyone to speak to about the charges. He was ranting and denying the charges. The public defender who was present told him to stop speaking until he has an attorney because staying quiet is in his best interests because there are others on Zoom and the conversation occurring is not private (29).

Even in situations where defendants were represented by counsel, connections between defendants and their attorneys appeared minimal: “I noticed there was no visible connection between defendants and their attorneys. I felt so much compassion for them because most of them appeared like they felt isolated as they entered the room to join the hearing via Zoom” (30). Without the ability to effectively communicate with their attorneys, defendants’ Sixth Amendment right to counsel is severely abridged.

About half of the students recorded at least one instance where the defense attorney appeared to actively ignore his or her client and a few students observed patterns among particular attorneys: “I saw Mr [X] conduct several detention hearings and he ignored his client every time. All of his clients seemed frustrated” (39). Another student observed “a pattern of outbursts” (25) among a particular attorney’s clients. One student, who had previously observed in-person proceedings in court prior to the COVID-19 pandemic, acknowledged that “attorneys ignoring their clients” is not a problem unique to virtual settings, but is exacerbated by them: “Zoom just makes it even easier for attorneys to ignore their clients. It is much harder to tune out someone sitting next to you than to ignore a Zoom box on a screen” (33).

Commanding a judge’s attention on Zoom may be particularly challenging for defendants too. Is using the Zoom (or other virtual platform’s) hand-raise function enough, especially when judges have the power to mute and unmute participants at will
A prevalent concern expressed by most students (n = 36) is that defendants are not given sufficient opportunity to express themselves and participate in their own defense in the virtual courtroom. “Everyone else was speaking about what would happen to the defendant and his microphone was off and he couldn’t say a word” (37). In certain instances, incarcerated defendants were muted for practical reasons, but those reasons were sometimes beyond the defendant’s control: “The defendant was muted during the hearing because the facility that he was in was too loud in the background, according to the judge” (32). More than half of the students observed defendants attempting to get the court’s or their attorney’s attention, to no avail: “The defendant was waiving his hands at the camera, raising his hand, and continually gesturing for his turn to speak. This went on and on and everyone ignored him” (25). A couple of students noted that the settings in the virtual courtroom impeded the defendant’s ability to be noticed and right to be heard: “Sometimes the proceedings were shown in speaker view. It is hard to see everyone at once and, at times, you couldn’t see the defendant at all. How are they supposed to get anyone’s attention this way?” (2).

About a quarter of the students described instances where judges seemed impatient when defendants tried to speak: “One judge was impatient and did not want to give the defendant a chance to express why he felt the way that he did. She seemed bothered and annoyed every time the defendant tried to speak” (16). While impatience by court actors toward defendants (while they are trying to be heard and participate in their own defense) may occur in non-virtual settings, students recorded instances where frustrations were heightened by technological difficulties. As one student noted: “The judge was furious when the defendant tried to speak and told him that the proceedings had been delayed enough by network issues and that they had to move quickly and there was no time for this” (4). Another student expressed a similar sentiment: “The way that the judge cut the defendant off—it felt as though she was trying not to miss a bus or train or appointment” (1).

Students recorded concerns that the virtual nature of the courtroom and lack of face-to-face human contact diminished the human element from the process:

As I watched the proceedings, the electronic nature of how court is being done made me feel concerned with the level of intimacy that is lost compared to in-person court hearings. Over Zoom and other means of electronic communication programs, you really can lose the humanity that should be present in these cases (17).

Another student equated the “mechanistic and formulaic” nature of the proceeding to a television show: “It reminded me of the Seinfeld episode where Elaine and Jerry purchased soup at the soup market where the owner is known as the soup Nazi. You go in respectfully, seriously, and decisively, order your soup, pay, and get out. The Court proceedings were exactly this way from first appearances to detention hearing proceedings. The added technical issues did not improve these feelings” (22). A handful of students were concerned that the lack of face-to-face human contact may “further desensitize” already desensitized court agents” (10) and interfere with productivity: “After sitting through multiple sessions of online court myself, I can only imagine how difficult it would be to prepare and to have the same amount of energy you
would have inside an actual courtroom. There is something about the environment of the courtroom that provides an extra level of energy” (17).

Courtroom Gravitas, Disorganization, and Lack of Preparation

The courthouse environment connotes a seriousness that prepares individuals for their proceedings. Family court Judge Randall H. Warner surmises, “There is something about going to the courthouse, waiting for your hearing to be called, and rising when the judge enters that conveys the significance and seriousness of what we are doing” (2020: 967). Since there are accounts of lawyers appearing on Zoom shirtless or still under bed sheets, it seems that attorneys need reminders about the gravity of the virtual courtroom too (Bailey, 2020). The courthouse is not just a psychologically preparatory space, it is a literal preparatory one too. Those unfamiliar with legal processes may ask personnel what to do; a chance meeting in the hallway or showing up to the wrong desk is an opportunity to better prepare to enter the courtroom (Shanahan et al., 2020–2021). Similarly, waiting for a session to start is a precious opportunity for lawyers to confer with their clients and ready them for the proceedings (Warner, 2020). The loss of informal education provided by the courthouse environment is especially difficult for self-represented litigants, who appear in 70%–98% of all cases (Bannon and Keith, 2021: 1897). Representing oneself presents significant challenges during the best of times; in the virtual courtroom, there is even less connection to legal services or resources.

A prevalent sentiment among almost half of the students is that court actors do not take the virtual courtroom seriously enough. According to students, this attitude was demonstrated by the way that court actors dressed and the locations in which they worked. For example, one student noted: “I just couldn’t believe it—the judge actually presided from his car” (22), while another was surprised that “the judge didn’t even bother putting a robe on for the hearing” (19). Beyond dress and location, about a quarter of the students referenced at least one case in which a judge or attorney were multi-tasking or appeared distracted or disinterested during the proceeding: “The judge muted herself during a side conference to take a personal call. You could tell that her personal life was coming into play during these sessions and that created an issue because during these times she should be focused on her job that will impact a person’s life and record” (3). A second student stated: “The defense attorney was very nonchalant about the case. He was yawning and obviously too relaxed for a professional who is defending a client” (30). A third student noticed that “the judge rested his chin on his hands and seemed to lose focus” (5). Finally, one student expressed the overall “feel” in the virtual courtroom: “There was a lack of emotion and wanting to understand” (3). Beyond feelings of indifference, various students reported a host of behaviors among court actors including rude interactions with their clients, and overall impatience: “The prosecutor was moody and rude to everyone and spoke in a condescending tone” (27).

In contrast, a quarter of the students were complimentary of the attitude and efforts of judges in at least one observation. As one student described: “You could tell that to this judge this was more than a gloomy Monday where he was stuck working in front of a camera but rather another day in which he had to make difficult decisions. Decisions
that no one wants to make. The judge seemed to be the one tying everything together from all ends” (3).

About ¾ of the students lamented the high level of disorganization in the virtual courtroom and its impact on the proceedings: “There was a lack of organization and no one knew who would be next on the schedule” (25). Another student noted: “The judge, prosecutor and defense attorney were joking around about who would be next in line for the case. Since the virtual courtroom did not allow these individuals to see who is next or to have that direct line of communication, it was almost a surprise or a guessing game for who would appear” (1). Students discussed their perceptions that this disorganization led to unprepared advocates: “In between cases I noticed that neither the prosecutor nor defense attorney knew whose case it was so it had to be pushed back because neither was prepared either way to deal with the case” (27).

Beyond the disorganization caused by virtual courtroom scheduling issues, some attorneys appeared ill-prepared for court. For example, one student noted: “The defense attorney was not up to date with the defendant’s criminal record. The judge corrected him and told him that the defendant had a prior gun charge that had not been concluded” (28). A second student stated: “The defense attorney looked overworked and would stumble on her statements. She would read the wrong dates and the prosecutor would clarify so that they would be on the same page” (2).

Security and Privacy

Social distancing and stay-at-home orders closed courtrooms to the public. Some courts turned to YouTube livestreaming while others opened up Zoom trials to anyone with a link to address this potential infringement. Unfortunately, courtrooms became vulnerable to Zoombombing (i.e. strangers interrupting a Zoom call with offensive images and/or abusive epithets), hacking, and data breaches (Baldwin et al., 2020; Bergeron, 2021; Lederer, 2021). While these breaches are important to note, the cost of closing a trial to the public greatly impacts defendants. For instance, Zoë Adel, communications manager with Brooklyn Community Bail Fund, noted that judges set lower bails when they know court observers are paying attention (Schiffer, 2020). While privacy violations must be acknowledged (and prevented where possible), without transparency and accountability, there is little trust in the justice system itself.

More than half of the students were concerned about the privacy implications for defendants in the virtual courtroom. About a third of students were disturbed when judges asked defendants to confirm their addresses or other personal information:

I do not like this because there is a breach of privacy in that anyone can be watching these cases. I understand that it is needed to ensure that they have the proper information but I still feel that there has to be a better way. At least this information should be confirmed in break-out rooms and not the main room where anyone can attend (27).

Students were also concerned that defendants may lack privacy while having confidential discussions with their attorneys on Zoom: “Being confident in the confidentiality of the conversations—even in breakout rooms—between defendants and their attorneys is
harder on zoom” (2). Finally, students expressed security concerns regarding the electronic transmission of sensitive files.

**Technological Challenges**

Technological challenges were noted in all the student journals for at least one observation. While somewhat inevitable, WIFI issues, blurry images, frozen screens, temporary loss of connection, malfunctioning cameras, and poor sound quality are consistent problems in the virtual courtroom. These challenges disrupt court proceedings and create a tremendous amount of frustration and stress for participants. They result in postponements, interfere with attorneys’ abilities to communicate with their clients, prevent family members from observing the proceedings, and contribute to extended periods of incarceration pre-trial, among a host of other problems. Sharing documents securely is also complicated (Hasan and Mia, 2021; Rossner and Tait, 2021). For example, a Massachusetts tenant was recently granted a new eviction trial because she could not share documents or use screen-share in Zoom during her trial (Bannon and Keith, 2021: 1891).

Almost a third of the students expressed concern that these technological issues harm defendants’ cases: As one student stated: “The defendant was able to join by audio only. In a criminal proceeding, the life, future, and well-being of the defendants are at stake and conducting such proceeding online without being able to see the defendant’s face and demeanor, can be detrimental to the defendant’s case” (30). And another noted: “The defense attorney’s network was bad and it was a challenge for her to speak to both the judge and the prosecutor. It was impossible for her to be effective with all of the interruptions” (34).

Several students were concerned about the defendant’s loss of emotional support from family and friends due to technological issues. As one student noted:

I was frustrated with the technical difficulties for myself, a student who was only trying to learn about the judicial system. The stress and frustration would be unimaginable if I was attempting to log on to support a family member or needed to watch to know if my family member would be detained while awaiting their trial. This is a life changing decision that is being made and I think that the support of one’s family and friends is important to this process (25).

Finally, about a quarter of the students described situations where judges, prosecutors, defense attorneys, and defendants were all speaking at the same time making it impossible to follow the proceeding: “Zoom itself is a disaster. It seems like everyone is talking over each other and no one is listening” (4).

**Timely Proceedings**

COVID-19 has led to life-altering case delays and postponements across the world (Baldwin et al., 2020; Cooper, 2021; Shanahan et al., 2020–2021; Sourdin et al., 2020). The stakes are high because extended time in jail awaiting a bail hearing or
trial means greater exposure to COVID-19, which is wreaking havoc in carceral spaces (Schiffer, 2020). This is why advocates have pressured courts to release pre-trial defendants. Advocates have also noted that there is an increase in defendants accepting plea deals to avoid jail where they may contract COVID-19 (Baldwin et al., 2020; Bannon and Keith, 2021).

Being charged with a crime is disruptive to defendants’ lives as well as those of their families and communities; the Sixth Amendment affords defendants the right to a speedy trial to minimize life disruptions (see Barker v. Wingo, 1972; Shestokas, 2014; Tracz, 2019). These disruptions are enhanced dramatically when the defendant is detained during the pendency of the case (while he, she, or they is still entitled to a presumption of innocence). While postponements are not unique to virtual courtrooms and are sometimes unavoidable, frequent postponements—often resulting in extended periods of incarceration pre-trial—is a common occurrence in the virtual courtroom.

The issue of detention hearings being postponed (and defendants remaining in jail) while attorneys sort out discovery issues was observed in about a third of the cases. In certain instances, congested court calendars resulted in longer postponements, beyond what the discovery issue required:

The defense attorney received the discovery earlier during the day and hadn’t spoken to the defendant about the evidence. The attorney pleaded with the judge to allow a postponement to later in the day but the judge refused. His reason was that the calendar was full of cases. The reason for the discovery issue was due to downloading technical issues. The judge denied a same day postponement and instead rescheduled for a later date—hence leaving the defendant detained (20).

Beyond discovery, connectivity issues were responsible for some of the postponements:

The Zoom kept on freezing on the defendant’s mother and they couldn’t get it fixed. The judge decided to postpone the hearing since he demanded to be able to see and hear the mother before he came to a decision on whether to release the defendant. I understand the frustration of the judge but can’t imagine how it feels to have your freedom be postponed due to technical Zoom problems. It is an anger that really can’t be targeted at anyone in particular, which then evolves to further anger and unease (28).

Other reported reasons for postponements include cases in which an attorney had not yet been assigned to or retained by the defendant \(n = 10\), and adjournments granted to accommodate attorneys’ schedules. Notably, a quarter of the students mentioned that postponements were focused on the scheduling needs and desires of attorneys and judges—not defendants.

**Recognition that Court Actors are Struggling**

While students were critical of the behaviors and level of preparedness of some of the court actors, about a third of the students acknowledged that working in a virtual courtroom is a difficult task and that many court actors are trying their best: “I do think that the attorneys
defending those waiting on their cases are having a hard time. In this case, the defense attorney was tired, lost, and although she was trying her best, it was clear that there was a struggle to keep up” (3). Another student noted: “I do not blame the defense attorney but rather wish something could be done to relieve her stress. If one is depending on a defense attorney to have a strong defense, it makes sense that you would desire a well-rested, level-headed defense attorney who can focus on your case without mixing up details of your case” (7). Given the challenges of COVID-19 and the glitches of the virtual courtroom, a handful of students expressed gratitude to those court actors keeping our criminal justice system going: “I think that the efforts are noticeable and should be appreciated when those legal professionals are going the extra mile” (3).

Discussion and Conclusion

The COVID-19 pandemic caused millions of deaths, mental health crises, and severe economic devastation globally. The need to socially distance forced societies to re-imagine modes of functioning, working, and communicating; it also created the demand to replace face-to-face contact with digital platforms in novel and previously unplanned ways. For some (industries, professions, and individuals), virtual platforms carry huge benefits (e.g. elimination of commuting time and expense, potential for increased productivity) (Baldwin et al., 2020; Bannon and Keith, 2021; Bergeron, 2021; Rossner and Tait, 2021; Schiffer, 2020). For others, decreased face-to-face interactions create voids (e.g. loss of group/corporate cultures and mentorship, decrease in interpersonal interactions and connections) that cannot be filled virtually.

In the criminal justice system, court proceedings often result in life altering consequences for criminal defendants, profoundly impacting their freedom and future trajectories. While constitutional provisions are designed to protect defendant rights during criminal case processing, their operationalization is dependent on courtroom procedures and professional interactions among judges, prosecutors, defense attorneys, jurors, and defendants within distinct courtroom communities (Eisenstein et al., 1988). Providing speedy and public trials, evaluating the need for pre-trial detention, ensuring the effective assistance of counsel, and imposing just sentences (among other criminal court functions) is an art that requires focus, attention to detail, nuanced calculations, and timely action. While virtual courtrooms were necessary to function during the pandemic and may continue to be used in the future, they are a profoundly flawed option for criminal justice administration—in their current form—and are incapable of fully preserving defendant rights.

First, our data demonstrate that technological issues associated with virtual courtrooms are disruptive to the processing of criminal cases. Computer screens freeze, WIFI connections are unreliable, and audio/video malfunctions are a regular occurrence (Bannon and Keith, 2021; Lederer, 2021). The United States is not alone in this regard (Hasan and Mia, 2021; Jamila et al., 2021; Krans et al., 2020; Rossner and Tait, 2021). Second, virtual courtroom environments are naturally less formal than in-person settings, and this casualness may result in less serious attitudes by courtroom actors. Indeed, our students observed critical courtroom proceedings (e.g. detention hearings, sentencing proceedings) being conducted by judges in cars or paused for court actors
to take private calls or interact with their own family members. Multitasking personal life interruptions while working is more common in virtual settings and difficult to avoid completely; yet, criminal court proceedings are life altering events that require the respect and attention of all court actors. The system should not function in a casual manner when personal freedoms of individuals are at stake.

Third, our students observed severe disorganization within the virtual courtroom. Attorneys and judges commonly did not know which cases were on the court calendar and needed documents were often unavailable. The anxiety associated with this disorganization is undoubtedly heightened for defendants and their families, who are often unfamiliar with court processes. Further, lack of information regarding court schedules may lead to missed court proceedings by case parties and members of the public, and a reduction in the transparency and accountability associated with public trials. Indeed, our students reported difficulties in locating proceedings and logging on, and often required numerous attempts before observing. This disorganization is more prevalent in countries that were not on the road to digitization and virtual court operations pre-pandemic (Krans et al., 2020). Fourth, disorganization and lack of preparedness in the virtual courtroom often leads to postponements, impeding the efficient resolution of cases (Baldwin et al., 2020; Schiffer, 2020). Delays in case processing may result in the loss of evidence, increased disruptions to defendants’ and victims’ lives, and potential danger to communities (Shestokas, 2014; Tracz, 2019). Notably, defendants are entitled to a presumption of innocence unless they plead guilty or are found guilty following a trial. Since pre-verdict or pre-plea postponements may lead to longer periods of incarceration, innocent defendants may experience an increase in pre-trial detention. Further, delayed or postponed detention and bail hearings may prevent defendants’ releases from custody simply because the court is unable to conduct the hearing, potentially resulting in less favorable case outcomes (as the ability to prepare a defense is more difficult for incarcerated defendants) (Leslie and Pope, 2017). Moreover, court sanctioned postponements for “good cause” may be excluded from speedy trial calculations (Shestokas, 2014); thus, technological difficulties and disorganization caused by virtual settings may prevent speedy trials.

The challenges associated with virtual courts may affect defendants’ abilities to participate in their own defense. Our students reported that defendants were sometimes muted during proceedings and/or unable to get the attention of judges or attorneys. Depending on the settings in the virtual courtroom (e.g. speaker or gallery view), some defendants were not even visible to their attorneys or judges. Being heard and seen are prerequisites to a defendant’s ability to actively participate in his, her, or their own defense. The frustrations associated with these limitations may cause defendants to seek an exit strategy in the form of guilty pleas, potentially leading innocent defendants to plead guilty out of despair.

Like in-person court proceedings, negative consequences associated with virtual courtrooms are not evenly distributed among members of the population. Racialized and poor defendants tend to have less access to digital technologies and WIFI (Beaunoyer et al., 2020; Lai and Widmar, 2021). The inability to connect visually or be heard clearly may severely disadvantage poor and racialized defendants who are already over-represented in the criminal justice system. Further, a greater number of racialized defendants are incarcerated during the pendency of their cases (Leslie and
Pope, 2017) and the ability to portray oneself in a crisp clear manner virtually (while in jail) is more difficult. This is why Rossner and Tait (2021) advocate for a virtual distributed courtroom, which is in the experimental stage in the UK, as a way to ensure more equity in the justice system. Inability to digitally connect may interfere with defendant/attorney consultations, impeding the development of an effective defense and denying defendants the effective assistance of counsel. As defendants living in poor communities often have similarly situated family members, they may experience a reduction in family support at their proceedings compared to in-person formats. All these factors may lead to a disproportionate number of unfavorable pleas among poor and racialized defendants.

Remote proceedings during COVID-19 accelerated the move to virtual justice that many countries were moving towards before the pandemic. It is likely that some of these technologies are here to stay. We need to heed the lessons learned and prepare to “do better” virtually. With proper planning and diverse stakeholders, including defense attorneys, at the table (Bannon and Keith, 2021), we can establish structures and procedures to make virtual courtrooms a viable and reasonable option. First, improved broadband and WIFI are needed to increase access to and the quality of digital court platforms. Similar to other industries, the criminal court system needs to invest in these technologies, have a live technology support person available, and be prepared to conduct proceedings online. Additionally, courts can create a guide for optimizing technology. Something as simple as teaching people how to use the spotlight, pin, and grid functions on Zoom, like jurisdictions in the UK and Australia are doing, creates a transparent visual standard (Lederer, 2021; Rossner and Tait, 2021). Second, similar to providing indigent defendants with counsel, all defendants who must participate in digital proceedings should be provided with laptops and technology to effectively communicate. Federal aid (such as the CARES act in the U.S.) provided such resources to students in need during the pandemic—defendants whose lives are on the line should be granted similar access to remote technologies. There are instances where legal aid clinics are stepping in to provide internet hot spots for defendants, but they are over-burdened so courts should pick up the slack (Bannon and Keith, 2021; Cooper, 2021; Krans et al., 2020). Third, jails and prisons must create better WIFI access and quiet places with computers for defendants to speak with their attorneys and attend court proceedings remotely. Fourth, courts must strengthen attorney-client interaction online. Whether it is through normalizing breakout rooms or being patient while proceedings are paused for a confidential conversation, the stakes of ineffective assistance of counsel are too high (Bannon and Keith, 2021). Similarly, additional support should be offered to self-represented litigants (Bannon and Keith, 2021). If courts remain remote, a virtual helpdesk (Shanahan et al., 2020–2021), a FAQ page, or even an information-only email address would help these litigants better prepare for their case. Fifth, individual courthouses should gather data to identify the specific needs relevant to their jurisdiction. Bannon and Keith remind that “there is no one-size-fits-all approach to remote proceedings” (2021: 1913)—what works for criminal jury trials may not work for eviction hearings. Courts must be nimble and tailor the technology to the needs of the case. Since local courthouses may experience different successes and failures, this information could be critical in helping to establish useful protocols. Best practices should be published and distributed internationally. Sixth, court protocols should delineate a priority order for in-person
proceedings (e.g. giving incarcerated defendants and jury trials preference) and defendants should be granted the option to waive certain in-person proceedings in exchange for virtual options. Such actions may free up courtrooms for jury trials or for serious cases with defendants who prefer in-person proceedings, potentially reducing case backlogs and allowing for more efficient case resolution. In these ways, we can heed the lessons learned, and successfully establish more efficient and just ways to process criminal cases and strengthen court foundations in preparation for future challenges.

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Note
1. Please see our 2020 article, “The Power of Experiential Learning in Emotional Courtroom Spaces” (Nir and Musial, 2020), which contains information regarding student perceptions of in-person courtroom proceedings prior to the COVID-19 pandemic. Discussions pertaining to rights violations pre-pandemic focus on shackled/handcuffed defendants, apathetic court actors, and lack of preparedness by attorneys. While present, these pre-pandemic perceptions are far less prevalent and/or severe as those expressed by students observing virtual courtrooms. Further, our data reveal a host of additional issues unique to virtual settings.

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