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Revenge of the Sixth: The Constitutional Reckoning of Pandemic Justice

Brandon Marc Draper

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REVENGE OF THE SIXTH: THE
CONSTITUTIONAL RECKONING
OF PANDEMIC JUSTICE

BRANDON MARC DRAPER*

The Sixth Amendment’s criminal jury right is integral to the United States criminal justice system. While this right is also implicated by the Due Process Clause, Equal Protection Clause, and several federal and state statutes, criminal jury trial rates have been declining for decades, down from approximately 20% to 2% between 1988 to 2018. This dramatic drop in the rate of criminal jury trials is an effective measure of the decreased access to fair and constitutional criminal jury trials.

Prior to the pandemic, critics generally ascribed the decline in criminal jury trials to two sources, first the “trial penalty,”—the substantial difference between the sentence offered prior to trial versus the sentence the defendant receives after trial—and second, the unfettered abuse of the Speedy Trial Act by prosecutors, defense attorneys, and judges. Both of these sources have had the effect of pressuring criminal defendants to plea or otherwise delaying the accused’s ability to obtain a jury trial.

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The COVID-19 pandemic caused national criminal jury trial rates to plummet further, with some states or jurisdictions nearing or reaching zero. Several courts throughout the country contemplated or implemented procedures to continue conducting criminal jury trials, including trials that were (1) socially distanced and in person; (2) conducted by video conference technology; or (3) a hybrid model of video conference jury selection with socially distanced/in-person trial.

This Article argues that the pandemic served as a type of stress test, revealing the inability of the criminal justice system to ensure the criminal jury right. Thus, the pre-pandemic problems, even if eliminated, will not solve the Sixth Amendment problems presented during the pandemic environment. The Article also argues that pandemic solutions to increasing criminal jury trial rates, while noble in intention, still likely force the accused to either waive his Sixth Amendment rights or choose the speedy trial right at the expense of the confrontation right or jury right, potentially causing prosecutors and defense attorneys to shirk their ethical obligations to seek justice or zealously represent their clients. Furthermore, because the Supreme Court’s rejection of a “functionalist assessment” of Sixth Amendment rights in Ramos v. Louisiana likely calls into question the constitutionality of such measures, greater action is needed to ensure a pandemic-proof criminal jury right. Indeed, while the vaccine may be a cure for the virus, it is not a cure for the problems it caused to our criminal justice system. Accordingly, to ensure a pandemic-proof criminal jury right, Congress should enact measures to end the trial penalty, provide courts and parties with a meaningful ability to enforce the Speedy Trial Act, and most importantly, amend the Constitution to create a criminal jury right that allows courts to conduct jury trials via video conference.

I. INTRODUCTION .................................................................................................................208
   A. Introduction to Video Conference Technology.................................................................211
      i. Criminal Justice System’s Video Conference Technology Immersion..................................215

II. THE SIXTH AMENDMENT: BOUNDARIES, LIMITATIONS, AND ORIGINALIST PHILOSOPHY .........................................................................................................................216

A. Boundaries and Limitations ..................................................218
   i. The Right to a Public Trial..............................................218
   ii. The Right to a Speedy Trial.........................................219
   iii. The Right to Confrontation........................................219
   iv. The Right to Assistance of Counsel/Right to Effective Assistance of Counsel ..............................................220
   v. The Right to a Fair and Impartial Jury ............................221
   vi. The Right to be Present.............................................222
B. Originalist Philosophy and *Ramos v. Louisiana* ......................222

III. PRE-PANDEMIC MATTERS: THE DECISION TO EXERCISE THE CRIMINAL JURY RIGHT AND CAUSES OF DECREASED CRIMINAL JURY TRIAL RATES..........................................................224
A. The Accused’s Decision to Exercise the Sixth Amendment Right 224
B. Who is to Blame?: The Trial Penalty, the Speedy Trial Act, and Other Issues .................................................................226
   i. The Trial Penalty..........................................................226
   ii. The Speedy Trial Act...................................................231
   iii. Other Causes to the Decreased Trial Rate .......................234
   iv. Potential Limits of the Proposed Solutions for Increasing Criminal Jury Trial Rates .........................................................236

IV. PANDEMIC PROPOSALS FOR MAINTAINING OR ENHANCING ACCESS TO THE CRIMINAL JUSTICE SYSTEM......................................................236
A. Pandemic Proposals, Observed Best Practices, and Opinions from the Profession ...............................................................239
   i. In Person and Socially Distanced .....................................239
   ii. Trials by Video Conference ...........................................240
   iii. Hybrid Jury Trials.....................................................242
   i. One Zoom Meeting with a Breakout Room for Each Individual Trial ..........................................................244
   ii. Separate Zoom Meeting for Each Individual Trial..............244
   iii. Zoom Webinar Rooms................................................245
C. Opinions from Trial Attorneys .............................................245

V. CONSTITUTIONAL RECKONING AND PROPOSAL TO AMEND THE CONSTITUTION ..........................................................246
A. Constitutional, Statutory, and Other Problems with Pandemic Proposals .................................................................246
   i. In Person and Socially Distanced .....................................246
   ii. Trial by Video Conference .............................................251
   iii. Hybrid Trials...........................................................258
I. INTRODUCTION

The year 2020 will be defined by the destruction caused by the COVID-19 pandemic. According to the World Health Organization, it is “the most severe” health emergency the organization has ever declared. As of January 3, 2022, the world death toll has surpassed 5.46 million. Countless others who contracted the virus ultimately survived but have endured “post-COVID conditions,” which could have health consequences lasting well into the future. Beyond the health consequences, the virus has caused the worst worldwide economic recession since World War II.

In the United States, the pandemic’s impacts were particularly devastating and, in many ways, tragic. For example, as of January 25, 2021, the United States had four percent of the world’s population and yet 25% of all confirmed COVID-19 cases and twenty percent of the world’s COVID-19 cases.

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deaths. At its deadliest, it was the number one cause of death. Its effect on the population was compounded by a simultaneous four percent decline in birthrate in 2020. And “[i]n 2020, . . . the United States saw the largest single-year surge in the death rate since federal statistics became available.” The impact was not limited to the death toll. The United States’ GDP growth in the second quarter of 2020 fell by 31.4%. Small businesses faltered. American citizens continued to lose faith in their government as many government officials publicly told them to avoid unnecessary travel as these officials simultaneously violated social distancing measures. 


persisted in spite of the fact that Americans were in desperate need of financial support.\textsuperscript{14} Fox News aided in increasing this mistrust as it promoted coronavirus misinformation approximately 13,551 times over the course of the pandemic in 2020.\textsuperscript{15} And through all of these issues, President Trump was found to be the “single largest driver” of COVID-19 misinformation.\textsuperscript{16} Beyond governmental issues, hate crimes skyrocketed, especially against Asian Americans.\textsuperscript{17} Despite continued low rates for other crimes, murder rates increased by an average of 36.7% in cities across the country.\textsuperscript{18} Even when a vaccine became remarkably available in December of 2020,\textsuperscript{19} news that the Trump Administration had rejected vaccine doses that could have been used to save lives and stop the spread of the virus harmed the national

\textsuperscript{14} See Paul Kane, Congress deeply unpopular again as gridlock on coronavirus relief has real-life consequences, WASH. POST (Aug. 1, 2020, 6:00 AM), https://www.washingtonpost.com/powerpost/congress-deeply-unpopular-again-as-gridlock-on-coronavirus-relief-has-real-life-consequences/2020/07/31/6d2f10c4-d36a-11ea-8c55-61e7f5e82ab_story.html [https://perma.cc/4HK7-QYPC]; see Kochhar supra note 12.


vaccination effort. Such efforts were also hindered by celebrities like Joe Rogan, a comedian and influential podcast host with millions of followers, who publicly told his listeners that young, healthy people do not need the vaccine, despite no evidence.

A. Introduction to Video Conference Technology

The pandemic also led much of society to be introduced to Zoom, which went from being a largely unknown company to becoming the number one service-provider for video conference communication in the world. From December 2019 to April 2020, Zoom’s daily participants increased from 10 million to 300 million. Google Meet and Microsoft Teams, two of Zoom’s primary competitors, also boast daily participation numbers of approximately 100 million and 115 million. Beyond daily users, video conference technology has changed our entire culture. Perhaps obviously, publisher Oxford Languages named “unmute” one of Oxford Dictionary’s 2020 words of the year.

Video conference technology platforms like Zoom, Google Meet, WebEx, and Microsoft Teams have several benefits. Those with social anxiety may be...
less stressed during video conference meetings than in person. Without worrying about traffic and parking, professional or social gatherings can be less stressful and more accessible. The data appears to bear out these benefits. Such data from ZipRecruiter shows that approximately “46% of workers would like to continue working from home forever.” And 76% of job seekers reported that they want to either work from home full-time or part-time. As a result of this adjustment in workplace arrangements, a recent Thompson Reuters poll showed that lawyers and firms have drastically changed their opinions regarding the acceptance of remote work, the use of technology in providing legal services, and cost-cutting measures entailed from remote work. The authors of this poll have posited that, due to the pandemic, the legal market has perhaps reached a “tipping point” regarding the widespread use of remote work and video conference technology. With respect to technology in the courtroom, in July of 2020 “the Conference of Chief Justices and the Conference of State Court Administrators jointly endorsed a set of Guiding Principles for Post-pandemic Court Technology with a blunt message: The legal system should move as many court processes as possible online.” Taking the lead on this guidance, the State of Texas has conducted over 1.2 million virtual hearings since the pandemic began. And more generally, the American Bar Association is now providing advice to attorneys for how to professionally appear “in court” via video conference.

27. Id.
30. Id.
33. See, e.g., Cara A. Murphy, Putting Your Best “Zoom” Foot Forward, LAW PRACTICE TODAY (Apr. 15, 2021), https://www.lawpracticetoday.org/article/putting-your-best-zoom-foot-forward/ [https://perma.cc/LS5V-5K2M]; Kandis L. Kovalsky, Zoom Court Appearances: Rising
While this technology has become vital during the pandemic, it brings its own challenges. This includes security and privacy concerns, psychological issues, suppression of First Amendment rights, and unlawful surveillance by foreign governments. Use of this technology has been linked to


increased anxiety, alienation, and exhaustion.\textsuperscript{38} Speakers may be wrongly perceived as “uninterested, shifty, haughty, servile or guilty.”\textsuperscript{39} Studies of virtual dating participants show increased attention paid to superficial characteristics, as well as an increase in missed social cues.\textsuperscript{40} In one poll, one-third of women stated that they were “talked over, interrupted or ignored more frequently” in video conference meetings than in person.\textsuperscript{41} And because of pandemic-related learning loss, children in eighteen states will be required to repeat their current grade.\textsuperscript{42}

The costs of video conference technology are also significant with respect to remote work.\textsuperscript{43} Polls have shown that nearly one-third of employees considered quitting after being forced to remote work, that approximately seventy percent felt that “mixing work with other responsibilities had become a source of stress,” and that approximately seventy-five percent stated they were “burned out.”\textsuperscript{44} By remaining separated from friends and colleagues, the “misery of loneliness” can lead to “depression, substance abuse, sedentary behavior, and relationship damage[.]”\textsuperscript{45} And a study by psychologists from the University of California and the University of Cambridge found that “there was no association between the frequency of virtual social interactions and well-being.”\textsuperscript{46} Indeed, video conference technology has often proven to

\begin{itemize}
\item \textsuperscript{38} See Murphy, supra note 35.
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} See Sheril Kirshenbaum, \textit{Dating Over Zoom? Don’t Be Surprised if Those Online Sparks Fizzle in Person}, THE CONVERSATION (May 28, 2020, 7:14 AM), https://theconversation.com/dating-over-zoom-dont-be-surprised-if-those-online-sparks-fizzle-in-person-138899 [https://perma.cc/P2ZC-A5BV] (noting that online daters place a higher value on superficial characteristics).
\item \textsuperscript{41} See Khazan, supra note 26.
\item \textsuperscript{42} See Carly Sitrin, \textit{‘Parents are powerless’: Students face being held back after a year of remote learning}, POLITICO (Apr. 22, 2021, 3:30 AM), https://www.politico.com/news/2021/04/22/repeat-school-year-482336 [https://perma.cc/L5HQ-5E8M].
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id} (citing Emily Towner, Danielle Ladensack, Kristen Chu & Bridget Callaghan, \textit{Welcome to My Zoom Party - Virtual Social Interaction, Loneliness, and Well-Being Among Emerging Adults Amid the COVID-19 Pandemic}, PSYARXIV (Jan. 27, 2021) https://psyarxiv.com/2ghtd/) [https://perma.cc/7ECU-Y7ZT].
\end{itemize}
live up to its moniker as the “villain of the pandemic, other than COVID-19.”\textsuperscript{47}

\subsection*{i. Criminal Justice System’s Video Conference Technology Immersion}

Every aspect of the criminal justice system has been harmed by the pandemic. Among those severely harmed have been the accused, victims, prosecutors, defense attorneys, judges, jurors, police, and the public. The accused—especially those who are in custody—face significant risks to their health and safety, as well as to their Sixth and Eighth Amendment rights.\textsuperscript{48} Victims face unprecedented delays in gaining justice.\textsuperscript{49} COVID-19 has been the number one cause of death among law enforcement officers in 2020.\textsuperscript{50} Prosecutors, defense attorneys, and courts continue to see their caseloads grow, leading to massive backlogs of even the most serious offenses and a loss of faith in the system by the public.\textsuperscript{51}

COVID-19’s impact on the criminal jury right has been particularly dire. While criminal jury trial rates had already fallen from approximately twenty percent to two percent over the past three decades, these rates fell even further, as low as zero percent after the pandemic began.\textsuperscript{52} Over a year into

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\textsuperscript{47} Khazan, supra note 26.
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\textsuperscript{48} See infra Part V; see also Jenny E. Carroll, Pretrial Detention in the Time of COVID-19, 115 NW. U. L. REV. ONLINE 59, 62 (2020). In Texas, for example, eighty percent of the 230 inmates who died from COVID-19 while in a correctional facility had not been convicted of a crime. Of those who died, “[9] of them had been approved for parole and were awaiting release, 21 of them had served 90 percent or more of their sentence, and 58 percent of those who died in prison were eligible for parole.” See Jerusalem Demsas, 80 percent of those who died of Covid-19 in Texas county jails were never convicted of a crime, VOX (Nov. 12, 2020, 1:50 PM), https://www.vox.com/2020/11/12/21562278/jails-prisons-texas-covid-19-coronavirus-crime-prisoners-death [https://perma.cc/LZS6-B2XE].
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\textsuperscript{52} See, e.g., Samantha Ketterer, No ‘meaningful relief’: Harris County trials plunge from 1,600 a year to 52 since COVID, HOUS. CHRON. (Feb. 10, 2021, 11:31 AM), https://www.houstonchronicle.com/news/houston-texas/crime/article/covid-jury-trials-harris-county-attorneys-rights-15939448.php [https://perma.cc/EM4M-PRL1] (including both civil and criminal
the COVID-19 pandemic, the near-complete halt in criminal jury trials has made clear that the Sixth Amendment does not protect the accused’s criminal jury right during a pandemic. Even more, it makes obvious the fact that any pre-COVID solution to increasing criminal jury rates will be insufficient to protecting the criminal jury right if and when the next pandemic strikes.

This Article proceeds as follows. Part II outlines the current boundaries and limitations of the Sixth Amendment criminal jury right, as well as the originalist philosophy guiding recent Sixth Amendment jurisprudence by the Supreme Court. Part III discusses factors considered by the accused for whether to pursue a jury trial and the perceived pre-pandemic causes of decreased criminal jury trial rates. Part IV discusses the measures courts undertook to restore the criminal jury right during the pandemic. These measures include (1) trials in person and compliant with social distancing policies, (2) trials conducted exclusively by video conference, and (3) hybrid in-person/video conference trials. This Part also analyzes the observations and best practices to conducting criminal proceedings during the pandemic. Part V transitions from examination to proposal. It discusses the potential constitutional, ethical, and other implications of the proposals discussed in Part IV, and presents an array of actions that Congress and state governments could take to increase criminal jury trial rates and create a pandemic-proof Sixth Amendment right.

II. THE SIXTH AMENDMENT: BOUNDARIES, LIMITATIONS, AND ORIGINALIST PHILOSOPHY

The criminal jury right lies at the foundation of American democracy. At our nation’s founding, criminal and civil jury rights were enshrined as law in the Sixth Amendment and Seventh Amendment of the Bill of Rights. Congress has fortified the United States’ commitment to ensuring access to fair and constitutional criminal jury trials on several occasions through


53. See, e.g., DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY, 1606–1898, 136–38 (William MacDonald ed., 1908) (discussing the Stamp Act Congress’ 1765 resolution that “trial by jury, is the inherent and invaluable right of every British subject in these colonies.”).

54. See U.S. CONST. amends. VI, VII.
legislation, including the Speedy Trial Act of 1974 and the Jury Selection and Service Act of 1968. Since our nation’s inception, our leaders have publicly declared the necessity of jury trials for our democracy. The criminal jury right in federal criminal prosecutions is primarily protected by the Sixth Amendment, which provides:

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

Within the text of the Constitution, this right is also protected by Article III, Section 2; the Due Process Clause of the Fifth and Fourteenth Amendments; and the Equal Protection Clause. Over the course of our country’s history, the Supreme Court has rendered decisions that have either

57. See, e.g., NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 243 (2019) (quoting John Adams, who described the jury trial as the “heart and lungs” of democracy.) Thomas Jefferson agreed, stating “I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution.” Richard Emery & Daniel Cooper, COVID-19 Cannot Be the Death Knell for the American Jury Trial, N.Y. LAW J. (Apr. 20, 2020, 1 PM), https://www.law.com/newyorklawjournal/2020/04/20/covid-19-cannot-be-the-death-knell-for-the-american-jury-trial/ [https://perma.cc/WF27-EPZ3]. And former U.S. Supreme Court Chief Justice William Rehnquist noted “[t]he right to trial by jury in civil cases at common law is fundamental to our history and jurisprudence. A right so fundamental and sacred to the citizens should be jealously guarded.” Id.
58. U.S. CONST. amend. VI.
59. See U.S. CONST. art. III § 2 (The Trial of all Crimes . . . shall be by Jury[].)
60. See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law[]."); U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law[].").
61. See U.S. CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws"). On the state level, the criminal jury right is also protected by each state’ constitution and/or local statute. See, e.g., N.Y. CONST. art. I § 2 ("Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever[]."); TEX. CONST. art. I § 10 ("In all criminal prosecutions, the accused shall have a speedy public trial by an impartial jury."); CAL. CONST. art. I § 16 ("Trial by jury is an inviolate right and shall be secured to all[]").
expanded or limited the scope of these protections. The following represents the current boundaries and limits of the rights guaranteed by the Sixth Amendment, including the right to a public trial, the right to a speedy trial, the confrontation right, the right to assistance of counsel/effective assistance of counsel, the right to a fair and impartial jury, and the right to be present.

A. Boundaries and Limitations

i. The Right to a Public Trial

The Sixth Amendment right to a public trial is one that belongs both to the accused and to the public. The Supreme Court has recognized the dual-protection feature of this right, noting that this right “gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.” The importance of the right to a public trial cannot be overstated. Indeed, the Supreme Court has rendered decisions to provide additional protections through the Due Process Clause of the Fourteenth Amendment. In relying on the Fourteenth Amendment, the Supreme Court in Oliver stated:

[W]e have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute.

Despite its importance, the Supreme Court in Waller v. Georgia created a four-part test outlining how the right to a public trial could be limited. Under Waller, a courtroom closure does not violate the Sixth Amendment where (1) closing the hearing would advance an “overriding interest that is

62. See, e.g., Sanjay Chhablani, Disentangling the Sixth Amendment, 1 U. PA. J. CONST. LAW 487 (2009).

63. The public’s right is also protected by the First Amendment. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).


65. See, e.g., In re Oliver, 333 U.S. 257 (1948).

66. Id. at 266 (footnote omitted).

likely to be prejudiced”; (2) the closure is “no broader than necessary to protect that interest”; (3) the trial court considers “reasonable alternatives to closing the proceeding”; and (4) the trial court makes “findings adequate to support the closure.”

ii. The Right to a Speedy Trial
The speedy trial right is perhaps the most troublesome right bestowed by the Sixth Amendment since the term “speedy” remains undefined within the Constitution. Presently, the Supreme Court standard determining whether the accused’s speedy trial right has been violated is set forth by *Barker v. Wingo*, where a unanimous majority held that four factors would be dispositive on this issue: “Length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” Writing for the majority, Justice Powell further explained that the length of the delay is “to some extent a triggering mechanism[,]” and if such delay is “presumptively prejudicial,” it will lead to an analysis of the remaining factors.

iii. The Right to Confrontation
The confrontation right typically requires that the witness be physically present, placed under oath, subject to cross-examination, and observed by the trier of fact. In some circumstances, however, the accused’s right to confront his accusers face-to-face is not absolute. This exception was created in *Maryland v. Craig*, where the Supreme Court held that the confrontation right “may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important

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70. *Id.* at 530. Here, however, the Supreme Court held that a delay of over five years was not violative of Mr. Barker’s Sixth Amendment rights based on its determination that he was only minimally prejudiced by the delay and that he “did not want a speedy trial.” *Id.* at 514.
71. *Id.* at 530–34. While the *Barker* test remains the standard for determining a speedy trial right violation, scholars have previously argued in support of removing the prejudice requirement and noted support for this transition in both Justice Souter’s majority and Justice Thomas’ dissenting opinions in *Doggett v. United States*, 505 U.S. 647 (1992). See Chhablani, *supra* note 62, at 536.
public policy and only where the reliability of the testimony is otherwise assured.” Notably, the facts of Craig are atypical when compared to most criminal cases. Namely, the accuser in Craig was a six-year-old sexual assault survivor. Since this decision was rendered, however, the Craig exception has been extended to a limited number of other witnesses, including confidential informants in disguise, out-of-country victims in poor health and unwilling to return to the United States, and active-duty military serving overseas.

iv. The Right to Assistance of Counsel/Right to Effective Assistance of Counsel

In Strickland v. Washington, the Supreme Court articulated that the “Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” The right to counsel may also be implicated where the government has access to privileged attorney-client communications. According to Supreme Court precedent from United States v. Morrison and Weatherford v. Bursey, a defendant can prove a violation of his Sixth Amendment right to counsel where he establishes that the

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73. Craig, 497 U.S. at 850. While the holding in Craig remains valid law, scholars have argued that the Supreme Court’s decision fourteen years later in Crawford v. Washington, 541 U.S. 36 (2004), should have overturned it. For example, Professor David M. Wagner argues that Crawford “contains dicta incompatible with Maryland v. Craig and portends [Craig’s] downfall.” David M. Wagner, The End of the “Virtually Constitutional”? The Confrontation Right and Crawford v. Washington as a Prelude to Reversal of Maryland v. Craig, 19 REGENT U. L. REV. 469, 470, 472–76 (2006); see Crawford, 541 U.S. at 68–69 (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”). Despite such assertions, the majority opinion in Crawford never mentioned its previous opinion in Craig. Where Craig was mentioned in the concurrence, it was only to note that purpose of the Confrontation Clause is to ensure the reliability of evidence against the accused by subjecting the witness to cross examination before the trier of fact. Crawford, 541 U.S. at 74 (Rehnquist, C.J., concurring).

74. See Craig, 497 U.S. at 840.

75. See U.S. v. de Jesus-Casteneda, 705 F.3d 1117, 1120 (9th Cir. 2013). Here, while the witness testified in person, the accused argued that by testifying in disguise, his Sixth Amendment right to meet his accuser face-to-face was violated.


79. Id. at 685.


government obtained private communications between the defendant and his counsel and where he was prejudiced by such action.\textsuperscript{82}

In \textit{Strickland}, the Court also outlined the circumstances by which the accused’s right to effective assistance of counsel would be violated under the Sixth Amendment. To prove such violation, a defendant must show (1) that counsel’s performance was “deficient[,]” and (2) “that the deficient performance prejudiced the defense.”\textsuperscript{83} To prove the first element, the defendant must demonstrate “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”\textsuperscript{84} And to prove the second, he must demonstrate “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”\textsuperscript{85} More specifically, he must prove that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”\textsuperscript{86}

v. The Right to a Fair and Impartial Jury

The right to a fair and impartial jury, or a “jury from a representative cross section of the community” is “an essential component of the Sixth Amendment[.]”\textsuperscript{87} Notably, the “fair-cross-section” requirement applies only to the panel and not to the jury that is actually selected.\textsuperscript{88} To show a \textit{prima facie} violation of this right, the accused:

\begin{itemize}
  \item [(M)]ust show (1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.\textsuperscript{89}
\end{itemize}

\begin{footnotes}
82. \textit{See} Morrison, 449 U.S. at 365; \textit{Weatherford}, 429 U.S. at 558.
83. \textit{See} Strickland, 466 U.S. at 687. The first element demands a defendant “show that counsel’s performance was deficient,” while lending his counsel a “strong presumption . . . of reasonable[ness],” a “heavy measure of deference” to his decisions, and judging his counsel based on “prevailing professional norms[,]” \textit{Id.} at 687–91.
84. \textit{Id.}
85. \textit{Id.}
86. \textit{Id.} at 694.
\end{footnotes}
If he does so, the state then bears the burden to show “a fair cross section to be incompatible with a significant state interest.”\footnote{Id. at 368.} Once jurors are selected, this aspect of the Sixth Amendment is only violated where there is an actual showing of bias from a juror.\footnote{See, e.g., Frazier v. United States, 335 U.S. 497, 509–10 (1948).} The ability to demonstrate juror bias, however, is limited. Specifically, it is limited to jury selection, observation by “the court, by counsel, and by court personnel[,]” and observation by fellow jurors.\footnote{See, e.g., Tanner v. United States, 483 U.S. 107, 127 (1987). In a rare exception to the “no impeachment” rule, however, the Supreme Court recently held that “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.” Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).}

vi. The Right to be Present

The accused’s Sixth Amendment right to be present is largely tied to the accused’s Sixth Amendment right to confront witnesses.\footnote{See, e.g., Illinois v. Allen, 397 U.S. 337 (1970).} The Supreme Court has also held that the accused’s right to presence in felony matters is protected by the Due Process Clause “whenever his presence has a relation, reasonably substantial, to the full[fill]ness of his opportunity to defend against the charge.”\footnote{Snyder v. Massachusetts, 291 U.S. 97, 105–06 (1934).} The accused’s presence is also required “to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.”\footnote{Id. at 108.} Such “critical stage[s]” where the accused presence is constitutionally guaranteed include arraignment, bail, plea, jury selection, trial, and sentencing.\footnote{Rothgery v. Gillespie Cty., 554 U.S. 191, 211–12 (2008).}

B. Originalist Philosophy and Ramos v. Louisiana

Originalism—the belief that a constitutional provision’s meaning becomes fixed upon its enactment, and the Supreme Court Justices who subscribe to this philosophy—has had a significant impact on recent Sixth Amendment jurisprudence.\footnote{See, e.g., Giles v. California, 554 U.S. 353, 357–66 (2008) (finding that California’s forfeiture by wrongdoing exception to the confrontation clause unconstitutional because it was “plainly not an ‘exception[n] established at the time of the founding[,]’” Id. (quoting Crawford, 541 U.S. at 54.); Crawford, 541 U.S. at 53–54 (barring otherwise admissible statements as an exception}
Court’s decision in *Ramos v. Louisiana*, where the Court clarified the accused’s right to a unanimous jury verdict for a serious offense. Writing for the majority, Justice Neal Gorsuch noted the racist history of the laws allowing non-unanimous juries in Louisiana and Oregon, the requirement for unanimous jury verdicts dating back to fourteenth century England, the fact that six states explicitly required unanimity, and the Supreme Court’s previous statements that the Sixth Amendment criminal jury right entailed unanimity at least thirteen times in 120 years. Justice Gorsuch then discussed Supreme Court’s previous decision in *Apodaca v. Oregon*, which allowed for non-unanimous verdicts under the Sixth Amendment because it served “an important ‘function’ in ‘contemporary society.’” In rejecting this functionalist approach, the majority overturned the precedent of *Apodaca* and held that all state and federal criminal felony trials require a unanimous jury verdict, in large part because “at the time of the Sixth Amendment’s adoption, the right to trial by jury included right to a unanimous verdict.”

The concurring and dissenting opinions interestingly do not take issue with felony criminal trials requiring unanimous jury verdicts. Rather, the
dissent was particularly troubled by the impact of the majority’s statements regarding the impropriety of a functionalist approach on the validity of several previous landmark criminal procedure Supreme Court decisions. Writing for the dissent, Justice Alito asked whether the Sixth Amendment only “incorporated the core of the common-law jury-trial right,” or if it “incorporate[d] every feature of the right[.]” He then explicitly worried that the majority’s decision will “almost certainly prompt calls to overrule” the Supreme Court’s decision in Williams v. Florida, which stated that a felony jury of only six jurors was constitutional because the Sixth Amendment did not incorporate every feature of the common law jury trial rights.

III. PRE-PANDEMIC MATTERS: THE DECISION TO EXERCISE THE CRIMINAL JURY RIGHT AND CAUSES OF DECREASED CRIMINAL JURY TRIAL RATES

A. The Accused’s Decision to Exercise the Sixth Amendment Right

While the criminal jury right is guaranteed by the Sixth Amendment, the decision to choose to exercise this right or plead guilty has never been simple. For the accused, their considerations fall into general categories of the strength of the case, the direct costs, and its collateral consequences. The following represents a thorough, but by no means exhaustive, pre-pandemic list of such considerations for the accused and their counsel.

With respect to the strength of the case, the accused—even when they are guilty—regularly consider whether the government will be able to prove guilt beyond a reasonable doubt, the quality of the prosecutor and defense attorney trying the case and of the judge hearing it, the quality of the officers who investigated the case and any Brady material the officers have in their record, the credibility of any potential victims or civilian witnesses who may testify, evidence that can be suppressed or excluded during the trial or in pretrial hearings and motions, the race and sex of the accused and victim, juror demographics, the type of charge they are facing, current political issues,

Court precedent and stated that “if the Court wishes to be done with [Apodaca], it must explain why overruling Apodaca is consistent with the doctrine of stare decisis.” Id. at 1427–32 (Alito, J., dissenting).


106. Ramos, 140 S. Ct. at 1433 (Alito, J., dissenting).


108. Ramos, 140 S. Ct. at 1436 (citing Williams, 399 U.S. at 100).
whether they can or should testify, the age of the case, and the likely sentence based on all of the above.\footnote{109}

Regarding costs, the accused will likely consider the time and money needed to hire or retain an attorney and litigate the case, the time it takes to receive a trial after arrest or indictment, punishment for a plea of guilty versus a guilty verdict after trial,\footnote{110} whether they are in custody or have secured pretrial bond/release, the bond conditions (if they are on bond), whether to choose a bench or jury trial, the time in which the State must provide pretrial discovery, the availability of probation as a post-trial sentence, how long it will take to be parole eligible (if convicted), and their age compared to the maximum potential sentence.\footnote{111} For federal cases, they will also likely consider whether their judge was appointed by a Democratic or Republican President.\footnote{112}

For collateral consequences, the accused will also likely consider whether a conviction will have an adverse impact on their immigration status (or initiate deportation proceedings), their ability to seek gainful employment, the availability of affordable housing, their ability to provide for or interact with their family, their right to vote or bear arms, previous convictions that may result in a parole or probation violation, their requirement to register as a sex offender, and child custody/pending child protective service cases.\footnote{113}

While prosecutors, defense attorneys, and victims share several of these concerns, they must also weigh their own costs and benefits for whether conducting, testifying, or participating in a trial is appropriate. Prosecutors, of course, have the primary responsibility of seeking justice.\footnote{114} Defense attorneys similarly bear the duty to act in the best interest of their clients.\footnote{115}

\footnotesize

\begin{itemize}
\item 110. See infra Part III.B.i.
\item 111. For example, while a twenty-year sentence may not be cost-prohibitive for a young defendant, it may, in effect, represent a life sentence for an older defendant.
\item 114. See Nat’l Dist. Att’y’s Ass’n, NAT’L PROSECUTION STANDARDS, § 1–1.1 (3d ed. 2009) (providing that “[t]he primary responsibility of the prosecutor is to seek justice”).
\end{itemize}
These duties weigh heavily on all aspects of criminal prosecution, not only on the decision to proceed to trial. In addition to many of the accused’s trial considerations, prosecutors may also consider the interest of the victim, the financial cost of the case, and whether the case furthers the goals of the elected district attorney. Victims, especially victims of sexual assault, have their own interests separate and apart from prosecutors as to whether a trial is appropriate. All of these concerns play a part in impacting the rate at which criminal cases go to trial in non-pandemic conditions.

B. Who is to Blame?: The Trial Penalty, the Speedy Trial Act, and Other Issues

i. The Trial Penalty

With respect to the pre-COVID decline in criminal jury trial rates, two sources are generally blamed for the steady decline in the trial rate that began approximately fifty years ago: the “trial penalty” and, more recently, a failure to enforce the Speedy Trial Act. The trial penalty has been the subject of debate and research by several legal scholars. Generally defined as “the substantial difference between the sentence offered prior to trial versus the sentence the defendant receives after a trial,” the trial penalty is regularly blamed as the primary cause of the pre-COVID decline in criminal jury trial rates from approximately twenty percent to two percent in federal criminal cases. On the state level, the results are no better. Perhaps even worse,
the absolute number of trials has declined by more than sixty percent since the mid-1980s. Because of the current structure of the criminal justice system, parties appear to have every incentive to agree to a plea deal. Indeed, Justice Anthony Kennedy recently concluded that “criminal justice today is for the most part a system of pleas, not a system of trials.” The trial penalty data appears to explain why. Studies show the cost of exercising the Sixth Amendment trial right is severe: on average, a defendant charged with a federal crime that proceeded to trial and was convicted received an additional seven-and-a-half years of jail compared to those who pled guilty. Inexorably intertwined in this disparity is the fact that when federal
to 3.6% in 2013. See Diamond & Salerno, supra note 118, at 122. And in some state courts, criminal trial rates in some states had fallen below 1% even before the pandemic.

120. See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. EMPIRICAL LEG. STUD. 459, 506–10 (2004); Smith & MacQueen, supra note 52, at 32.

121. See Galanter, supra note 120. See also John Gramlich, Only 2% of federal criminal defendants go to trial, and most who do are found guilty, PewsCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/DB84-TNAS].


124. See Jones, Lefcourt, Pollack, Reimer & O’Dowd, supra note 118, at 20–21 (Figure 1). Specifically, those who pled guilty received an average sentence of 3.3 years, while those proceeded to trial received an average of 10.8 years. Id. The disparity was greatest for those charged with antitrust violations; arson, auto theft; burglary, or breaking and entering; drug trafficking; unlawful possession of firearms; kidnapping; murder; and sexual abuse. Id. These findings are not unique. For example, a study from Cook County, Illinois, showed that those charged with state drug offenses and convicted after trial received greater sentences than if they had pled guilty. See Joseph George Duske, The Effect of Plea Bargaining Vs. Trial Conviction on the Sentencing of Offenders Charged with a Drug Offense in Cook County, Illinois (Aug. 2010) (Ph.D. dissertation, Loyola University Chicago) (on file with Loyola University Chicago eCommons), https://ecommons.luc.edu/luc_diss/269 [https://perma.cc/3XD9-CXBD]. In a five-state study comparing sentences after jury trial, bench trials, and guilty pleas, the authors also found that sentences after jury trials were greater than those after guilty plea, while sentences after bench trial varied between being greater than or less than post-jury trial sentences. See King, Soulé, Steen & Weidner, supra note 118, at 975. One prosecutor interviewed for the study bluntly stated the likely reason for the observed “plea discount”: “We reward people for making our lives easy. We’re not going to reward a person if he won’t make our lives easier.” Id. at 977. In yet another study of the federal trial penalty, the author observed that defendants who proceeded to trial received a sentenced 64% larger than those who accepted a plea of guilty. See Kim, supra note 118, at 1199.
defendants exercised their right to a jury trial, they were convicted in 83% of all cases.125

Rick Jones and his co-authors ("Trial Penalty authors") also assert several negative side effects from the trial penalty. This includes the government accountability issues that go unresolved due to favorable plea deals, the atrophy of trial skills for prosecutors and defense attorneys who spend most of their time negotiating plea deals, and a reduction of a judge’s role as the supervisor of a case.126 They further claim it will lead to a worsening of our country’s mass incarceration problems, an increased likelihood of innocent persons pleading guilty, and an inability of jurors as members of society to serve as "an important community check on [the] excesses of [the] criminal justice system."127 The Trial Penalty authors are not alone in their concerns. As outlined by Smith and MacQueen, fewer trials also reduces “the space for effective speech, eliminates a source of public information, and abandons an important vehicle for citizen self-governance.”128 Reduced trial rates also create a “danger that law developed only through motions will be arid, divorced from the full factual content that has in the past given our law life and the capacity to grow” which “may lead to greater uncertainty about trial outcomes and substantive law.”129

In the face of these consequences, the National Association of Criminal Defense Attorneys has made several recommendations they believe will eliminate the trial penalty:

(1) Relevant Conduct: USSG § 1B1.3 should be amended to prohibit the use of evidence from acquitted conduct as relevant conduct.

(2) Acceptance of Responsibility: USSG § 3E1.1(b) should be amended to authorize courts to award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial.

(3) Obstruction of Justice: USSG § 3C1.1 should be amended to clarify that this adjustment should not be assessed solely for the act of an accused testifying in her or his defense.

125. See Gramlich, supra note 121.

126. See Jones, Lefcourt, Pollack, Reimer & O’Dowd, supra note 118, at 9–10. University of Wisconsin law professor Marc Galanter further claims that “[a]s lawyers who ascend into decision-making positions have less trial experience, the discomfort and risk of trials looms large in their decisions[,]” which will further reduce trial rates. See Smith & MacQueen, supra note 52, at 34.


128. Smith & MacQueen, supra note 52, at 35 (internal citations omitted).

129. Id. (internal citations omitted).
Application Note 2 should also be clarified in this respect.

(4) Mandatory Minimum Sentencing: Mandatory minimum sentencing statutes should be repealed or subject to a judicial “safety valve” in cases where the court determines that individual circumstances justify a sentence below the mandatory minimum.

(5) Full Discovery: Defendants should have full access to all relevant evidence, including any exculpatory information, prior to entry of any guilty plea.

(6) Remove the Litigation Penalty: The government should not be permitted to condition plea offers on waiver of statutory or constitutional rights necessary for an accused person to make an intelligent and knowing decision to plead guilty. This includes an accused person’s decision to seek pre-trial release or discovery, investigate a case, or litigate statutory or constitutional pre-trial motions.

(7) Limited Judicial Oversight of Plea-Bargaining: There should be mandatory plea-bargaining conferences in every criminal case supervised by a judicial officer who is not presiding over the case unless the defendant, fully informed, waives the opportunity. These conferences would require the participation of the parties but could not require either party to make or accept an offer. In some cases, one or more parties might elect not to participate beyond attendance.

(8) Judicial “Second Looks”: After substantial service of a sentence, courts should review lengthy sentences to ensure that sentences are proportionate over time.

(9) Proportionality Between Pre-Trial and Post-Trial Sentencing: Procedures should be adopted to ensure that the accused are not punished with substantially longer sentences for exercising their right to trial, or its related rights. Concretely, post-trial sentences should not increase by more than the following: denial of acceptance of responsibility (if appropriate); obstruction of justice (if proved); and the development of facts unknown before trial.

(10) Amendment to 18 U.S.C. § 3553(a)(6): In assessing whether a post-trial sentencing disparity is unwarranted, the sentencing court shall consider the sentence imposed for similarly situated defendants (including, if available, a defendant who pled guilty in the same matter) and the defendant who was convicted after trial. The sentencing
court shall consider whether any differential between similarly situated defendants would undermine the Sixth Amendment right to trial.\textsuperscript{130}

Implementation of these reform ideas could potentially have a drastic impact on increasing the trial rate. Notably, when the trial penalty is discussed, it is almost exclusively mentioned in the context of felony cases.\textsuperscript{131} The reasoning is intuitive. Misdemeanor offenses typically carry a maximum jail sentence of twelve months.\textsuperscript{132} As noted above, the average disparity for federal sentences after plea and post-jury conviction is six-and-a-half years longer than the maximum misdemeanor sentence.\textsuperscript{133} So even where a prosecutor would threaten a maximum jail sentence for a misdemeanor offense,\textsuperscript{134} a misdemeanor conviction is unlikely to result in a maximum sentence of twelve-months. Even where it does, the defendant will ultimately serve approximately half of that time.\textsuperscript{135} But in most cases, where the person accused of a misdemeanor has no prior criminal history or does not stand accused of a relatively egregious crime, that person will almost certainly not be sentenced to any term in jail, let alone the maximum. Prosecutors, defense attorneys, and the accused typically know this, and as such, a maximum sentence is rarely recommended or considered a realistic plea.

However, despite the lack of the type of trial penalty traditionally present in the felony system, the misdemeanor system of criminal justice nevertheless has a similarly low jury trial rate to felonies.\textsuperscript{136} While lacking a traditional trial penalty, the misdemeanor system is fraught with other problems that discourage trials, encourage pleas, and otherwise inhibit the exercise of the

\textsuperscript{130} Jones, Lefcourt, Pollack, Reimer & O’Dowd, supra note 118 at 12–13.

\textsuperscript{131} \textit{See generally id.} (Jones, Lefcourt, Pollack, Reimer & O’Dowd primarily discuss the trial penalty regarding felony cases and only mention misdemeanors in this context twice.).

\textsuperscript{132} \textit{See, e.g.,} 18 U.S.C. § 3559(a)(6); N.Y. PENAL LAW § 70.15(1) (1998); TEX. PENAL CODE ANN. § 12.21(2) (2011).

\textsuperscript{133} \textit{See supra} Part III.B.i.

\textsuperscript{134} Such practice may be reasonable where the alleged conduct is particularly egregious, the victim is overly sympathetic, the defendant has a significant criminal record, or probation and other treatment alternatives have proven ineffectual. For prosecutorial discretion, see generally, Thirty-Eighth Annual Review of Criminal Procedure, 38 GEO. L.J. ANN. REV. CRIM. PROC. 219 (2009).

\textsuperscript{135} \textit{See, e.g.,} 18 U.S.C. § 3624(b); N.Y. PENAL LAW § 70.30 (1998); TEX. GOV’T CODE § 498.003.

\textsuperscript{136} \textit{See Annual Statistical Report for the Texas Judiciary: Fiscal Year 2018} OFF. OF CT. ADMIN. (2018) https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf [https://perma.cc/PX4J-CWZW]. In Texas, the rate of jury trial convictions in the statutory county courts was as low as 0.6% in 2018. \textit{Id.}
accused’s Sixth Amendment rights. This is most prevalent with crimes where the plea recommended by the prosecutor is for “time served” or involves significant collateral consequences. In the former, even where a defendant believes and evidence supports he is either not guilty or innocent, the ability to quickly resolve a case with a “time served” plea often outweighs the interest in waiting months or even years to gain this result through a trial. In the latter, should a defendant rebuff a plea and proceed to trial on a relatively inconsequential misdemeanor, a conviction could have the same overall effect as one for a serious felony.

ii. The Speedy Trial Act

In 1974, Congress determined that Supreme Court decisions and implementation of Rule 50(b) of the Federal Rules of Criminal Procedure failed to give the Sixth Amendment “real meaning.” As a remedy, Congress enacted the Speedy Trial Act, which set explicit time limits in

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138. NATAPOFF, supra note 137. Time served is a sentence that “imposes no additional punishment than the time already served before conviction.” John Rubin, Is a sentence of “time served” permissible?, UNI. N. CAROLINA, https://www.sog.unc.edu/resources/faqs/sentence-%E2%80%9Ctime-served%E2%80%9D-permissible [https://perma.cc/XS2H-3LU3].

139. NATAPOFF, supra note 137.

140. In Texas, for example, felony punishment options after a plea of guilty typically include incarceration, probation, or a deferred adjudication (“deferred”). See TEX. CODE CRIM. PROC. ANN. art. 42A.101. However, when a defendant receives a deferred, he is not found guilty by the judge. See TEX. CODE CRIM. PROC. ANN. art. 42A.101. A deferred usually entails the same terms and conditions of probations if he were convicted, but the defendant would retain his right to vote. See TEX. ELEC. CODE § 11.002(b). But, if he were convicted of a misdemeanor prior to completing the deferred, regardless of the punishment, the prosecutor could then file a motion to adjudicate guilt (“MAG”). See TEX. CODE CRIM. PROC. ANN. art. 42A.108. At an MAG hearing, the prosecutor would only have to prove by a preponderance of the evidence that that defendant violated the terms of the deferred. See Hacker v. State, 389 S.W.3d 860, 864–65 (Tex. Crim. App. 2013). If the prosecutor met that lower burden, then the defendant would in essence lose his right to vote in large part due to a minor offense.


which federal crimes may be charged and tried.\textsuperscript{143} Specifically, with limited exceptions, a defendant’s trial must begin within seventy days from the filing of the information or indictment against the defendant, or from the date of the defendant’s initial appearance.\textsuperscript{144} When a defendant is not tried within the seventy day time limit and timely files a motion to dismiss,\textsuperscript{145} absent a valid exception, the court must dismiss the indictment, with or without prejudice.\textsuperscript{146}

The Speedy Trial Act lists eight categories under which a delay is excluded from the seventy day limit.\textsuperscript{147} These include delays caused by other proceedings concerning the defendant,\textsuperscript{148} deferred prosecution agreed to by the parties and approved by the court,\textsuperscript{149} absence or unavailability of the defendant or essential witness(es),\textsuperscript{150} mental incompetence or physical inability to stand trial,\textsuperscript{151} voluntary dismissal and refiling of charges by the government,\textsuperscript{152} joinder for trial with a codefendant where the time limit has not run and a motion for severance has not been granted,\textsuperscript{153} the “ends of justice” outweighing the best interest of the public and the defendant,\textsuperscript{154} and obtaining foreign evidence.\textsuperscript{155} Enforcement of the Speedy Trial Act can be difficult because all parties tasked with complying with it have several

\textsuperscript{143} Id.
\textsuperscript{144} See id. at § 3161(c)(1).
\textsuperscript{145} See id. at § 3162(a)(2).
\textsuperscript{146} See id. at § 3162(a)(2).
\textsuperscript{147} See id. at §§ 3161(h)(1)–(8).
\textsuperscript{148} See id. at §§ 3161(h)(1)(A)–(H). This exception is further divided into subcategories, including proceedings related to mental competency or physical capacity, trial for other charges against the defendant, interlocutory appeal, pretrial motions, transfer to or removal from another district, transportation to or from another district, or hospitalization, the court’s consideration of plea agreements, and a proceeding regarding the defendant that is “actually under advisement by the court.” Id.
\textsuperscript{149} See id. at § 3161(h)(2). Typically, while defendants’ prosecution is deferred, they are required to show good conduct to the court to ultimately receive the benefit of this deferral. See, e.g., Deferred Prosecution Agreement, U.S. v. America Online, Inc. (E.D. Va., Crim. No. 1:04 M 1133), https://www.justice.gov/archive/dag/cftf/chargingdocs/aolagreement.pdf [https://perma.cc/L4WP-9KAN]. Good conduct may include paying restitution to victims, testifying against a codefendant in another proceeding, performing community service, or completing drug and alcohol rehabilitation. Id. Should defendants show such good conduct, they may have their charges reduced to lower-level crimes or even dismissed. Id.
\textsuperscript{150} See 18 U.S.C. § 3161(h)(3).
\textsuperscript{151} Id. at § 3161(h)(4).
\textsuperscript{152} Id. at § 3161(h)(5).
\textsuperscript{153} Id. at § 3161(h)(6).
\textsuperscript{154} Id. at § 3161(h)(7).
\textsuperscript{155} Id. at § 3161(h)(8).
incentives to disregard or abuse it. Longer delays give prosecutors a greater chance “to flip a co-defendant into a cooperating witness through a negotiated plea deal.” 156 They provide private defense attorneys with more time to meet with new clients and make money. 157 While public defenders’ earnings are typically not dependent on clients, 158 they—like private defense attorneys—still benefit from delays when they lead to the government’s inability to proceed to trial. 159 And because trials can be lengthy and taxing on a court’s staff and resources, judges are also incentivized to grant arguably unnecessary continuances. 160

The feature of the Speedy Trial Act most widely blamed for the cause of delays in federal trials is the “ends of justice” continuance. 161 Professor Hopwood noted that courts abuse this exception by failing to give its reasons for granting such continuance on the record, improperly allowing for implicit findings as the basis for a continuance, granting open-ended continuances, and putting its findings on the record at a time other than the hearing where the court granted a continuance. 162 Since Speedy Trial Act abuse arises from prosecutors, defense attorneys, and judges alike, 163 Professor Hopwood has made several suggestions for legal academia, prosecutors, defense attorneys, and judges. He asserts that scholars should conduct empirical studies evaluating Speedy Trial Act violations by circuit. 164 Prosecutors should limit their own continuance requests and argue on the record for a more serious evaluation of defense requests from the court. 165 Defense attorneys should

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157. See Alschuler, supra note 109, at 1181–86 (discussing the practice of some financially-motivated defense attorneys to seek plea deals even when not in the best interest of their clients). In my personal experience as a prosecutor, I have handled cases against defense attorneys who exhibited such motivations.
158. Though if a private attorney is appointed pursuant to the Criminal Justice Act, delays could add to the overall hours billed for the case. See 18 U.S.C. § 3006A(d) (2012).
160. See Hopwood, supra note 156, at 739.
161. See id. at 719–29. “Ends of justice” continuances are continuances that judges grant in order to promote the just results in court. These continuances are granted in situations where parties need to obtain counsel, or when counsel needs time in order to effectively represent their client.
162. Id.
163. Id. at 740–43; see also Glaberson, supra note 159.
164. See Hopwood, supra note 156, at 740.
165. See id. at 741.
gain a better familiarity with the Act and its detrimental consequences on their clients.\textsuperscript{166} And courts should make more thorough inquiries of requesting parties, give greater weight to the public’s speedy trial right and provide findings contemporaneously to the granting of an ends of justice continuance.\textsuperscript{167}

iii. Other Causes to the Decreased Trial Rate

A recent study from United States District Judge Robert Conrad and Katy L. Clements identifies other factors as the source of blame for pre-pandemic plummeting trial rates.\textsuperscript{168} Here, District Judge Conrad and Clements contend decreased trial rates can be tied to three sources: (1) greater incentives to accept a guilty plea post-\textit{United States v. Booker};\textsuperscript{169} (2) changes in Main Justice (Department of Justice) polices throughout the George W. Bush, Obama, and Trump administrations;\textsuperscript{170} and (3) external factors including increased trial and litigation costs, the entrenched expectation that a case should end with a plea, and the efficiency of resolving cases with pleas.\textsuperscript{171} The authors additionally argue that, to reverse decreasing trial rates, legislators could enact legislation so that mandatory minimums only applied to “those crimes that truly constitute the gravest concerns to society[,]” prosecutors and defense attorneys could make greater efforts to hone their trial skills, and judges could more greatly promote a trial culture.\textsuperscript{172}

A more recent study by the American Bar Association Commission on the American Jury indicated other potential reasons for the decline in criminal jury trials.\textsuperscript{173} Here, the survey questioned judges, prosecutors, and criminal defense attorneys on whether litigants, from the perspective of judges, or clients, from the attorney perspective, preferred to settle over going to trial.\textsuperscript{174} Each group of respondents indicated agreement with the idea that parties preferred to settle, though judges noted a much stronger agreement with that

\begin{itemize}
\item 166. \textit{See id.}
\item 167. \textit{See id. at 742–43.}
\item 169. \textit{See id. at 127–36.}
\item 170. \textit{See id. at 136–49.}
\item 171. \textit{See id. at 149–57.}
\item 172. \textit{Id. at 165.}
\item 173. \textit{See Diamond & Salerno, supra note 118.}
\item 174. \textit{Id.} The survey also asked civil judges and practitioners the same questions. Since those results are beyond the scope of this Article, they will not be examined here.
\end{itemize}
sentiment. Respondents were also asked to rank whether, in comparison, bench or jury trials were more predictable, speedier, more cost-effective, and fairer. While judges, prosecutors, and defense attorneys generally agreed at similar rates that bench trials were more predictable, speedier, and more cost-effective than jury trials, their responses regarding fairness was largely dependent on the group asked. Specifically, while all groups stated that jury trials were fairer than bench trials, over eighty percent of defense attorneys ranked jury trials as fairer than bench trials, while the percentages fell to sixty-seven percent for judges and fifty-six percent for prosecutors. The fairness rankings also represented each groups’ overall preference for jury trials over bench trials.

Consistent with the beliefs and recommendations by the Trial Penalty authors, eighty-five percent of defense attorneys in this study indicated that mandatory minimums were the cause of a medium to large reduction in trials. Defense attorneys also indicated the strongest belief that sentencing guidelines, the bail system, racial disparities, and defendant pressure to plead guilty played a role in reducing trial rates. Regarding the source of pressure to plead guilty, all three groups ranked the defense attorney as the number one source of such pressure, while judges and prosecutors shifted responsibility to family members, friends, or each other before accepting responsibility. The authors of the study noted one potential exception where a mandatory minimum may actually increase the likelihood of a trial: in cases where “the prosecutor is unwilling to offer a reduced charge that will take a mandatory minimum off the table, then the defendant may have nothing to lose by going to trial.” Surprisingly, despite all of the issues associated with conducting a jury trial, “87.7% of criminal [practitioner] respondents expressed agreement that jury trials were worth the costs associated with them.” Interestingly, the authors did find one area where the law within the state appeared to impact criminal defense attorneys’ responses. They noted that sixteen states

175. See Diamond & Salerno, supra note 118, at 130.
176. Id. at 141.
177. See id.
178. See id.
179. See id. at 147. Judges and prosecutors also indicated that mandatory minimums played a role, though at much lower rates. Id.
180. See id. at 148, 155.
181. See id. at 157.
182. Id. at 147.
183. Id. at 160.
expressly bar judges from involvement in the plea-bargaining process.\textsuperscript{184} When comparing responses in states where the practice is not allowed to those where it is, the authors found that the rate at which defense attorneys reported judicial pressure as a cause of decreased trials was more than double in states where judges could be involved in the plea-bargaining process.\textsuperscript{185}

iv. Potential Limits of the Proposed Solutions for Increasing Criminal Jury Trial Rates

It is important to note that some of these solutions may have no impact on increasing criminal trial rates. For example, with respect to the solutions proposed by the \textit{Trial Penalty} authors in both civil and criminal cases, full discovery may not have a positive impact on the jury trial rate and may even decrease it.\textsuperscript{186} Similarly, stricter enforcement of the Speedy Trial Act may only cause a trial delay to result in a plea of guilt or dismissal on the date of trial. Of course, even if full discovery makes no net positive impact on the criminal jury trial rate, or even reduces it, it should at least “accomplish its goal of ensuring people know their rights and don’t feel pressure to plea[,]”—a worthy goal regardless of the effect on jury trial rates.\textsuperscript{187} Ultimately, the longer a case languishes, the more likely it is that victims and witnesses will disappear or lose interest, evidence will go missing or be destroyed,\textsuperscript{188} and defendants will plead guilty to move on with their life.

IV. PANDEMIC PROPOSALS FOR MAINTAINING OR ENHANCING ACCESS TO THE CRIMINAL JUSTICE SYSTEM

Jury trial rates in the federal and state criminal justice systems have been falling for decades.\textsuperscript{189} The pandemic, however, has brought the criminal jury right to death’s door, as jurisdictions across the country have seen their trial rates approach or fall to zero percent.\textsuperscript{190} The severe decrease in criminal jury

\begin{footnotesize}
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\item \textsuperscript{184} See \textit{id.} at 162.
\item \textsuperscript{185} \textit{Id.} Specifically, the rates were twenty-five percent (prohibited) and fifty-nine percent (allowed).
\item \textsuperscript{187} See \textit{supra} Part III.B.i.; see also Fertwig, \textit{supra} note 186.
\item \textsuperscript{188} See Hopwood, \textit{supra} note 156, at 741.
\item \textsuperscript{189} See \textit{supra} Part III.
\item \textsuperscript{190} See FULLY INFORMED JURY ASS’N, supra note 52.
\end{itemize}
\end{footnotesize}
trials amid COVID-19 was hardly surprising. At the beginning of the pandemic, courts at all levels largely ceased all in-person proceedings, including criminal jury trials.191 This decision was clearly necessary as a public health and safety response. Furthermore, courts that refused to enact these measures placed participants at an unnecessary risk of illness or death.192 As the nation learned more about the virus, several courts attempted to resume with their schedule of criminal jury trials.193 However, even these carefully measured plans posed risks; in many cases, participants to these trials unfortunately contracted the virus.194

In response to the COVID-19 pandemic, courts invested significant time and resources into determining how to continue with criminal proceedings during the pandemic. The United States Courts established a COVID-19 Judicial Task Force (“Judicial Task Force”) to create guidelines regarding resumption of federal trials.195 The Judicial Task Force “offered suggestions about the type and amount of personal protective equipment needed to accommodate jurors, the public, attorneys, witnesses, and members of the press; juror travel to and from the courthouse; social-distancing and deep-cleaning procedures for courthouse spaces; and seating of jurors and other


participants in ways that would mitigate health risks.”¹⁹⁶ Importantly, the Judicial Task Force noted that payment to jurors who serve via video conference may be barred by the Jury Act.¹⁹⁷ It also suggested seeking consent of the parties to allow for a unanimous verdict from a jury of ten or fewer members.¹⁹⁸ Even with these suggestions, several district courts throughout the country postponed their scheduled jury trials through most or all of 2020.¹⁹⁹ Some even suspended jury trials indefinitely.²⁰⁰

State court systems and bar organizations created similar task forces. In Texas, for example, the State Bar of Texas (SBOT) launched a presidential task force to make recommendations on the reopening of the criminal jury trial process.²⁰¹ Much like the Judicial Task Force, SBOT’s recommendations focused on the health and safety of trial participants, constitutional concerns, and the potential for allowing witnesses, upon the consent of the parties, to testify via video conference.²⁰² Approximately five months after the pandemic began, and with guidance from the Supreme Court of Texas,²⁰³ Texas’s Office of Court Administration (OCA) set out to coordinate with regional presiding judges and local administrative judges across the state to help courts conduct a limited number of criminal jury trials.²⁰⁴ In total, the OCA approved eighty-five requests to conduct jury trials amid the pandemic and eventually conducted twenty of them (including one that was conducted by video conference), and their report revealed useful information about the


¹⁹⁷ See COVID-19 JUD. TASKFORCE, supra note 195, at 9. The Judicial Task Force’s concern for payment likely stems from the language of the Jury Act, which states that jurors will be paid “for actual attendance at the place of trial[,]” but also states that jury duty is performed when a juror is “in attendance at court[].” See 28 U.S.C. §§ 1871, 1877 (emphasis added).

¹⁹⁸ See COVID-19 JUD. TASKFORCE supra note 195, at 15 (citing Fed. R. Crim. P. 23(b)).


²⁰⁰ See FULLY INFORMED JURY ASS’N, supra note 52.


²⁰² Id.


²⁰⁴ Id. ¶ 4, 8–10.
expanded use and acceptance of remote proceedings.\textsuperscript{205} And as of April 5, 2021, Texas courts had conducted approximately 1.2 million remote hearings.\textsuperscript{206} After investigating concerns relating to the continuation of the traditional jury trial setup, courts have chosen to resume access to criminal jury trials in three general formats: (1) in person and socially distanced, (2) jury trials by video conference, and (3) hybrid in-person/video conference.\textsuperscript{207}

\textit{A. Pandemic Proposals, Observed Best Practices, and Opinions from the Profession}

i. In Person and Socially Distanced

Over the course of the pandemic, several courts resumed in-person trial proceedings in compliance with many socially distanced health guidelines, thanks to a useful precedent for such action.\textsuperscript{208} In 1918, while enduring the Spanish Flu, some courts in the United States held hearings outdoors to allow for social distancing and ventilation.\textsuperscript{209} As outlined by Professor Anna Offit, in-person trials during the pandemic should be socially distanced, employ staggered juror arrival times to minimize or avoid overcrowding, and alter juror seating arrangements such that jurors can remain socially distanced within the confines of the courtroom.\textsuperscript{210}

Courts throughout the country began implementing many of these suggestions. As courts became more accustomed to operating under pandemic conditions, they also amended their requirements and suggestions.\textsuperscript{211} Harris County, Texas, for example, has largely proceeded


\textsuperscript{206} See Tex. Jud. Council, supra note 32.

\textsuperscript{207} See Tex. Sup. Ct., supra note 203, ¶¶ 4–7; Prior to the pandemic, many jurisdictions have allowed for the use of video conference technology in criminal proceedings dating as far back as the 1970s. See Jenia Turner, Remote Criminal Justice, 53 Tex. Tech. L. Rev. 197 (2021).


\textsuperscript{209} Id.


\textsuperscript{211} See Court Coronavirus Information, Tex. Jud. Branch, https://www.txcourts.gov/court-coronavirus-information/emergency-orders/ [https://perma.cc/246F-82V8] (As of December 31, 2021, the Supreme Court of Texas has issued forty-five emergency orders that encourage or require types of court proceedings in effort to comply with health and safety measures during the pandemic.).
with an in-person and socially distanced “NRG Plan.” Pursuant to this plan, jury selection occurs at NRG Arena, a 10,000-person capacity venue in Houston, Texas. Potential jurors must wear masks and have their temperatures checked prior to entering, and those selected as jurors are then screened for symptoms. Harris County even provides hand sanitizer. Across the nation, other plans involved hiring an epidemiologist to oversee the reopening, mandating witnesses to wear transparent masks, and requiring prosecutors or jurors to wear face shields.

ii. Trials by Video Conference

On a more limited scale, courts also began to conduct jury trials solely by video conference. Under this format, all parties appear from the comfort of their own home, office, or other location. They can log in through their computers, phones, tablets, or other devices. Jurors and witnesses are sworn

212. See Robert Arnold, Harris County Continues to Grapple with a Huge Backlog of Criminal Cases, CLICK2HOUSTON (July 1, 2020, 11:02 PM), https://www.click2houston.com/news/investigates/2020/07/02/harris-county-continues-to-grapple-with-a-huge-backlog-of-criminal-cases/ [perma.cc/ZA3C-4R7V].

213. See id.


215. See Arnold, supra note 212.


218. See Miles, supra note 217; Jouvenal, supra note 217.
in over video conference. Evidence is published via a share-screen feature. At the conclusion of the trial, jurors are sent to a “breakout room” to deliberate.

To broaden the scale of criminal jury trials by video conference and to make such proceedings a permanent feature of their criminal justice system, the Texas State Legislature passed legislation—H.B. 3774—to amend their government code. Importantly, the new law allows “a judge, party, attorney, witness, court reporter, juror, or any other individual to participate in a remote proceeding, including a deposition, hearing, trial, or other proceeding.” Accordingly, a criminal jury trial in Texas appears to allow for a jury composed of some jurors who appear in person and others who appear by video conference.

The purpose of such legislation is clear. As of May 24, 2021, there are approximately 50,000 additional felony cases pending in Texas than there were on March 1, 2020. The OCA anticipates that without additional funding from the Texas Legislature, the case backlog created by the pandemic “will take us anywhere from three to five years to dig out[.]” The OCA has asked for $6.7 million to reduce the time needed to reduce the backlog to one year. As initially drafted, the legislation would allow for remote jury trials where (1) the court determined it was appropriate, and (2) it is not limited by the United States or Texas Constitutions. However, prior to passing the bill, H.B. 3774 was updated to also require, under Section 21.013 of the Texas Government Code, that the court provide adequate notice of the remote

219. See Waters, supra note 208.
220. Id.
221. Id.
223. See id.
224. Id.
225. See id.
226. See Paul Stinson & Joyce E. Cutler, Texas Court Backlog Could Last Five Years Without More Funding, US LAW WEEK (May 24, 2021, 3:46 PM), https://news.bloomberglaw.com/us-law-week/texas-court-backlog-could-last-five-years-without-more-funding?fbclid=IwAR03d2QvMaSHmgpu5r5f58cLEvBeQI49QFclFpPEwqdijg9Wozz00MfLHBiw [https://perma.cc/N7F2-WY5H]. Florida officials believe their backlog is up to 1 million cases. Id.
227. See id.
proceeding, allow parties to object to such proceeding by written motion, and provide participation methods for those unable to participate remotely. In the Bill Analysis for the House and Senate bills, the authors stated that the purpose of this bill was to increase the “accessibility and efficiency” of the criminal justice system after the pandemic ends, while noting decreased costs to the parties and clarifying that remote proceedings would not “fully replace” in-person proceedings.

iii. Hybrid Jury Trials

Other courts have tested jury trials that employ features from both of the aforementioned options. In New Jersey, for example, their state courts began to conduct jury trials where jury selection was completed by video conference, while the remainder of the trial was completed in person and socially distanced. One criminal court in Harris County, Texas conducted another type of hybrid jury trial over the objection of counsel. In that trial, the defense attorneys attempted to withdraw as counsel for ethical reasons, and when the trial court denied that application, they filed a petition for a writ of mandamus with the court of appeals to stay the proceedings. When that petition was denied, they ultimately “chose” to conduct the trial and, along with their client, were the only parties to appear virtually.


Many organizations have taken steps to determine how to use the lessons learned from the pandemic to permanently reform the criminal justice system. In addition to federal and state governments, scholars have also recently

229. See id. at § 21.013(c)(1)–(2).
231. See Glenn A. Grant, New Jersey Judiciary’s First Socially Distanced Trials to Begin, N.J. CTS. (Sept. 29, 2020), https://njcourts.gov/pressrel/2020/pr092920a.pdf?c=jXM [https://perma.cc/8JU2-DNJZ]. New Jersey also moved its grand jury proceedings to a virtual format. The constitutionality of the grand jury practice was recently questioned, and the Supreme Court of New Jersey found that the practice did not violate the accused’s fair cross-section right or equal protection rights. State v. Vega-Larregui, 248 A.3d 1224, 1243–44 (N.J. 2021).
233. Id.
234. Id.
proposed several potential reform measures. For example, Christopher T. Robertson and Michael Shammas have argued that such reform measures should take into consideration “the benefit of modern science and technology” and recommended six solutions that could “increase citizens’ engagement; better foster civic education and democratic deliberation; improve accuracy in sorting truth from falsehood; and enhance efficiency in terms of both time and cost.” 235 Based on their analysis, they recommended the follow six reforms: (1) larger juries without peremptory challenges, (2) asynchronous video presentation, (3) shorter, edited trials, (4) breaking limitations for time and place, (5) a national jury pool for national civil cases, and (6) vote-aggregation without deliberation. 236

In the realm of virtual mock trials, the Texas Young Lawyers Association (TYLA) partnered with Professor Justin Bernstein of the UCLA School of Law and Professor A.J. Bellido de Luna of the St. Mary’s University School of Law to administer the 2021 National Trial Competition (NTC), which consisted of fifteen regional competitions and one national competition involving over 140 law schools and 1,000 law students per year. 237 As the Co-Chair of the NTC Committee, this author and his TYLA committee worked with Bernstein and Bellido de Luna to administer approximately 600 virtual jury trials where advocates, witnesses, and judges/jurors all appeared remotely. 238 Over the course of administering these trials, it was found that Zoom and other video conference platforms are a great medium for administering virtual advocacy competitions. 239 Zoom offered three methods for conducting these competitions. These included (1) one Zoom meeting with a breakout room for each individual trial, (2) a separate Zoom meeting for each individual trial, and (3) Zoom Webinar rooms. 240 The NTC

236. See id. (manuscript at 126–153).
239. Id.
240. See id.
employed all three options during regionals and nationals and found costs and benefits to all three.  

i. One Zoom Meeting with a Breakout Room for Each Individual Trial

During the NTC, this option benefited from its simplistic approach. When using this option, only a single link was needed for all advocates, judges, and witnesses to use. Once they joined the room from this link, the host could then move them into individual breakout rooms for their trial (though this became easier when Zoom allowed users to join breakout rooms on their own). In terms of costs, it was not possible to live stream with this option, and if too many people were in the room or breakout rooms, the system could be slowed or ultimately crash. Furthermore, one person was required to oversee all the trials simultaneously—a particularly difficult task in larger tournaments.

ii. Separate Zoom Meeting for Each Individual Trial

When utilizing a separate room for each trial, one person only had to oversee a single trial, so each trial was easier to administer. The NTC was also able to live stream trials under this option. Additionally, each trial had its own unique link, which was helpful to NTC participants because they only needed to click on one link to be directed to the room in which their trial would occur. While this was beneficial during the trial, it increased administrative costs pre-tournament since separate links for each trial had to be created.

241. See id. The lessons from NTC have some important limitations regarding potential application to real virtual criminal trials. Most notably, the rules of NTC require that jurors provide scores without deliberating with other jurors, and they are explicitly instructed to determine scores on the quality of the advocacy and not the weight of the facts and evidence. As such, our experience with Zoom cannot be used to measure the effectiveness of virtual juror deliberation.

242. See id.

243. See id.

244. The information reflected in this sentence is derived from my personal experience as Co-Chair of the NTC, including many conversations with Professor Bernstein and Professor Bellido de Luna.

245. Supra text accompanying note 244.

246. Supra text accompanying note 244.

247. Supra text accompanying note 244.
iii. Zoom Webinar Rooms

With webinar rooms, NTC administrators were able to control which participants could appear on screen and use audio and video functions, and which could only observe. This greatly limited the ability of someone to “Zoom bomb” a trial and allowed spectators to observe without risk of being seen or heard by judges. Large numbers of observers were able to view each round without worrying about crashing the system or being required to live stream the trial. Despite all of these benefits, webinar rooms were the most financially costly.

C. Opinions from Trial Attorneys

To get a more complete understanding of practitioner interest and feelings toward the use of remote criminal proceedings, Professor Jenia Turner conducted a comprehensive survey during the pandemic from state and federal prosecutors, defense attorneys, and judges within Texas, specifically asking about their experiences with remote proceedings both before and during the pandemic.

Notably, a majority of all groups of respondents agreed that virtual criminal proceedings saved time and resources for the parties, that such proceedings helped lead to quicker resolutions of cases, and that they enhanced public access to the proceedings. However, a majority of all groups of respondents also believed that it was more difficult to present their cases via virtual proceedings, while a majority of defense attorneys believed such proceedings interfered with attorney-client confidentiality and led to invalid pleas and worse overall case outcomes. Despite these mixed results, majorities of judges and prosecutors, and a large minority of defense attorneys, indicated they would be in favor of continuing to use remote criminal proceedings after the pandemic fully subsided.

248. Supra text accompanying note 244.
249. A “Zoom bomb” is typically a prank where someone obtains the ID number to a Zoom meeting that they were not invited to, joins the group, and causes a disruption to the meeting. See Porterfield, infra note 317.
250. See Turner, supra note 207, at 231–265. While Professor Turner acknowledges the survey sample is nonrepresentative since “participants were not randomly chosen but rather self-selected[,]” Turner’s findings are nevertheless vital to understanding how, if at all, virtual criminal proceedings can be done in a fair and constitutional manner. See id. at 233.
251. See id. at 239, 243, 246.
252. See id. at 252, 253, 256, 258.
253. See id. at 259. Importantly, some noted an unconditional opposition to remote criminal jury trials. Id. at 262. An earlier poll performed by the Harris County judiciary revealed similar
A. Constitutional, Statutory, and Other Problems with Pandemic Proposals

i. In Person and Socially Distanced

In-person and socially distanced criminal jury trials are most likely to impact a defendant’s confrontation right, their public trial right, their right to a fair and impartial jury, right to counsel, speedy trial rights, and right to effective assistance of counsel. Regarding the confrontation right, which remains governed by prior decisions in Craig and Gigante, defendants and defense attorneys have largely complained that when witnesses wear masks or are separated by a plexiglass divider, they are unable to sentiments regarding the use of Zoom for a jury trial. See Angela Morris, Most Houston Lawyers Don’t Want Jury Trials Back Before Fall, Survey Says, LAW.COM (June 1, 2020, 3:34 AM), https://www.law.com/texaslawyer/2020/06/01/most-houston-lawyers-dont-want-jury-trials-back-before-fall-survey-says/?slreturn=20210428172254 [https://perma.cc/NB49-SAU7].

254. Some defendants have also argued that the confrontation right should extend to pretrial hearings as well. In Gonzalez-McFarlane, the defendant argued that “her Sixth Amendment right to confront her accuser will be violated if the Government witness testifies at her [pretrial] suppression hearing.” United States v. Gonzalez-McFarlane, No. 3:19-CR-0056, 2020 WL 6262968, at *2 (D.V.I. Oct. 24, 2020). There the district court noted held “the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination.” Id. (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 52–53 (1987) (emphasis omitted)). In U.S. v. Lattimore, while the district court similarly ruled that the confrontation right was a trial right, it specifically noted that “there are several colorable arguments that the Confrontation Clause does apply at a pre-trial suppression hearing.” U.S. v. Lattimore, No. 20-123, 2021 WL 860234, at *3–4 (D.D.C. Mar. 8, 2021) (noting that the plain text of the Sixth Amendment does not exclusively limit the confrontation right to trial and that the suppression hearing is “undoubtedly a critical part of a criminal prosecution[]” where the confrontation right rationally could attach). The district court ultimately held that this right did not apply pretrial based on Supreme Court precedent.

255. See Maryland v. Craig, 497 U.S. 836 (1990); supra text accompanying note 72.

256. United States v. Gigante, 166 F.3d 75, 81 (2d Cir. 1999) (holding that “[u]pon a finding of exceptional circumstances, . . . a trial court may allow a witness to testify via two-way closed-circuit television when this further[s] the interest of justice.”). Defendants continue to question the constitutionality of Craig and Gigante amid the pandemic. In Akhaven, the defendant argued that Gigante was no longer good law “because it conflicts with the Supreme Court’s 2004 opinion in Crawford v. Washington[,]” United States v. Akhaven, No. 20-CR-188, 2021 WL 797806 at *9 (S.D.N.Y. Mar. 1, 2021). Because the Supreme Court was silent regarding Craig when it issued its decision in Crawford, the district court declined to follow the defendant’s reasoning.
constitutionally confront witnesses. \textsuperscript{257} In Petit, for example, the defendant argued that witness testimony from behind a plexiglass encasement interfered with his ability to observe the witness and thus violated his confrontation right. \textsuperscript{258} There, the district court found “that the plexiglass encasement, and any attendant glares resulting therefrom, poses, at most, a minimal threat to the jurors’ opportunity to assess the credibility of witnesses in this trial.” \textsuperscript{259} In In re Justice and in reliance on Craig, the “military judge found the wearing of masks was necessary to further the important public policy of ‘ensuring the health and safety of all proceeding participants amidst a unique global pandemic.’” \textsuperscript{260}

Regarding public trial rights, defendants have a legitimate concern that the public will not attend out of fear of contracting COVID. \textsuperscript{261} The defendant in Trimarco argued that, because elderly or those with preexisting health conditions, including his seventy-nine year old father, would be unwilling to attend a trial in person out of fear of contracting COVID, such fact violated his right to a public trial. \textsuperscript{262} There, the district court complied with the Supreme Court’s Waller test and found that the “partial closure” created by the Eastern District of New York’s COVID-19 protocols did not violate the defendant’s Sixth Amendment rights. \textsuperscript{263} In the neighboring Southern District, the district court in Donziger found that their COVID protocols were a “constitutionally permissible” partial closure. \textsuperscript{264}

With respect to a defendant’s right to a fair and impartial jury, data suggests that pandemic jurors are more likely to be white and more

\begin{footnotesize}
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\item[258.] See Petit, 496 F. Supp. 3d at 828–29.
\item[259.] Id. at 829. This result is should not be surprising given the Ninth Circuit’s previous decision in de Jesus-Casteneda that confidential informants may testify in a mask without violating the defendant’s confrontation right. See United States v. de Jesus-Casteneda, 705 F.3d 1117, 1120 (9th Cir. 2013).
\item[260.] In re Justice, 2021 WL 920176, at *3.
\item[262.] See Trimarco, 2020 WL 5211051, at *2.
\item[263.] See id. at *4.
\item[264.] See Donziger, 2020 U.S. Dist. LEXIS 148029, at *11.
\end{enumerate}
\end{footnotesize}
conservative—two traits that typically help prosecutors.\textsuperscript{265} Here, however, courts would need to determine whether such in-person and socially distanced trials were systematically excluding jurors of a specific gender, race, or ethnicity, to hold that they were violative of this Sixth Amendment right.\textsuperscript{266} Criminal defense lawyers have also raised concerns regarding the defendant’s right to a fair and impartial jury. For example, the Harris County Criminal Lawyers Association (HCCLA), the largest local criminal defense bar in the United States, has argued that no criminal jury trial that employed social distancing standards during the pandemic could be fair to any of the parties.\textsuperscript{267} Specifically:

Even if a proper venire panel could be assembled, the NRG Plan makes jury selection impossible. Social distancing which must be maintained between each individual venire member will mathematically require panels to be so spread out neither a judge, a prosecutor, nor a defense attorney can adequately canvass the area while asking questions in the manner required to select a fair and impartial jury. Furthermore, the NRG Plan for face masks and/or shields required of venire members will make it virtually impossible to hear answers to questions or judge facial expressions in response to those questions. The idea of a Constitutionally guaranteed fair and impartial jury with due process of law under these circumstances is completely absurd.\textsuperscript{268}

Nationally, this sentiment is the same. The National Association of Criminal Defense Lawyers (NACDL) has stated that resumption of jury trials during the pandemic would be “reckless and irresponsible.”\textsuperscript{269} In June of


\textsuperscript{266} See \textit{Taylor v. Louisiana}, 419 U.S. 522, 531 (1975) (holding that the Sixth Amendment requires a jury to be drawn from a fair cross-section of the community in a federal case); \textit{see also} \textit{Duren v. Missouri}, 439 U.S 357, 370 (1979) (holding that the fair-cross section requirement applies to state cases).


\textsuperscript{268} Id.

2020, the NACDL released a report regarding measures that should be required in order to reopen courtrooms for jury trials.\textsuperscript{270} In their report, the NACDL urged that when the courts did reopen, such reopening should be safe, constitutional, and not increase historical harms within the criminal justice system.\textsuperscript{271} Additionally, some scholars have suggested that an alternative to virtual proceedings would be to dismiss charges against the accused.\textsuperscript{272}

The pandemic has also shown the inherent weakness of the defendant’s speedy trial rights under the Sixth Amendment and Speedy Trial Act.\textsuperscript{273} Several courts have found that delays caused by COVID did not violate this right on either constitutional or statutory grounds. They specifically found

\begin{itemize}
\item \textsuperscript{271} See id.
that these delays of five months, fourteen months, fifteen months, or twenty months did not run afoul of the Barker factors or, alternatively, were proper to serve the “ends of justice.”

Several cases during the pandemic have also involved questions regarding the accused’s right to counsel or effective assistance of counsel. However, in 

Landji, the district court found that the thirty-day suspension of legal visits for in-custody defendants did not violate their right to counsel. And in 

Petit, the district court held that limiting counsel’s table to three seats did not violate the accused’s right to effective assistance of counsel. In-person and socially distanced criminal jury trials raised a host of logistical issues. For example, continuing in-person trials during the pandemic could incentive attorneys to use a COVID diagnosis to tactically delay a proceeding. Perhaps most importantly, jurors have stated a desire to not perform their civic duty largely due to valid concerns for their personal health and safety. One way to reflect the criminal justice system’s appreciation for jurors taking

274. See Briggs, 471 F. Supp. 3d at 639.
278. See Briggs, 471 F. Supp. 3d at 639; Doran, 2021 WL 413520, at *6; Barker v. Wingo, 407 U.S. 514, 530 (1972); Pair, 2021 WL 772235, at *4; Elliott, 2021 WL 416158, at *2; Lacy, 2021 WL 1063402, at *3. But see Henning, 2021 WL 222355, at *6; Olsen, 494 F. Supp. 3d at 727. In these cases, United States District Judge Cormac J. Carney, who during the pandemic has twice ruled that an “ends of justice” continuance was inappropriate and dismissed criminal indictments with prejudice. Henning, 2021 WL 222355, at *6; Olsen, 494 F. Supp. 3d at 727. In both Henning and Olsen, District Judge Carney held that continuances under the “ends of justice” are only appropriate where it would be impossible to hold the trial without a continuance. Henning, 2021 WL 222355, at *6; Olsen, 494 F. Supp. 3d at 727. In both Henning and Olsen, District Judge Carney held that continuances under the “ends of justice” are only appropriate where it would be impossible to hold the trial without a continuance. Henning, 2021 WL 222355, at *6; Olsen, 494 F. Supp. 3d at 727. In these cases, United States District Judge Cormac J. Carney, who during the pandemic has twice ruled that an “ends of justice” continuance was inappropriate and dismissed criminal indictments with prejudice. Henning, 2021 WL 222355, at *6; Olsen, 494 F. Supp. 3d at 727. In both Henning and Olsen, District Judge Carney held that continuances under the “ends of justice” are only appropriate where it would be impossible to hold the trial without a continuance. Henning, 2021 WL 222355, at *6; Olsen, 494 F. Supp. 3d at 727. In these cases, United States District Judge Cormac J. Carney, who during the pandemic has twice ruled that an “ends of justice” continuance was inappropriate and dismissed criminal indictments with prejudice. Henning, 2021 WL 222355, at *6; Olsen, 494 F. Supp. 3d at 727. Despite Judge Carney’s concerns, the Ninth Circuit nevertheless reversed his dismissal with prejudice. Olsen, 995 F.3d at 695.
282. See Curriden, supra note 265; see also Melanie D. Wilson, The Pandemic Juror, 77 WASH. & LEE L. REV. 102 (2020) (discussing the ways in which the criminal justice system often takes advantage of potential jurors during jury selection.).
on this increased burden would be to provide them with greater pay for their service. While the data in this field is limited, at least one county that was asked to increase juror pay during the pandemic declined to do so.\(^{283}\)

ii. Trial by Video Conference

As outlined by Professor Turner, many pretrial criminal hearings can be conducted remotely, even without the defendant’s consent, where the state has a “compelling interest in protecting public health and speedy trial trials.”\(^{284}\) Turner further posits that for criminal trials, the “defendant’s consent is even more clearly required . . . because of the strictures of the Confrontation Clause and the greater likelihood that the video format would affect the fairness of the proceedings, the ability of counsel to offer effective assistance, and the fairness and impartiality of the jury.”\(^{285}\) Additionally, even if the defendant consented to a completely virtual jury trial for the purpose of exercising his speedy trial right, such exercise may come at the expense of both his Sixth Amendment confrontation right and right to a fair and impartial jury.

The current state of remote jury trial technology may violate defendants’ right to counsel, including where technological limitations impact their ability to have private communications with counsel at trial.\(^{286}\) For example, in a 2010 study from the National Center for State Courts, the author found that “[o]f the 111 videoconferencing programs observed, 41 (36.94%) have no provisions for private communications between attorney and client.”\(^{287}\) Thus, in these courts, should this technological issue allow the government to have


\(^{284}\) See Turner, supra note 207, at 227. Prior to the pandemic, the defendant’s presence was required at his plea pursuant to Federal Rule of Civil Procedure 43 even where he consented to appear by video conference. See United States v. Bethea, 888 F.3d 864, 867 (7th Cir. 2018). During the pandemic, however, Congress enacted the CARES Act, which allowed federal judges to conduct hearings for felony plea and sentencing by video or teleconference if the accused consented upon consulting with counsel and “the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice.” Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, §§ 15002(b)(2)(A), (b)(4), 134 Stat. 281, 528–29 (2020).

\(^{285}\) See Turner, supra note 207, at 230.

\(^{286}\) See supra text accompanying notes 80–82.

access to such privileged communications, and the defendant was prejudiced by such access, his Sixth Amendment right to counsel would be violated.

Remote testimony is already permitted under the Sixth Amendment in federal criminal jury trials pursuant to the Supreme Court’s ruling in *Maryland v. Craig*. In state courts, however, the constitutionality of remote testimony varies by state. In Indiana and Massachusetts—whose constitutions explicitly discuss a “face-to-face” confrontation right—state courts have held that the use of video conference technology to secure witness testimony is *per se* unconstitutional. In Ohio, Kentucky, and Wisconsin—even without such wording—their state courts have held that any use of video conferencing for witness testimony is unconstitutional. But in the State of Washington, such language is not a bar on remote testimony.

A defendant’s public trial rights may also be violated where his jury trial is conducted remotely, especially where the technology or policy prevents or limits public access to jury trials. Court watchers have reported that monitoring virtual court hearings has become “difficult [and] in some cases even impossible[.]” In *Trimarco*, however, the Eastern District of New York outlined how a court could allow for remote public access in a manner that was compliant with the Sixth Amendment. Specifically, the court’s partial closure complied with the Sixth Amendment because (1) the entrance policies “advance an overriding interest in protecting the health and safety of those attending and participating in the trial[,]” (2) the partial closure was “no broader than necessary to protect this substantial interest[,]” and (3) the court

“considered alternatives to the partial closure, but [found] that any alternative would be unreasonable.”

The defendant’s speedy trial right poses its own issues. In courts that do not have the technological ability to conduct a virtual jury trial but have the ability to conduct a virtual bench trial, a defendant may be forced to waive his jury right in order to exercise his speedy trial right. Depending on the state or judge, such decision could increase the punishment received if he were to be convicted.

Exercising the speedy trial right may also force a defendant to waive his confrontation right where he could otherwise establish that virtual testimony was not compliant with Craig. In-custody defendants may also choose to exercise their speedy trial right at the expense of others in order to avoid potential Eighth Amendment violations.

Of course, a defendant may waive all of his relevant Sixth Amendment rights, and such waiver could potentially allow for a constitutional completely virtual criminal jury trial. But without this unlikely waiver, and perhaps even with it, recent Supreme Court precedent suggests that such trial could not occur. Most recently for example, the Supreme Court’s decision in Ramos calls into question the constitutionality of criminal jury trials by video conference since the “history of the jury right, coupled with evidence from treatises and dictionaries from the Founding Era, support the conclusion that jury trials must be in person.”

Indeed, consistent with his originalist philosophy, Justice Gorsuch noted that importance of “grappling with the historical meaning of the Sixth Amendment’s jury trial right” when determining the constitutionality of actions under the Sixth Amendment.

295. Id.
296. See King, Soulé, Steen & Weidner, supra note 118, at 975.
297. See Carroll, supra note 48.
298. Justin D. Rattey, Gap Filling: Assessing the Constitutionality of Virtual Criminal Trials in Light of Ramos v. Louisiana, 125 PENN ST. L. REV. PENN STATIM 1, 3 (2020). Importantly, Rattey does not conclude that virtual juries are unconstitutional. Rather, he indicates that an expanded analysis is needed to fully “consider the Supreme Court’s vast jurisprudence” on this issue. Id. at 10.
Historically, “trial by jury” at common law meant “(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.”

Taken with other recent Sixth Amendment decisions guided by originalist philosophy, these cases suggest that measures to conduct a completely virtual criminal jury trial falling short of a constitutional amendment would be deemed unconstitutional by the Supreme Court.

Regarding potential logistical issues, encouraging data from New Jersey and Michigan shows that, after their criminal court systems transitioned to online proceedings, the rate at which defendants appeared for their court dates increased from 80% (New Jersey) and 89% (Michigan) to nearly 100% in both states. In Texas, 60% to 80% of citizens summoned for jury duty have showed up for online jury selection, double the in-person rates. Additionally, recent studies have shown that jury trials by video conference produce juries that are more likely to be young and more diverse.

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301. See Patton v. United States, 281 U.S. 276, 288 (1930) (emphasis added). Of course, a defendant’s right to be present is not absolute. See Illinois v. Allen, 397 U.S. 337, 343 (1970) (holding “that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.”); See also FED. R. CRIM. P. 43(c) (“A defendant who was initially present at trial…waives the right to be present” when he is voluntarily absent after the trial has begun, is voluntarily absent during sentencing of a noncapital case, or when the court warns and ultimately removes him for disruptive behavior.”) (emphasis added). Notably, Rule 43’s statement that a defendant “need not be present” when he consents to a misdemeanor trial by video conference or in his absence. FED. R. CRIM. P. 43(b)(2). The language of paragraphs B and C of Rule 43 appears to imply that a defendant is “not present” when he appears by video conference, and that he must be present for at least the beginning of felony trial.

302. See supra note 97.

303. But see Robertson & Shammas, supra note 235, at 154–55 (arguing that tradition has little place in constitutional interpretation where the Constitution is silent).


305. See Scigliano, supra note 31.

306. See Joe Patrice, Juries For Online Trials Are Younger And More Diverse, ABOVE THE L. (Mar. 3, 2021, 1:46 PM), https://abovethelaw.com/2021/03/juries-for-online-trials-are-younger-and-more-diverse/ [https://perma.cc/FZ4C-RRXW]. Such jury composition can have drastic effects on verdicts and sentences rendered by juries. See Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, The Role of Age in Jury Selection and Trial Outcomes, 57 J.L. ECON. 1001 (2014) (finding that “if a male defendant, completely by chance, faces a jury pool that has an average age above 50, he is about 13 percentage points more likely to be convicted than if he faces a jury pool with an average age below 50.”)
Furthermore, this method would also avoid the perhaps pointless posturing of attorneys to sit at the table in closer proximity to the jury.\textsuperscript{307}

Jury trials by video conference have raised different but equally troubling logistical concerns. Zoom and similar platforms have suffered several security and privacy breaches.\textsuperscript{308} Indigent parties, small or solo law firms, and smaller or rural counties have not had the consistent access to the high-speed internet needed to fully participate in this type of trial.\textsuperscript{309} Even worse, approximately 42 million Americans live outside the reach of broadband service.\textsuperscript{310} According to a study by New York University’s Civil Jury Project, jurors had issues with focusing over a long period of time.\textsuperscript{311} Another expressed concern regarding the lack of juror bonding and its impact on deliberations.\textsuperscript{312} In a civil summary jury trial conducted in Collin County, Texas, one juror left to take a phone call.\textsuperscript{313} According to the chief public

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defender for Texas Rio Grande Legal Aid, a juror for an online trial “couldn’t get the screen image right side up.”314 During another civil trial, jurors appeared to sleep, exercise, or tend to their children.315 One lawyer famously informed a judge that he was “not a cat” after enduring a mishap with a Zoom filter.316 Hackers have uploaded pornographic images or obscene language to disrupt and delay criminal and civil Zoom hearings.317 During one criminal Zoom hearing, a judge allegedly muted a defense attorney eight times for a total of twelve minutes in a forty-eight minute hearing.318 In another, an attorney attended in the nude.319 In an unrelated case, a federal magistrate judge deemed it necessary to advise the parties to “wear clothes.”320 And to reach a new low, an attorney had sex on camera during a hearing.321

314. Scigliano, supra note 31.

315. See Debra Cassens Weiss, Potential Jurors Exercised, Curled Up on Bed During Virtual Voir Dire, Motion Says in Asbestos Case, A.B.A. J. (July 22, 2020, 2:41 PM), https://www.abajournal.com/news/article/potential-jurors-exercised-curved-up-on-bed-during-virtual-voir-dire-motion-says#:~:text=Potential%20jurors%20were%20distracted%20or,to%20the%20July%202016%20motion [https://perma.cc/9R4N-LZA8]. Virtual proceedings outside of the trial arena have had similar issues. Most recently, a state senator from Ohio attended a hearing discussing distracted driving as he was actually driving, which was discovered when his seatbelt was visibly strapped across his chest even though his Zoom background portrayed his home. See Marie Fazio, Ohio State Senator is Caught Zooming and Driving, N.Y. TIMES (May 6, 2021), https://www.nytimes.com/2021/05/06/us/andrew-fazio-ohio-state-senator.html [https://perma.cc/6CX8-JKVN].


addition to these specific examples, many have more general concerns. For example, while live-streaming jury trials on YouTube may fulfill the accused’s right to a public trial, Michigan Chief Justice Bridget Mary McCormack worries that “[a]nybody can record it and use it against you later.”

Michigan Court of Appeals Judge Michelle Rick expressed specific concern for domestic violence victims since Judge Rick does not “know where they’re phoning in from” or “whether someone [off-screen] is exerting influence over them.”

Statutory solutions to expanding the role of criminal jury trials by video conference may also be problematic. Notably, H.B. 3774 appears to conflict with Section 33.03 of the Texas Code of Criminal Procedure, which states:

In all prosecutions for felonies, the defendant must be personally present at the trial, and he must likewise be present in all cases of misdemeanor when the punishment or any part thereof is imprisonment in jail; provided, however, that in all cases, when the defendant voluntarily absents himself after pleading to the indictment or information, or after the jury has been selected when trial is before a jury, the trial may proceed to its conclusion.

Thus, while H.B.3774 would allow the trial judge to decide if a remote criminal jury trial was appropriate, Section 33.03 dictates that the defendant determines when he is to be “personally present” at trial, and that he might not be allowed to consent to a virtual jury selection under any circumstances. And as noted by Alex Bunin, Chief Defender for the Harris County Public Defender’s Office, Texas laws allowing virtual criminal jury trials would conflict with several other Texas laws that require consent. Until the Texas

322. Scigliano, supra note 31.
323. Id.
325. Id. (emphasis added).
326. See, e.g., Morrison v. State, 480 S.W.3d 647, 657 (Tex. App. 2015) (stating that “as the Texas Court of Criminal Appeals has recognized, although a defendant may waive his Sixth Amendment right to be present in the courtroom virtually any time after a trial commences, under Article 33.03, ‘an accused’s right to be present at his trial is unwaivable until such a time as the jury has been selected.’”).
327. See ALEX BUNIN, NACDL, CAN A TEXAS CRIMINAL JURY TRIAL OCCUR BY VIDEO CONFERENCE, ABSENT A DEFENDANT’S CONSENT?, https://www.nacdl.org/getattachment/12aeb9e-ed4d-4973-bb10-b2e0fd3e3874b/can-a-texas-criminal-jury-trial-occur-entirely-by-video.pdf [https://perma.cc/DQ59-H6BR] (noting that Tex. Code Crim. Proc. art. 27.18 (Plea or Waiver of Rights by Videoconference) and 38.076 (Testimony of Forensic Analyst by Video Teleconference) both require consent). Bunin also notes that pursuant to Tex. Code Crim. Proc. art. 35.17 (Voir
courts or the legislature determines whether a defendant can be personally present while appearing virtually, it appears that completely remote criminal jury trials remain barred by Texas law.

iii. Hybrid Trials

This format has also come under fire from local criminal defense organizations. Matthew Adams, Chair of the Pandemic Task Force for the Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ), argued that New Jersey’s hybrid model “placed expediency over constitutional rights[,]” and that the pandemic was “no excuse to relax the constitutional protections that ensure the presumption of innocence and the right to a fair trial before a jury of one’s peers.” However, when one such jury trial in this format was appealed after the defendant was convicted, the Supreme Court of New Jersey ultimately found that this method of hybrid jury trial was constitutional. During a separate hybrid criminal jury trial in Harris County, Texas, all parties appeared in person except the accused and his defense attorneys. Brent Mayr and Sierra Tabone, the defense attorneys who tried the case and secured an acquittal for their client, noted several troubling and potentially unconstitutional features of their hybrid jury trial, including the inability to see the jury for any portion of the trial, being forced to choose between their ethical obligations to withdraw as counsel and their client’s Sixth Amendment rights, their client being forced to waive his right

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Dire Examination), jury selection must be done “in the presence of the entire panel[,]” and under A RT 37.06 (Presence of Defendant), a defendant must be present when the verdict is read.


329. Id.

330. See State v. Dangcil, 256 A.3d 1016, 1022 (N.J. 2021) (holding that the trial court’s use of a virtual jury selection process was constitutional because the defendant “failed to support his representative-cross-section claim”).

331. See Mayr & Tabone, supra note 232. This format is especially troubling given data from Cook County, Illinois regarding bail hearings conducted by closed-circuit television. In this study, the authors analyzed bail hearings where all parties appeared in person except for the defendant, who appeared by closed-circuit television. They found that the “average bond amount for the offenses that shifted to televised hearings increased by an average of 51%.” See Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions, 100 J. CRIM. L. & CRIMINOLOGY 869 (2010).

332. See Mayr & Tabone, supra note 232; see also TEX. DISCIPLINARY RULES OF PROF. CONDUCT 1.06(b); Lerma v. State, 679 S.W.2d 488 (Tex. Crim. App. 1982) (holding that the trial court’s failure to grant motion to withdraw in case of direct conflict of interest denies the accused of his right to effective assistance of counsel).
to be physically present in the courtroom, and potential juror prejudice against their client.

B. Impact on Jury Trials

Because of the Sixth Amendment, statutory, and logistical issues surrounding these measures, jury trial rates have drastically fallen since the pandemic began. In Harris County, for example, trials fell from 1,600 to 52, a drop of almost 97%. Nationally, trial rates fell as precipitously or worse. In New York City, for example, from March to November of 2020, nine trials took place compared to the 800 that occurred in 2019 during the same time period. Similarly, in the entire state of Massachusetts, from March to September of 2020, zero jury trials occurred compared to the 1,800 that occurred during the same time period in 2019. Unfortunately, despite great efforts of the courts to continue with trials during the pandemic, and evidence showing the many benefits of virtual criminal jury trials, access to the criminal jury right—as measured by the rate by which trials occurred—was effectively extinguished.

C. Proposal to Amend the Constitution

My proposal to create a constitutional amendment allowing criminal jury trials to be conducted by video conference rests on several assumptions. These include: (1) Supreme Court precedent, including *Ramos* and similar Sixth Amendment cases, would bar the practice for felonies and most misdemeanors, even where the defendant waived all relevant Sixth


334. See Mayr & Tabone, *supra* note 232. The authors reported that many potential jurors “were offended” that they and their client would be appearing at the trial via Zoom. They did, however, note several benefits to non-trial use of video conference technology in the legal field, including reduced time spent commuting, parking, and waiting to speak to a judge. *Id.*

335. See Ketterer, *supra* note 52.

336. See *FULLY INFORMED JURY ASS’N*, *supra* note 52.

337. See *id.*

338. See, e.g., Roy Ferguson, *From the Front Porch: The Fear & Future of Remote Jury Proceedings*, VOICE FOR THE DEFENSE ONLINE (June 7, 2021), https://www.voiceforthedefenseonline.com/from-the-front-porch-the-fear-future-of-remote-jury-proceedings/ [https://perma.cc/89L6-DWWE] (discussing evidence from Texas that one percent individual “lacked the ability to connect to a remote proceeding[,]” that response rates by potential jurors for remote jury trials compared to in-person criminal trials increased by as much as 41%, and that remote juries were more diverse and had a younger average age than in-person juries).
Amendment rights; (2) the United States will endure another pandemic that will similarly inhibit our ability to access public places;\(^\text{339}\) and (3) parties could refuse to consent to a virtual criminal jury trial, even where the technology eliminated or minimized any logistical issues.\(^\text{340}\)

Of course, the act of amending the Constitution to allow for an entire criminal jury trial to be conducted by video conference would be an exceedingly difficult task. Indeed, only twenty-seven amendments have been ratified of the over eleven thousand proposed amendments introduced by members of Congress.\(^\text{341}\) Such difficulty in amending the Constitution is by design.\(^\text{342}\) According to Article V of the Constitution, amendments may be proposed for ratification in two ways: (1) by a two-thirds vote of the House of Representatives and the Senate or (2) by a congressionally requested national convention on request of two-thirds of the state legislatures.\(^\text{343}\) The Framers were not alone in urging restraint in the constitutional amendment process. In 1999, a group of law professors prepared and published a report which stated the following principles for constitutional amendment:

(1) Does the proposed amendment address matters that are of more than immediate concern and that are likely to be recognized as of abiding importance by subsequent

\(^{339}\) See, e.g., Michaleen Doucleff, Next Pandemic: Scientists Fear Another Coronavirus Could Jump From Animals To Humans, NPR (Mar. 19, 2021, 5:25 PM), https://www.npr.org/sections/goatsandsoda/2021/03/19/979314118/next-pandemic-scientists-fear-another-coronavirus-could-jump-from-animals-to-hum [https://perma.cc/VXX4-S3MK] (quoting virologists who predict that the next pandemic could occur as soon as next year). This assumption is especially important since, without another pandemic, issues related to the reduced trial rate could largely be solved if our even if our federal and state governments exacted legislation that ended the trial tax and meaningfully enforced the Speedy Trial Act or its state analogs. But if these actions were taken, criminal jury trial rates increased to 20%, and another pandemic occurred, the lack of a constitutional amendment would likely lead to another decrease to rates at or approaching 0%.

\(^{340}\) See Mayr & Tabone, supra note 232. It is important to note that some hesitancy to virtual criminal justice proceedings may be related to the fact that our country is experiencing them during a pandemic. Further research on these proceedings in non-pandemic conditions would be needed to show whether feelings for such proceedings are tainted by other negative feelings toward the pandemic.

\(^{341}\) See Measures Proposed to Amend the Constitution, U.S. SENATE, senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm [https://perma.cc/X9TM-YFHZ] (“Approximately 11,848 measures have been proposed to amend the Constitution from 1789 through January 3, 2019.”).

\(^{342}\) See, e.g., Ruth Bader Ginsburg, On Amending the Constitution: A Plea for Patience, 12 ARK. L. REV. 677, 693 (1990) (arguing that the amendment process was “designed to be lengthy, deliberative, and not frequently invoked.”); Erwen Chemerinsky, Amending the Constitution, 96 MICH. L. REV. 1561 (1998) (discussing the inherent difficulty in amending the Constitution).

\(^{343}\) See U.S. CONST. art. V.
generations?
(2) Does the proposed amendment make our system more politically responsive or protect individual rights?
(3) Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?
(4) Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact?
(5) Does the proposed amendment embody enforceable, and not purely aspirational, standards?
(6) Have proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?
(7) Has there been full and fair debate on the merits of the proposed amendment?
(8) Has Congress provided for a nonextendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?

An amendment allowing for completely virtual criminal jury trials is likely to spark debate regarding each of these principles. While the most likely source of debate lies with whether such amendment protects individual rights, the preliminary data available allows for salient arguments to support that each of these principles can be answered with a “yes.” Even with such preliminary data, current sentiments within the legal community suggest that any investment of political capital by members of Congress to amend the Constitution to allow for trials by video conference would be met with significant resistance. And even if Congress were to attempt to make this investment, efforts by legislators, legal scholars, and other interested parties must first conduct empirical studies and analyze the constitutionality of virtual criminal jury trials, especially as the technology in this field continues to develop and improve.

346. See supra Part IV. Principles seven and eight cannot be addressed until and unless such amendment is actually proposed.
347. See Turner, supra note 207; see also Ariturk, Crozier & Garrett supra note 345; Bunin, supra note 327.
i. Language of Amendment Allowing Jury Trials by Video Conference

In an effort to create a pandemic-proof criminal jury trial right and based on the principles discussed in Part V.C.i, I am suggesting the following to represent the constitutional amendment allowing for criminal jury trials by video conference:

In all criminal prosecutions, the accused’s right to a trial by an impartial jury may be satisfied where such trial occurs by video conference, holographic, or other audio-visual technology only where the denial of an in-person trial is necessary to further an important public policy and only where the reliability of the trial by video conference, holographic, or other audio-visual technology is otherwise assured.\(^{348}\)

Importantly, my proposal to constitutionalize access to criminal jury trials by video conference does not require the consent of the accused or the government. Due to current sentiments toward virtual criminal trials—some based on genuine concern for the protection of Sixth Amendment rights and others grounded in opposition to any attempt change as society advances—a consent requirement would almost certainly create an amendment in name only.\(^{349}\) My proposal largely mirrors the Supreme Court’s language in \textit{Craig},\(^{350}\) since any criminal jury trial by video conference should occur as a

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\(^{348}\) To avoid potential for confusion or misinterpretation, precise language is vital to ensuring the amendment is enacted as intended. \textit{See}, \textit{e.g.}, Revisionist History, \textit{Divide and Conquer} (May 18, 2018) (downloaded using Apple Podcasts) (discussing grammatical rules as they pertain to Article IV, Section 3 of the Constitution, and the Twenty-Sixth Amendment). Malcolm Gladwell and his guests note that Article IV, Section 3 technically says that a state cannot form a new state from within its borders without the consent of Congress. \textit{Id}. Taken with the language of the Congressional resolution by which Texas was admitted as state to the United States, which gave Texas Congressional consent to create four additional states from within its borders, the State of Texas could transform into five total states if its legislature so desired. \textit{Id}. Regarding the Twenty-Sixth Amendment, Gladwell and his guests note that the amendment technically states that a citizen of the United States is \textit{anyone} over the age of eighteen. \textit{Id}.

\(^{349}\) Based on the language of its statute, the Texas Legislature appears to have anticipated this issue as it does not require consent but does require any court that elects to conduct a jury trial by video conference to provide the provide the parties with adequate notice of this decision and the opportunity to object, and also provide for in-person methods of participation to those who cannot participate by video conference. \textit{See} H.B. 3611, \textit{supra} note 228.

\(^{350}\) \textit{See} Maryland v. Craig, 497 U.S. 836, 850 (1990) (“\textit{O}ur precedents confirm that a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”).
last resort and only where video conference technology functions such that the accused’s Sixth Amendment rights are reliably assured.\textsuperscript{351}

ii. Statutory Changes Concurrent with the Constitutional Amendment

Taken alone, any amendment to constitutionalize criminal jury trials by video conference is unlikely to have any significant impact on criminal jury trial rates. After all, the incentives to plea or delay trial due to the trial penalty; inadequate enforcement of the Speedy Trial Act; or statutory, political, or other hindrances would remain even if such amendment did exist.\textsuperscript{352} Therefore, I also recommend that Congress and state governments enact legislation that ends the trial penalty as recommended by the NACDL,\textsuperscript{353} and that the measures to both enforce the Speedy Trial Act and end other incentives to delay trial discussed in Part IV are similarly sought out. Such actions would, at worst, avoid needless delays to case resolution and, at best, increase criminal jury trial rates such that the accused, victims, and society had more meaningful access to fair and constitutional criminal jury trials.

VI. CONCLUSION

The coronavirus pandemic greatly hindered the criminal justice system’s ability to conduct criminal jury trials and largely prevented the accused from exercising their Sixth Amendment rights. But it also allowed our society to more clearly observe that fair and consistent access to criminal jury trials largely evaded our grasp well before COVID-19 arrived on our shores. And, as such, it should force us to search for solutions that guarantee fair and constitutional criminal jury trials regardless of whether we are enduring a pandemic.

While the problem is clear, the solution is not. Indeed, efforts to allow for criminal jury trials during the pandemic by in-person and socially distanced trials, trials by video conference, and hybrid trials were fraught with

\textsuperscript{351} While not necessary for any amendment that constitutionalizes jury trials by video conference, it is important to consider the \textit{Ramos} dissent’s concern for the how the majority’s opinion calls into question the constitutionality of six-person juries in state courts criminal cases. See \textit{supra} text accompanying notes 106–07. When the \textit{Williams} decision was rendered, the Supreme Court was not considering whether six-person juries would help courts comply with social distancing measures. But reducing the number of people required constitutionally to reaching a unanimous verdict would certainly aid in that effort. As such, efforts to make a pandemic-proof criminal jury right may also consider a clause allowing for six-person juries when conducted in person.

\textsuperscript{352} See \textit{supra} Part III.B.

\textsuperscript{353} See \textit{supra} text accompanying note 126.
legitimate constitutional and logistical concerns. But these concerns do not mean that these efforts should be abandoned. Instead, they should be perfected. For example, a constitutional amendment to provide for a criminal jury right by video conference would allow for the accused to maintain their ability to exercise their criminal jury right and speedy trial right regardless of whether the country was enduring a pandemic that prevented in-person social gatherings. Based on limited data, their juries would be less likely to convict and more likely to deliver a more lenient sentence. Similarly, victims could avoid delays to gaining the justice they deserve. The criminal justice system as a whole could prevent the case backlogs caused by a pandemic, both from cases that would have proceeded to trial and cases that would have pled or been dismissed if the parties knew a trial could happen. Court systems throughout the country would be incentivized to utilize technologies that provided for a video conference trial experience that matched the best aspects of the in-person experience, and also enhanced the ability of the public to attend without having to appear in person.

It is unclear, however, if these or other benefits outweigh the costs. For the accused, the exercise of their speedy trial right or jury right would come at the expense of their right to confront their accusers face-to-face. While there was a limited pre-pandemic exception to this right created by the Supreme Court’s decision in Craig, such amendment would allow the exception to subsume the rule. Additionally, since many courts are currently unprepared to provide the accused with video conference technology that guarantees the ability to have consistent or confidential communications with counsel, the accused in those courts also risk infringement of their right to counsel and the effective assistance of counsel. Problems with criminal jury trials by video conference are not limited to those faced by the accused. Victims would be forced to testify in a medium where jurors are less able to read their social cues and judge their credibility, which could result in verdicts of “not guilty” that are unsupported by the evidence. Furthermore, both prosecutors and defense attorneys have largely stated their opposition to jury trials by video conference on constitutional grounds.

These concerns suggest that efforts to amend the constitution to provide a criminal jury right by video conference must include a substantial investment in video conference technology. Such investment must produce technology that ensures the accused’s Sixth Amendment rights are upheld and is available in all states and jurisdictions. Furthermore, any amendment must be met with legislation to end the trial penalty and meaningfully enforce laws that seek to avoid undue delays to trial. The accused, victims, and society deserve a pandemic-proof criminal jury right. The COVID-19 pandemic has shown us how to provide one. When the next pandemic arrives, we must be ready.