

Virtual Juries

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VIRTUAL JURIES¹

Valerie P. Hans^{2*}

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

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INTRODUCTION: VIRTUAL JURIES

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

I. BACKGROUND

The worrisome news about the dramatic increase in infections, hospitalizations, and deaths due to COVID-19 reached a crescendo in the middle of March 2020. Many public-facing institutions in the United States, including businesses, government offices, and universities, shut down.⁴

That week in March, my research assistants and I had scheduled several in-person mock juries for the upcoming weekend for an ongoing experiment on decision making in tort cases.⁵ Residents from Ithaca, New York, and the surrounding communities would come to Cornell Law School, watch a videotaped tort trial, and deliberate in six-person groups to arrive at verdicts and damage awards in the case. The study was going well, until it was not. On March 13, a national emergency was declared, and Cornell University's president announced the closure of the university. Faculty scrambled to get out of their offices with essential teaching and research materials and our

3. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

4. Luis Ferré-Sadurni, *New York City Schools, Restaurants and Bars are Shut Down over Coronavirus*, N.Y. TIMES (last updated Mar. 16, 2020), <https://www.nytimes.com/2020/03/15/ny-region/coronavirus-nyc-shutdown.html>.

5. Krystia Reed, Valerie P. Hans, Vivian Rotenstein & Valerie Reyna, *Guiding Jury Damage Award Decision Making in Virtual Versus In-Person Civil Juries: Experimental Evidence* (Cornell Law School, 2021) (referring to the in-person version of the mock jury experiment).

distraught students packed up and left town. Our experience in Ithaca was repeated countless times around the country and the globe.⁶

Most courts closed during this difficult early period. The National Center for State Courts identified courts' common responses to the pandemic, including suspension of in-person proceedings, deadline extensions, limited entrance to courthouses, and restriction of jury trials. Many courts encouraged videoconferences or teleconferences instead of in-person proceedings.⁷ As they began to get back to business, a number of courts transformed themselves into virtual courtrooms holding remote hearings, with participants logging on to teleconferences or online platforms from their homes. The U.S. Supreme Court began holding oral arguments by telephone.⁸ The U.S. Tax Court used ZoomGov to conduct hearings and trials in cases in which petitioners challenged IRS rulings.⁹ State courts in Texas shifted overnight to virtual hearings for a number of matters, including family court, broadcasting them on YouTube.¹⁰

Understandably, as many individuals needed to get up to speed in this brave new virtual world, there were, and continue to be, technological challenges and mishaps. For example, the video of the Texas lawyer who was displayed as a cat during his court appearance created some welcome levity.¹¹ Even Supreme Court justices encountered problems, with one justice getting kicked off the teleconference when

6. Annie Correal, *College in the Coronavirus Era: Wistful Goodbyes and a Sense of Loss*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/nyregion/cornell-university-coronavirus.html>.

7. For state courts, see *5 of the Most Common Efforts State Courts Are Taking to Combat the Coronavirus*, NAT'L CTR. FOR STATE COURTS, https://www.ncsc.org/__data/assets/image/0017/13058/coronavirus.png (last visited Jan. 14, 2022). For federal courts, see *Court Orders and Updates During COVID-19 Pandemic*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic> (last visited Jan. 14, 2022).

8. Erwin Chemerinsky, *Chemerinsky: SCOTUS Should Embrace Technology Reforms Prompted by Pandemic*, ABA J. (May 28, 2020, 9:07 AM), <https://bit.ly/3iYTAOK>. The Supreme Court resumed in-person hearings in October 2021. See Adam Liptak, *Supreme Court Will Return to Its Courtroom Next Month*, N.Y. TIMES (Sept. 8, 2021), <https://www.nytimes.com/2021/09/08/us/supreme-court-arguments.html>.

9. See *Zoomgov Proceedings*, U.S. TAX COURT, <https://www.ustaxcourt.gov/zoomgov.html> (last visited Jan. 14, 2022) (offering guidance about the Court's virtual proceedings, including video examples).

10. See also BigCountryHompge, *Texas Court Holds First US Jury Trial via Videoconferencing*, YOUTUBE (May 22, 2020), <https://www.youtube.com/watch?v=U6lnI7FZRoc>; Elizabeth G. Thornburg, *Observing Online Courts: Lessons from the Pandemic*, 54 FAM. L.Q. 181, 183 (2020) [hereinafter *Observing Online Courts*].

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

he received another call and another justice forgetting to unmute herself before speaking.¹²

There have also been some pleasant surprises. A number of judges and lawyers touted the benefits of virtual proceedings that allowed the continuation of court operations and legal practice, especially given the context of the pandemic.¹³ Obvious in retrospect, remote proceedings appear to have provided much easier access for many participants. Law professor Elizabeth Thornburg supervised a Texas virtual court observation project in May and June of 2020 and observed:

[W]e idealize the courthouse. We thought clearly the online hearing is going to be a poor substitute for the real courthouse in terms of access. What I didn't think through is there are a number of people, and this was noticeable in the family court hearings, who have a hard time getting to the courthouse It turns out that it's easier for certain people to testify or participate in a hearing on Zoom The judge told me a story about a woman who participated in a hearing wearing her Walmart uniform sitting in the Walmart dressing room on her break. She was able to participate in this hearing that affected her life without losing work. It has increased access for a number of citizens of Texas.¹⁴

Despite the embrace of remote technology for other court proceedings, jury trials seemed to be a sticking point for many courts throughout the country—and for good reason. A typical jury trial includes a group of strangers, recruited randomly from the community, who are asked to sit in close proximity to others to observe a trial in a courtroom, and then are required to deliberate with other jurors in a small, closed room. These features of a typical jury trial offered many challenges for in-person proceedings that had to be conducted observing health protocols, such as social distancing and masking. Was it really safe to conduct jury trials, though, when the science behind COVID-19 transmission was still developing?

Even if jury trials could be conducted safely, would the trial itself be diminished? How could a jury adequately assess the credibility of

12. Robert Barnes, *Supreme Court Takes Modest but Historic Step with Teleconference Hearings*, WASH. POST (May 4, 2020), https://www.washingtonpost.com/politics/courts_law/supreme-court-teleconference-hearings-bookingcom/2020/05/03/f5902bd6-8d76-11ea-a9c0-73b93422d691_story.html; Associated Press, *AP Courtside: Who Flushed? Phone Arguments' Unresolved Issue*, AP NEWS (May 6, 2020), <https://apnews.com/article/us-news-ap-top-news-courts-supreme-courts-virus-outbreak-6ddacce32137c9e3775854b378f3cc60>.

13. Herbert B. Dixon, Jr., *Pandemic Potpourri: The Legal Profession's Rediscovery of Teleconferencing*, 59 ABA JUDGES' J. 37, 37 (2020).

14. D. Todd Smith & Beth Thornburg, *Lessons Learned from Online Court Proceedings*, TEX. APPELLATE LAW PODCAST (Nov. 26, 2020), <https://www.butlersnow.com/2020/11/lessons-learned-from-online-court-proceedings-beth-thornburg/>. See also Thornburg, *Observing Online Courts*, *supra* note 10, at 188.

masked witnesses who were now farther away from the jurors because of social distancing? How could lawyers establish rapport, or get feedback about whether the jury was confused or responding negatively to legal arguments, if most of the jurors' faces were covered up? Despite these concerns, pausing in-person civil jury trials was likely to produce multiple consequences, including substantial case backlogs, pressures to settle cases under unfavorable terms, moving to arbitration, and defaulting to a bench trial.¹⁵

The other option was to move the jury trial online. Before the pandemic, many courts had already experimented with online hearings and other legal proceedings; the pandemic accelerated the practice.¹⁶ But again, jury trials seemed to be a bridge too far. How could lawyers and judges learn what they needed to know about prospective jurors who appeared as a square on a screen to be able to exercise peremptory and for-cause challenges? For that matter, how does one craft a persuasive opening statement to a group of squares on a screen? Or instruct a virtual jury? Even more pressing, how could one ensure an engaged jury and a secure jury deliberation when online jurors would not be meeting in person? When asked to choose between an in-person, socially distant, masked jury trial or a virtual jury trial, the Clifford Symposium sponsor and eminent civil trial attorney Robert Clifford refused to choose between what he saw as two bad alternatives.¹⁷

The vast majority of courts reopened to some degree, responding to the pandemic challenge with different approaches. Some proceeded with in-person jury trials, conducted with enhanced health and safety

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

16. 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, 877–78, 883 (2010) (describing the expansion of videoconferenced hearings in legal proceedings and the Cook County, Illinois, implementation expanding videoconferenced bail hearings); Fredric I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 VAND. J. ENT. & TECH. L. 301, 302–04 (2021) (describing pre-pandemic technological advances in the nation's courtrooms, including remote appearances).

17. Robert A. Clifford, Valerie P. Hans & Richard Jolly, *Jury Trials in the Era of COVID19*, BERKELEY LAW CIVIL JUSTICE RESEARCH INITIATIVE WEBINAR (May 22, 2020, 10:00 AM), <https://civiljusticeinitiative.org/berkeley-boosts-jury-trials-in-the-era-of-covid-19/>.

protocols.¹⁸ Others opted for virtual jury trials, the subject of which is the focus of this Article.¹⁹ Given the Clifford Symposium context, this Article examines civil juries, not criminal juries. Virtual criminal juries raise distinctive constitutional issues that are not pertinent to virtual civil juries.²⁰

Legal scholars Susan Bandes and Neal Feigenson insightfully noted that the pandemic offered an opportunity, albeit one with many more negatives than positives, to identify the key features of courtroom proceedings.²¹ They observed that:

[T]he questions raised by the pandemic affect the whole range of legal proceedings and interactions. . . . These questions are not merely tangential; they implicate many of the core beliefs undergirding the U.S. system of justice, including the whole notion of “a day in court” as the promise of a synchronous, physically situated event.²²

Bandes and Feigenson focused on the essential, necessary features of the courtroom trial and considered how these might be affected and transformed by virtual trials.²³

This Article surveys some key issues and summarizes what courts have done to adapt to the pandemic by instituting virtual jury trials. What has been the experience with virtual jury trials? How have courts, lawyers, and jurors responded to the virtual trial? Have virtual jury trials in civil cases been up to the task of deciding legal disputes

18. The Oregon experience was presented in *How State Courts are Using Innovative Technologies and Responsible Health and Safety Practices to Resume Jury Trials*, NAT'L CTR. FOR STATE COURTS WEBINAR (May 22, 2020), <https://vimeo.com/422780495>. Jury trials proceeded in Oregon with socially distant jurors sitting in the gallery area, not the jury box.

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

20. See discussion *infra* Part II. Nonetheless, a number of courts have reviewed the constitutional issues in virtual criminal proceedings and have concluded that they pass constitutional muster and may proceed. See, e.g., *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 831 (Mass. 2021) (Supreme Judicial Court of Massachusetts finding that virtual suppression hearing did not violate defendant's due process rights); *State v. Vega-Larregui*, 248 A.3d 1224, 1230 (N.J. 2021) (Supreme Court of New Jersey holding that virtual grand jury proceedings during pandemic were consistent with constitutional protections). For an extensive examination of the constitutional and practical issues in remote criminal court proceedings, see STANFORD CRIMINAL JUSTICE CENTER, *VIRTUAL JUSTICE? A NATIONAL STUDY ANALYZING THE TRANSITION TO REMOTE CRIMINAL COURT* 5–12 (2021), <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/08/Virtual-Justice-Final-Aug-2021.pdf> (finding, based on survey data and interviews, that many criminal defense attorneys reported that remote proceedings saved time and costs but hurt client communication and compromised access to justice).

21. Tulante et al., *supra* note 19.

22. Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1280 (2020).

23. *Id.*

fairly, impartially, and in a procedurally just way? Further, this Article raises questions about jury representativeness, the adequacy of virtual jury selection, the quality of decision making, and the public's access to jury trial proceedings. When possible, this Article addresses these questions with some limited but useful information from the Cornell Virtual Jury Experiment. When the pandemic forced our in-person mock jury experiment to close down, my collaborators and I conducted a virtual version of the same experiment via Zoom.²⁴

Writing about virtual jury trials in early 2022, one must recognize that this is a swiftly changing landscape. At the time of this writing, many courts have reopened their courthouses and returned to in-person jury trials with public health protections in place, pausing or suspending jury trials as needed.²⁵ Virtual jury trials may continue to be utilized for only a short period of time, or virtual proceedings may continue into the future. While they are here, let us learn what we can from them.

II. EVALUATING VIRTUAL JURIES: FUNDAMENTAL REQUIREMENTS OF TRIAL BY JURY IN CIVIL CASES

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

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

The Massachusetts Supreme Court's decision in *Vazquez Diaz v. Commonwealth* offers a useful recent example.²⁶ The question posed to the court was whether a proposed suppression hearing to be conducted via Zoom because of the COVID-19 pandemic violated the defendant's federal and state constitutional rights.²⁷ The Massachusetts Supreme Court followed the roadmap laid out by previous federal and state cases, observing that due process was a "flexible"

24. Reed et al., *supra* note 5.

25. *Coronavirus and the Courts*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Jan. 26, 2022) (providing links to state court requirements and practices during the pandemic); see also Michael Finnegan, *Federal Jury Trials Suspended in L.A. Amid Rapid COVID Spread*, L.A. TIMES (Jan. 4, 2022), <https://www.latimes.com/california/story/2022-01-04/federal-jury-trials-suspended-omicron-coronavirus-covid> (describing suspension of jury trials due to COVID-19).

26. See generally *Vazquez Diaz v. Commonwealth*, 167 N.E.3d 822, 828 (Mass. 2021).

27. *Id.* at 827–28.

concept that might vary based on the circumstances.²⁸ Reviewing the specific rights of the criminal defendant, to wit, the right to be present; the right to confront witnesses; the right to a public trial; and the right to effective assistance of counsel, the court concluded that virtual proceedings were not a per se violation of these rights.²⁹ If the trial court's Zoom hearing allows the defendant "to listen to the evidence, adequately observe the witnesses who testify at the hearing, and privately consult with his attorney at any time," then it can "effectively safeguard the defendant's right to be present," the Massachusetts Supreme Court concluded.³⁰ The defendant's right to a public trial was met by the Superior Court's standing order that allowed public access to the virtual proceedings through Zoom or telephone lines.³¹

Civil jury trials do not offer such a straightforward road map. The Seventh Amendment to the U.S. Constitution, which guarantees the right to a civil jury, has not been held to apply to the states, reflecting an apparent reluctance to constitutionalize civil procedure.³² Law professor John Leubsdorf argues that this is one of the reasons that there is a comparative absence of constitutional law doctrine regulating the procedures for civil actions.³³ Instead, according to the Supreme Court, what is preserved is "the substance of the common law right of trial by jury, as distinguished from mere matters of form or procedure."³⁴

28. *Id.*

29. *Id.*

30. *Id.* at 831–32.

31. *Id.* at 840.

32. U.S. Const. amend. VII; *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 418 (1996) ("Seventh Amendment . . . governs proceedings in federal court, but not in state court . . ."); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (observing that "[t]he Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment"). See generally NANCY S. MARDER, *THE JURY PROCESS* 39–45 (2005).

33. John Leubsdorf, *Constitutional Civil Procedure*, 63 *TEX. L. REV.* 579, 579–80 (1984) (questioning why the Supreme Court's constitutional jurisprudence has been so dominant in criminal and administrative procedure but has left civil procedure "relatively untouched"). Of the limited number of decisions regulating state civil procedure, the Supreme Court has held that timely notice and an implied right of defense (by providing an opportunity for a hearing or another safeguard) are required. *Id.* at 582. But, as Leubsdorf notes, "the Court has never extended this right to defend to situations in which the defendant was hampered but not barred or virtually barred from presenting his claim before the court." *Id.* He observes that aside from a few exceptions, "[h]ere the trail ends. The researcher may find some fugitive dicta, but he will discover no further Supreme Court constitutional holdings regulating civil procedure in state courts." *Id.* at 583. Leubsdorf thinks this is a mistake, noting that "fair procedures for the assessment of civil legal claims are special." *Id.* at 587. Leubsdorf argues that "[t]he text of the Constitution, the functions of civil litigation within the constitutional structure, and the robust case law requiring fair procedures in criminal and administrative proceedings all support vigorous judicial protection of civil procedural rights." *Id.*

34. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935).

In evaluating civil proceedings, law professor Kevin Clermont points to the due process clauses of the Fifth and Fourteenth Amendments, noting that:

[P]rocedural due process . . . aims to assure a basically fair procedure when the government acts. For example, to authorize governmental action significantly impairing a person's protected interest, procedural due process normally requires adequate notification and the opportunity to be heard at proceedings before a neutral decisionmaker.³⁵

But what process is due? To assess this, the Supreme Court employs a balancing test, weighing “(1) the value, or importance, of the interest at stake; (2) the probability of an erroneous deprivation if the procedural safeguard in question is not provided; and (3) the cost of, or the burden imposed by, that safeguard.”³⁶ Clermont points out that the U.S. Constitution only requires the minimum, so “the risk of harm would have to considerably exceed the costs before amounting to a constitutional violation, rather than merely bad policy.”³⁷

There is one other key principle for civil jury trials that is worth noting. A civil jury must be drawn from a cross-section of the community. The assumption is that, over time and over juries, a representative pool of community citizens will result in generally representative trial juries.³⁸ Although the Seventh Amendment does not mention a

35. KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* 515 (6th ed. 2021). With respect to due process, Tom Tyler draws on a substantial body of empirical research to identify the critical determinants of perceptions about what constitutes fair procedure. They are: (1) having voice, the opportunity to present one's story; (2) being treated with dignity and respect; (3) the decisionmaker's neutrality and transparency; and (4) the decisionmaker's trustworthiness. TOM TYLER, *WHY PEOPLE OBEY THE LAW* 163–64 (1990). We can consider these features, too, as we evaluate the virtual jury trials.

36. CLERMONT, *supra* note 35, at 514–17.

37. *Id.* Kevin Clermont suggested another way to identify important elements of civil proceedings, which is to look at how the U.S. courts treat foreign judgments. U.S. courts will not recognize or enforce foreign judgments decided in proceedings that depart from key elements of U.S. procedural due process. See CHARLES T. KOTUBY, JR. & LUKE A. SOBOTA, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS* 157–202 (2017) (identifying content of general principles of procedural law); Stacey I. Strong, *General Principles of Procedural Law and Procedural Jus Cogens*, 122 PENN. ST. L. REV. 347, 389–90, 400–03 (2018) (drawing on international litigation to identify content of general principles of procedural law). Kotuby and Sobota identified six principles of procedural fairness: notice and jurisdiction; judicial impartiality and independence; equality and the right to be heard; condemnation of fraud and corruption; allowing the presentation of evidence and identifying the burdens of proof; and following the principle of *res judicata*. KOTUBY & SOBOTA, *supra*, at 157–202. Notice, jurisdiction, and *res judicata* aside, one would want virtual civil jury trial procedures that protect the impartiality and independence of the judge and jury and that allow for both parties a full and equivalent opportunity to present their cases. Might the virtual format interfere with these principles, raising concerns about procedural due process?

38. See generally NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* (2007).

cross-section requirement, in contrast to the Sixth Amendment, which requires a jury drawn from the jurisdiction where the crime has been committed, cases interpreting the Seventh Amendment refer to the cross-section requirement.³⁹ In addition, several other sources support a cross-section requirement in civil trials. The Equal Protection clause of the Fourteenth Amendment prohibits discrimination on the basis of membership in protected classes, such as a juror's race, ethnicity, and gender.⁴⁰ The federal Jury Selection and Service Act of 1968 requires that civil and criminal juries be drawn from a representative cross-section of the community; many states have enacted similar laws.⁴¹ Thus, a question we can ask is whether the transformation of jury trials into a virtual form leads to venires that fail to represent the community. If so, whether proceeding with virtual civil trials, although cognizant of their nonrepresentative potential, would meet the requirement of purposeful discrimination is another matter.

III. REAL-WORLD EXPERIENCES WITH VIRTUAL CIVIL JURIES

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

1. In May 2020, Judge Emily Miskel of the Collin County District Court, Texas, presided over the first fully virtual jury trial in the United States; it was a nonbinding summary jury trial concerning an insurance dispute.⁴² As Judge Miskel explained, "it's a non-binding process, so if the whole thing went down in flames, nobody would be hurt."⁴³ Although the summary jury trial result is confidential, Judge Miskel confirmed that the trial was

39. U.S. Const. amend. VI; U.S. Const. amend. VII. For an example of a case interpreting the Seventh Amendment and referencing the cross-section requirement, see *Colgrove v. Battin*, 413 U.S. 149, 160 n.16 (1973).

40. U.S. Const. amend. XIV.

41. Valerie P. Hans, *Challenges to Achieving Fairness in Civil Jury Selection* 3 (Cornell Legal Studies, Research Paper No. 21-23, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3899957; NANCY GERTNER, JUDITH H. MIZNER & JOSHUA DUBIN, *THE LAW OF JURIES* 35 (11th ed. 2020). The Jury Selection and Service Act of 1968 was codified as 28 U.S.C.A. §§ 1861–1878 (1988).

42. Carl Smith, *Virtual Justice: A Texas County Forges Path During Crisis*, GOVERNING, a publication of GOV'T TECH. (Sept. 18, 2020), <https://www.govtech.com/public-safety/virtual-justice-a-texas-county-forges-path-during-crisis.html>. See also BigCountryHomepage, *supra* note 10.

43. Smith, *supra* note 42.

- “completed successfully.”⁴⁴ Texas has continued to expand its virtual courtroom; an upbeat overview of its virtual jury trials may be found on the Texas Court’s YouTube channel.⁴⁵
2. In June 2020, the Online Courtroom Project conducted an online demonstration project of a virtual civil jury trial of a slip and fall case (Online Jury Trials).⁴⁶ In a two-day trial, all conducted remotely, lawyers undertook virtual voir dire and jury selection (done in conjunction with an extensive pretrial juror questionnaire), followed by opening statements, the presentation of evidence, closing arguments, and judicial instructions.⁴⁷ Both a virtual jury and a shadow jury listened to the evidence and deliberated.⁴⁸ The virtual jury did not reach a verdict in the time allotted; the shadow jury quickly reached a unanimous verdict.⁴⁹
 3. Also in June 2020, the Civil Jury Project at New York University (NYU) School of Law conducted a mock Zoom jury trial.⁵⁰ The aim was to demonstrate the conduct of jury trials via Zoom, to identify parts that succeeded or fell short, and to obtain feedback from participants.⁵¹ The mock jurors were NYU law students.⁵² The trial included all phases, starting with jury selection and ending with a virtual deliberation.⁵³ On the whole, participants gave positive feedback about the experience but had a variety of specific suggestions for improvement, including giving jurors an opportunity to get to know one another prior to deliberation.⁵⁴
 4. The nation’s first binding virtual jury trial appears to have been the July 2020 trial of *Ocampo v. AAMCO Transmissions, Inc.*,

44. *Id.*

45. See Texas Courts, *Virtual Jury Trials During COVID-19 Pandemic*, YouTube (Sept. 10, 2020), <https://www.youtube.com/watch?v=fddHfJHR2SY>.

46. ONLINE COURTROOM PROJECT ADVISORY BOARD, *Online Jury Trials: Summary and Recommendations 22* (2020), https://6a1ab614-8a16-459a-b02b-6cb58b4e4148.filesusr.com/ugd/850355_1977b7d61f524fa3b67ea7e992168253.pdf?index=true [hereinafter ONLINE JURY TRIALS].

47. *Id.*

48. *Id.*

49. *Id.*

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

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

- in the Superior Court of Alameda County, California.⁵⁵ The defendant objected and appealed unsuccessfully.⁵⁶ The asbestos trial proceeded via Zoom and resulted in a defense verdict.⁵⁷
5. In August of 2020, Florida held its first binding virtual civil jury trial in the case of *Griffin v. Albanese Enterprise, Inc.*, as part of a pilot program (Remote Civil Jury Trial Pilot Project) launched that first summer of the pandemic.⁵⁸ The jury decided only damages in a case of injuries suffered by the plaintiff at the hands of nightclub bouncers.⁵⁹ The jury awarded more than the plaintiff's attorney had requested during closing arguments.⁶⁰ A second jury trial, *Mathis v. Argyros*, a breach of contract case that resolved a fee dispute between an attorney and a client, completed the Remote Civil Jury Trial Pilot Project.⁶¹
 6. In September of 2020, the U.S. District Court for the Western District of Washington conducted a virtual civil jury trial in the case of *Dallo v. Holland America Line, N.V., LLC*.⁶² The case involved a woman who was knocked down by a crew member, suffering a brain injury.⁶³ The judge said that despite a few technical problems, the case proceeded well.⁶⁴ "We lost a couple of

55. *Ocampo v. AAMCO Transmissions, Inc.*, No. RG19041182, 2020 Cal. Super. LEXIS 8858, at *1 (May 15, 2020).

56. *Id.*

57. *Id.* at *14–15.

58. See Jury Verdict, *Griffin v. Albanese Enterprise, Inc.*, No. 16-2019-CA-1555 (Fla. Cir. Ct., Aug. 10, 2020); *Florida Remote Civil Jury Trial Pilot Program*, COURTROOM VIEW NETWORK, <https://pages.cvn.com/duval-county-florida-remote-trial-program> (last visited Jan. 14, 2022).

59. *Id.*

60. *Id.* See also Jim Ash, *The Key to Pulling off the Fourth Circuit's Virtual Jury Trial was the Court Tech Officers Who Served as "Remote Bailiffs,"* THE FLA. BAR (Aug. 13, 2020), <https://www.floridabar.org/the-florida-bar-news/the-key-to-pulling-off-the-fourth-circuits-virtual-jury-trial-was-the-court-tech-officers-who-served-as-remote-bailiffs/>. The binding jury trials were preceded by mock jury trials to gather information that informed the structure and procedure of the binding jury trials. See BRUCE ANDERSON, REMOTE CIVIL JURY TRIAL PILOT PROJECT, FOURTH JUDICIAL CIRCUIT, A REPORT TO CHIEF JUSTICE CHARLES T. CANADY FLORIDA SUPREME COURT 5–18 (2020), <https://www.courts.wa.gov/newsinfo/content/Reference%20Materials/Remote%20Civil%20Jury%20Trial%20Pilot%20Project%20Fourth%20Judicial%20Circuit.pdf> [hereinafter REMOTE CIVIL JURY TRIAL PILOT PROJECT] (link goes to page with links to project report and links to the video streams of the two virtual jury trials conducted as part of the pilot project).

61. Trial Court Order, *Mathis v. Argyros*, No. 16-2019-CA-1668 (Fla. Cir. Ct., Sept. 29, 2020); *Mathis vs. Argyros Remote Trial Stream*, COURTROOM VIEW NETWORK, <https://pages.cvn.com/mathis-vs-argyros-remote-trial-stream> (last visited Jan. 14, 2022).

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

63. *Id.*

64. *Id.*

jurors for a couple of minutes a couple of different times, but, by and large, I thought it was as well tried a case as we'd have in court.”⁶⁵ The (winning) plaintiff's attorney said, “[t]he jury was also terrific. They were quickly able to learn the special Zoom program used by the Court and to focus on the evidence.”⁶⁶ He acknowledged the occasional technical difficulties and also thought it was problematic that jurors did not have “an opportunity to meet or talk to other jurors prior to deliberations.”⁶⁷

7. In a summary of early experimentation with virtual juries, Washington State's King County Superior Court must be mentioned. King County has been perhaps the most prolific court in the nation in holding virtual jury trials.⁶⁸ Judge Sean O'Donnell reported that as of March 2021, the King County Superior Court had conducted more than 300 virtual civil trials, including a substantial number of civil jury trials.⁶⁹

Following these early experiences with virtual civil jury trials, other federal and state courts around the country have planned, and in some cases conducted, their own virtual civil jury trials.⁷⁰

IV. THE SELECTION OF VIRTUAL JURIES

A. *Background: Concerns about COVID-19 and Technology*

As noted above, the civil jury must be drawn from a representative cross-section of the community. From the start of the pandemic, commentators worried about the ability of courts to assemble representative juries under these difficult conditions. A national poll of U.S. registered voters in June 2020 underscored some of the new challenges the pandemic created for putting together representative jury panels.⁷¹ The National Center for State Courts (NCSC) commissioned the poll, which inquired into participants' views about serving on a

65. *Id.*

66. *Id.*

67. *Id.*

68. *The Online Courtroom Now and Post-Pandemic: Skills and Tools for Remote Advocacy*, Webinar, NITA & ONLINE COURTROOM PROJECT (Apr. 23, 2021), <https://www.nita.org/webcasts/s71LEC136> [hereinafter *The Online Courtroom Now and Post-Pandemic*].

69. Matt Markovich, *King County Court Shifts to Virtual Trials, Potentially Changing Future of Courtrooms*, KOMO NEWS (Mar. 4, 2021), <https://komonews.com/news/local/king-county-superior-court-shifts-to-virtual-trials-chips-away-at-massive-case-backlog>.

70. Tulante et al., *supra* note 19.

71. *See State of the State Courts in A Post Pandemic World*, NAT'L CTR. FOR STATE COURTS WEBINAR (June 18, 2020), <https://vimeo.com/430765431> [hereinafter *State of the State Courts in A Post Pandemic World*]. The link to slides reporting the poll results: <https://nationalcenterforstatecourts.app.box.com/s/n7w8zu89tbayfjr0qz6h7mn6nrg0x6qh/file/680542851103> [hereinafter *Poll Results*].

jury during the pandemic.⁷² More than half of those surveyed mentioned one or more obstacles to reporting for jury duty, including childcare, elder care, or health conditions.⁷³ The respondents' gender and age were linked to the likelihood of experiencing obstacles: 41% of men under the age of fifty and 52% of women in the same age range reported one of these obstacles.⁷⁴ The obstacles were greater for older men and women, with 57% of men aged fifty or above and 65% of women in the same age range reporting obstacles.⁷⁵ Interestingly, when survey participants were asked whether they felt more comfortable with in-person or remote jury service, 44% said remote, 23% said in-person, and 32% replied that it made no difference.⁷⁶

A survey of eighty-three judicial advisors to the NYU School of Law Civil Jury Project found that all of the judges agreed when asked whether they had noted an increase in requests to be excused for hardships by potential jurors.⁷⁷ Indeed, and not surprisingly, the vast majority also said that they have been more forgiving in excusing jurors during the pandemic.⁷⁸

Although it spares citizens the close contact of in-person service, virtual jury participation requires access to technology and sufficient ability to use it competently. The NCSC poll, which recruited participants both online and via phone, discovered that 85% of the respondents subscribed to the internet at their homes, and 95% of respondents had a cell phone (with 86% having a smartphone).⁷⁹ Only 2% of the respondents said that they had no home internet and no cell phone.⁸⁰ In addition, the poll showed that respondents' age was related to their access, with 70% of those sixty-five and older saying they had internet access at home; 64% of these older respondents had smartphones.⁸¹ Note that they were recruited online and by phone;

72. *See id.*

73. *Poll Results, supra* note 71, at Slide 6.

74. *See* GBAO, *JURY TRIALS IN A (POST) PANDEMIC WORLD – NATIONAL SURVEY ANALYSIS* (2020), https://www.ncsc.org/__data/assets/pdf_file/0006/41001/NCSC-Juries-Post-Pandemic-World-Survey-Analysis.pdf [hereinafter *JURY TRIALS IN A (POST) PANDEMIC WORLD*].

75. *Id.* at 2.

76. *Poll Results, supra* note 71, Slide 13.

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

78. *Id.*

79. *JURY TRIALS IN A (POST) PANDEMIC WORLD, supra* note 74, at 2.

80. *Id.* at 2.

81. *Id.* at 3.

these figures could underestimate the percentage of U.S. jury-eligible citizens in different age groups without internet or cellphone access.

Regular usage of videoconferencing services may lead to greater competence and greater comfort. Here as well, the NCSC poll revealed substantial age differences. As of June 2020, about half of the total respondents (52%), but just 30% of the senior cohort (age sixty-five and older), had regularly used videoconferencing services offered by Zoom, WebEx, Skype, or Google.⁸² Non-college-educated men reported low levels of regular use (31%), in contrast to substantially higher levels for college-educated women (73%), women under fifty (72%), and those under age thirty (69%).⁸³

The NCSC poll is a snapshot taken in June of 2020, a relatively early point in the pandemic. With the widespread availability of vaccination for adults in the United States in 2021, the impact of COVID-19 on individuals' health shifted and may shift again in the months ahead. As of this writing, the majority of people in older age groups are vaccinated,⁸⁴ and as a consequence, their willingness to serve and their relative preference for virtual versus in-person jury service may have changed.

States that have conducted virtual jury trials invariably include alternative options for those without access to reliable internet or without the necessary computer technology, including participating at alternate locations such as courthouse kiosks or library carrels, and loaning tablets or laptop computers to jurors who do not have the devices.⁸⁵ Jurisdictions have also routinely conducted training and “tech checks” for jurors (and for the parties) prior to virtual jury service. For example, the Remote Civil Jury Trial Pilot Project in the Fourth Judicial District of Florida sent prospective jurors an email containing a link to the jury selection questionnaire and Zoom information that they would need to participate in the remote jury selection.⁸⁶ The juror questionnaire included questions about the prospective jurors' technology access.⁸⁷ Subsequent emails contained detailed information about installing and using Zoom, including the

82. *Id.*

83. *Id.*

84. The Centers for Disease Control and Prevention track COVID-19 vaccinations by demographic characteristics. See *Demographic Characteristics of People Receiving COVID-19 Vaccinations in the United States*, CDC, <https://covid.cdc.gov/covid-data-tracker/#vaccination-demographic> (last visited Jan. 14, 2022).

85. The Florida, Texas, Washington State, and California virtual jury trials all offered alternatives to potential jurors who did not have access to the necessary technology.

86. REMOTE CIVIL JURY TRIAL PILOT PROJECT, *supra* note 60, at xvii.

87. *Id.*

specific techniques that would be necessary to participate as a juror.⁸⁸ During the pilot jury trials, a group of “remote bailiffs” were available to troubleshoot problems that jurors encountered.⁸⁹

B. The (Limited) Evidence Thus Far on the Representativeness of Virtual Juries

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

We do not have a lot of systematic information about the representativeness of pandemic-era jury pools, whether in-person or virtual service is anticipated. However, judges have reported encouraging observations and have shared data indicating that at least some jurisdictions have seen increases in their responses to jury summonses.⁹⁰ King County Court Presiding Judge Rogers was quoted in March of 2021 saying that “the jury pool is far more diverse than it used to be and that’s a really good thing.”⁹¹ His colleague, Superior Court Judge Matthew Williams, agreed that the jury pools showed “increased diversity.”⁹² Judge Emily Miskel of Collin County, Texas, reported that the local response to jury summons was dramatically higher: “[b]efore the COVID-19 pandemic, the yield on jury summons was 45 percent for in-person trials. With virtual juries, 86 percent of persons summoned have indicated an ability to serve.”⁹³ In Florida, 150 summonses were sent to recruit jurors for the first virtual (non-pilot) civil jury trial, and 87 responded (a 58% response rate, compared to the typical 50% response rate).⁹⁴ Florida Judge Jennifer Bailey remarked in a webinar on remote advocacy that the jury venires were “at least as diverse as pre-pandemic, or even more.”⁹⁵

The agreement among judges that they are observing similar or greater diversity, and the higher response rates to jury summonses,

88. *Id.* at 58–64 (describing email communications and instructions sent to prospective jurors and trial jurors).

89. Ash, *supra* note 60.

90. See Tulante et al., *supra* note 19.

91. Markovich, *supra* note 69.

92. *The Online Courtroom Now and Post-Pandemic*, *supra* note 68.

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

94. Ash, *supra* note 60.

95. *The Online Courtroom Now and Post-Pandemic*, *supra* note 68.

are something of a surprise given the many difficulties and disruptions posed by the pandemic. One reason might be simply that during the early period of the pandemic, more people were at home to receive their jury summons. But the poll numbers also suggest that a significant number of citizens prefer remote jury service (at least during a pandemic) and anticipate easier access and less disruption than in-person service.

Comments that I gathered during the Cornell Virtual Jury Experiment reinforce the value of the ease with which people are able to participate in online proceedings.⁹⁶ Out of 189 mock jurors, 27 had also served previously as sworn jurors.⁹⁷ My collaborators and I asked them to comment on the advantages and disadvantages of the virtual jury compared to their real-world jury experience.⁹⁸ Table 1 shows that a common response was noting the ease of participation: “can continue with trial and keep jurors safe (due to C-19)”; and “advantage in your own home.”⁹⁹ This benefit was particularly important to one of our jurors, who wrote: “[a]s a disabled person being able to attend to my needs while also being able to attend this event was a huge advantage. I truly hope we as a society start making more use of the advances technology give[s] us where accessibility is concerned.”¹⁰⁰

The Remote Civil Jury Trial Pilot Project surveyed prospective jurors who participated in remote jury selection. The vast majority (80%) expressed a preference for remote jury selection rather than in-person jury selection.¹⁰¹ They described it as efficient and effective.¹⁰² Circuit Court Judge Bruce Anderson, who led the Remote Civil Jury Trial Pilot Project, noted that:

Based upon the feedback of the participating stakeholders, and our experience conducting this pilot program, it is my opinion that a hybrid process consisting of a remote jury selection and an in-person jury trial would be a workable solution that balances the competing concerns of public health and the need to continue the civil justice system.¹⁰³

A final note on virtual juries and representativeness: Even if civil litigants might be able to demonstrate that pandemic-era virtual jury

96. Reed et al., *supra* note 5.

97. *Id.*

98. *Id.*

99. *Infra* Table 1.

100. *Id.*

101. REMOTE CIVIL JURY TRIAL PILOT PROJECT, *supra* note 60, at 106.

102. *Id.*

103. *Id.* at xviii.

selection resulted in a dramatically unrepresentative jury venire, whether a successful challenge could be mounted is doubtful, considering the balancing test that courts would use. Even before the pandemic, challenges to the venire in civil cases were infrequent and victories were even rarer.¹⁰⁴ Litigants challenging the representativeness of the venire in a civil case must show purposeful discrimination.¹⁰⁵ Yet they rarely have knowledge of legal actors' motives, and many lack access to basic information about the demographic characteristics of the jury pool that would be necessary to mount a challenge. Federal courts acknowledge litigants' rights to review jury selection records, but not all state courts do so.¹⁰⁶ Combined with these inherent difficulties, a challenge on the grounds of decreased representativeness of jury pools during the pandemic would face a high bar.¹⁰⁷

C. *Efficacy of Virtual Voir Dire*

Recognizing that virtual voir dire during jury selection on Zoom might not allow attorneys the same opportunity to explore prospective jurors' attitudes and biases, a number of judges appear to be more inclined to allow extensive juror questionnaires that include a range of case-relevant questions.¹⁰⁸ Such questionnaires can be extremely useful. Information about prospective jurors' backgrounds can be obtained outside the online format, in advance, and as a result can make the online questioning more specifically targeted. Expanded questioning about case-relevant backgrounds, attitudes, and experiences has a better chance of uncovering biases that will influence case outcomes.¹⁰⁹ Washington state court Judge Williams, for example, re-

104. Hans, *Challenges to Achieving Fairness in Civil Jury Selection*, *supra* note 41, at 24–25 (documenting apparently rare use of *Batson* challenges in civil jury trials and suggesting reasons).

105. Nina W. Chernoff, *No Records, No Rights: Discovery and the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719, 1750, 1753 (2016).

106. *Id.* See also Nina W. Chernoff & Joseph B. Kadane, *Preempting Jury Challenges: Strategies for Courts and Jury System Administrators*, 33 JUST. SYS. J. 47, 47 (2012).

107. Michael Pressman, *The Challenge of Achieving a Representative Cross-Section of the Community for Jury Trials During the Pandemic*, CIVIL JURY PROJECT (no date), <https://civiljuryproject.law.nyu.edu/3200-2/>. A challenge might have a greater likelihood of success in criminal trials because of the standard used. See Oscar Bobrow & Lois Heaney, *A Response to Michael Pressman's "The Challenge of Achieving a Representative Cross-Section of the Community during the Pandemic,"* CIVIL JURY PROJECT (no date), <https://civiljuryproject.law.nyu.edu/a-response-to-michael-pressmans-the-challenge-of-achieving-a-representative-cross-section-of-the-community-for-jury-trials-during-the-pandemic/>.

108. *The Online Courtroom Now and Post-Pandemic*, *supra* note 68.

109. See Jessica M. Salerno, John C. Campbell, Hannah J. Phalen, Samantha R. Bean, Valerie P. Hans, Daphna Spivack & Lee Ross, *The Impact of Minimal Versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases*, 45 LAW & HUM. BEHAV. 336, 347–48 (2021) (showing that extended voir dire questions predicted biases that affected case

ported that in his jurisdiction, a pretrial juror questionnaire is sent to all jurors online, with alternatives for people without the appropriate technology, and may include case-specific questions. In his view, this permits lawyers to have more focused and effective voir dire.¹¹⁰

The Online Jury Trials demonstration reported that attorneys had a favorable reaction to the online questionnaires that prospective jurors completed prior to voir dire; the attorneys said that the information allowed them to prepare more completely.¹¹¹ The attorneys reported that they “were able to adequately view jurors and their responses in order to make cause and peremptory challenges.”¹¹² Interestingly, both the judge and the attorneys thought that “the jurors were more candid and forthright in their responses because they were in the comfort of their own homes, and that a view into a juror’s home gave attorneys additional insights into the juror.”¹¹³ So, the demonstration project pointed to a more efficient and effective voir dire, at least one that was conducted in conjunction with the use of an extensive pretrial questionnaire.¹¹⁴

V. QUALITY OF DECISION MAKING

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

Two such experimental studies, the Cornell Virtual Jury Experiment¹¹⁵ and the other project conducted by a research team led by social and behavioral sciences professor Jessica Salerno,¹¹⁶ are under-

outcomes, whereas demographic variables and minimal questions did not); Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1196 (2003) (arguing for the use of juror questionnaires and extended voir dire questioning as more effective ways to identify juror biases).

110. *The Online Courtroom Now and Post-Pandemic*, *supra* note 68.

111. ONLINE JURY TRIALS, *supra* note 46, at 8.

112. *Id.*

113. *Id.*

114. *Id.*

115. Reed et al., *supra* note 5.

116. Jessica M. Salerno, Hannah J. Phalen, Janice Nadler, Nicholas J. Schweitzer & Susan A. Bandes, *The Impact of Gruesome Photographs and Jury Instructions on Deliberating Jurors'*

way at the moment. Both comparative studies were the product of the pandemic, which caused both of these in-person research studies to come to a halt. In our research project, the same videotaped trial presented to mock jurors we recruited to participate in-person was also shown to other mock jurors who participated via Zoom.¹¹⁷ Both of these studies are ongoing, so no final results from these two experimental studies are available yet. Although the two experiments will not answer all the pressing questions about the experience and impact of virtual juries, they do offer the potential of some controlled comparisons.¹¹⁸ In the meantime, it is worth examining the real-world experiences that courts have had with virtual juries.

VI. JURORS' REACTIONS TO VIRTUAL TRIAL WITNESSES AND EVIDENCE

Referring back to the principles for evaluating the adequacy of civil jury trials, one sees the importance of having virtual civil jury trial procedures that allow litigants on both sides an equal and full opportunity to present their cases, and that ensure the impartiality and independence of the jury. Considering the adequacy of virtual procedures for litigants' presentation of their cases, Bandes and Feigenson have identified a number of potential concerns about how virtual jury trials might affect the jurors' comprehension and interpretation of witness evidence and responses to the parties. One might imagine both positive and negative effects. The virtual world offers a much closer view of people's faces and upper bodies than would be the case in a typical courtroom. But being able to observe an individual witness in the full context of the courtroom environment could also be useful.¹¹⁹ Although, as one judge quipped, "[i]t's rare to make a credibility judgment from the waist down!"¹²⁰

A virtual trial could undermine jurors' ability to assess witness demeanor.¹²¹ Bandes and Feigenson describe the "tenacious and deeply held" belief in the power of a person's demeanor to offer clues about

Emotions and Verdicts (ongoing research project, Arizona State University, 2021). Perhaps more such studies will come to light.

117. Reed et al., *supra* note 5.

118. For example, in the Cornell Virtual Jury Experiment, a videotaped trial was presented to both in-person and virtual mock jurors, so important questions about how jurors interpret live versus videotaped testimony cannot be answered. However, the project will be able to compare in-person versus virtual mock jury deliberation. Reed et al., *supra* note 5.

119. See Mary R. Rose, Shari Seidman Diamond & Kimberly Baker, *Goffman on the Jury: Real Jurors' Attention to the "Offstage" of Trial*, 34 *LAW & HUM. BEHAV.* 310, 321 (2010).

120. Judge Matthew Williams, remarks in *The Online Courtroom Now and Post-Pandemic*, *supra* note 68.

121. Bandes & Feigenson, *supra* note 22, at 1284.

their veracity.¹²² But they note that this strong belief in the insights to be gained from observing and assessing demeanor is “heavily reliant on dubious folk knowledge.”¹²³ Social science research on demeanor has largely debunked its value as a reliable cue for veracity.¹²⁴ Yet, soundly or not, many of us will rely on nonverbal cues to make inferences about credibility.

One feature of videoconferencing platforms is that most people have reduced eye contact. Instead of looking at the camera, they gaze at the other individuals pictured on the screen. Additionally, connectivity problems or the awkwardness of speaking on Zoom might lead to delays in a witness’s response to an attorney’s questions. Averting one’s gaze and hesitation in responding have long been perceived as indicia of lying.¹²⁵ Videoconference participants may also experience greater cognitive load, interfering with their ability to present themselves effectively. Thus, compared to an in-person presentation, virtual presentation of a witness’s testimony might lead to reduced credibility.

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

The report about the first Florida pilot jury trial reached a positive conclusion about juror attention: “Overall, the jurors were attentive and focused on the case. They seemed to be as attentive as an in-person trial, perhaps more so.”¹²⁶ When potential juror inattention (a juror appeared to be typing something and watching another screen) came to the attention of the court, the trial judge was notified and repeated instructions about paying attention and refraining from the

122. *Id.*

123. *Id.*

124. *See id.* at 1284–92 (for discussion of social science research on the efficacy of relying on human demeanor to gauge truthfulness). *See generally* Jeremy Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157 (1993).

125. Gordon D. Hemsley & Anthony N. Doob, *The Effect of Looking Behavior on Perceptions of a Communicator’s Credibility*, 8 J. APPLIED SOC. PSYCHOL. 136, 138, 141–42 (1978) (eye gaze associated with decreased perception of truth telling).

126. REMOTE CIVIL JURY TRIAL PILOT PROJECT, *supra* note 60, at 26.

use of other devices during the trial.¹²⁷ The juror was reportedly “attentive thereafter.”¹²⁸

Jurors in the Florida pilot project were surveyed following their virtual jury service. Overall, they were quite positive about the experience, with seven of eight jurors strongly agreeing that they were able to clearly hear the judge, attorneys, and witnesses.¹²⁹ A follow-up survey asked jurors whether they agreed or disagreed with the statement: “I would prefer to serve on another remote civil jury trial rather than an in-person jury trial.”¹³⁰ Of the nineteen jurors who responded, ten strongly agreed, three strongly disagreed, and the remainder were neutral.¹³¹

The Online Jury Trials’ demonstration mock jury discovered that the jurors had little difficulty viewing witness testimony and exhibits. Interestingly, “[s]ome jurors who had sat on previous juries felt it was easier to judge witness credibility because they had a closer view of the witness rather than looking across a courtroom.”¹³² Likewise, some mock jurors who had served in person also reported that they could see the documents more clearly in the virtual demonstration trial and they could see each other.¹³³ As one juror remarked, “[i]t was really nice being able to see the other jurors face-to-face. Usually, we would be sitting side-by-side, not able to look at each other.”¹³⁴

The twenty-seven mock virtual jurors in the Cornell Virtual Jury Experiment made diverse comments about how the virtual jury trial experience compared to their real-world service in a jury trial.¹³⁵ Many saw no difference in the virtual versus in-person jury experiences, as shown in Table 1.¹³⁶ However, several who saw a difference tended to mention the value of in-person trials: “[t]here’s less of that human connection” and “[b]ody language was not as good and we had less invested in the outcome. Sitting in the same room as the people in the trial gave me more of a stake in how they were ultimately treated.”¹³⁷ One juror worried that “[v]irtual could give a false sense

127. *Id.*

128. *Id.*

129. *Id.* at 107. Full results were available from the first trial conducted during the pilot project, but the report presented only limited results from the second trial (they were not yet available).

130. *Id.* at 111.

131. *Id.*

132. ONLINE JURY TRIALS, *supra* note 46, at 8.

133. *Id.*

134. *Id.* at 40.

135. Reed et al., *supra* note 5.

136. *Infra* Table 1.

137. *Id.*

of confidence compared to face-to-face court proceedings, from witnesses, to judge, to jury deliberation.”¹³⁸

Although the reports from these field studies and demonstration projects are on the whole positive, they all mention without exception that they experienced technical problems.¹³⁹ For example, in the Alameda County Superior Court jury trial, Judge Jo-Lynne Lee observed, “[o]ur experience was that the jurors were, for the most part, very attentive” but jurors occasionally missed testimony when they lost their internet connection.¹⁴⁰ When that happened, the trial was paused until the juror was able to reconnect, and the court reporter read back the missed testimony.¹⁴¹

The technical problems were usually able to be resolved with the intervention of the judge or technical support staff, such as the “remote bailiffs” in the Remote Civil Jury Trial Pilot Project.¹⁴² How interruptions to the flow of the trial due to these technical problems affect the processing and interpretation of evidence is not yet known. Research does suggest that when attorneys experience technical problems in the courtroom, it negatively affects jurors’ perceptions of the attorneys’ competence.¹⁴³

VII. VIRTUAL JURY DELIBERATIONS

Jury deliberation is a crucial aspect of trial by jury. Although courts had some pre-pandemic experience with videotaped and remote trial testimony, there was no precedent for virtual jury deliberation. The impact on the jury starts even before deliberation. The virtual jurors meet on Zoom, and do not have the extensive social interaction during a trial that is characteristic of in-person jury trials. As one of our virtual mock jurors noted: “I think there tended to be a little more socialization with an in-person jury (say, during breaks or lunch).”¹⁴⁴ The lack of prior social interaction might cut different ways. It might increase deliberation time as jurors start a discussion by exchanging personal information. It might decrease individual jurors’ willingness to compromise on a verdict. Or, as one of our virtual mock jurors

138. *Id.*

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

140. *Id.*

141. *Id.*

142. Ash, *supra* note 60.

143. Research studies have linked lawyer favorability ratings to proficiency with technology.

144. *Infra* Table 1.

noted, “jurors may speak up more freely given the impersonal nature of virtual interaction.”¹⁴⁵

The Online Jury Trials’ demonstration mock jury also concluded that the participants were able to deliberate successfully.¹⁴⁶ They reported that “[j]urors had a vigorous discussion, with most of the jurors speaking up. Jurors felt comfortable talking with one another, and they indicated in debriefing discussions that they found it easy to use Zoom and the technology did not hinder their connection.”¹⁴⁷ Most jurors (90%) reported that they felt well connected to the other juror participants; for example, as one explained, seeing one another face-to-face generated a “newfound level of connection that you wouldn’t find in a brick and mortar courtroom.”¹⁴⁸

The twenty-seven virtual mock jurors who had also served on in-person juries had mixed views about the virtual jury deliberation experience. Table 1 shows that many saw little difference.¹⁴⁹ Of those who reported a difference, they went both ways. Several were quite positive, noting that “it was easier in a virtual environment to see who was contributing and not contributing. It was nice to be able to see everyone at once!” and “I feel that over ZOOM we are a closer group. Closer physically. Faces up close and personal.”¹⁵⁰ Others pointed to disadvantages over Zoom: “delays and taking turns were more awkward [and] people can walk away or be less adherent to participating (avoiding talking, being off screen etc.)”¹⁵¹

In the process of analyzing results from the Cornell Virtual Jury Experiment, one difference we will examine is whether there are differences in simultaneous talking and fewer interruptions in the virtual as opposed to in-person mock jury deliberations.¹⁵² The mock jurors expressed divergent perceptions (see Table 1): “People will not interrupt each other (as often) when seated in the same room,” yet also

145. *Id.*

146. See ONLINE JURY TRIALS, *supra* note 46, at 55.

147. *Id.* at 18.

148. *Id.* at 44, 55. However, the report also noted that one juror participant fell asleep, and there was no way to rouse him. *Id.* at 18. Of course, sleeping jurors are not limited to Zoom, but how to wake a sleeping juror up remains a challenge. Ryan J. Winter & Jon Carbone, *Judicial Notebook: Would Somebody Please Wake Up Juror Number Five?*, 41(8) APA MONITOR 6, 26 (Sept. 2010), <https://www.apa.org/monitor/2010/09/jn>.

149. *Infra* Table 1.

150. *Id.*

151. *Id.*

152. In face-to-face deliberations, it is very common for people to interrupt and to talk over one another, yet also attend to nonverbal cues that help with turn-taking. Interruptions may be more visible on Zoom.

“Virtual there’s less interrupting each other; I have found people take more time listening to each other in the virtual.”¹⁵³

VIII. PUBLIC ACCESS

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

One important issue that Bandes and Feigenson raise is that a virtual courtroom experience is not identical to being in the physical courtroom.¹⁵⁴ The majesty and grandeur of many courtrooms can convey the importance and seriousness of the occasion to those who are physically present. And there is the absence of “offstage” behavior that Professor Mary Rose and her colleagues mention.¹⁵⁵ All of that is absent from a virtual proceeding.

In some instances, public access to courtroom proceedings, including jury trials, has expanded compared to pre-pandemic levels.¹⁵⁶ In addition to the telephonic arguments of the U.S. Supreme Court that are now available, the U.S. Tax Court live streams trial sessions, allowing anyone to listen to the live audio of the proceedings.¹⁵⁷ As I noted above, the Texas courts also livestreamed many of their court proceedings.

The Remote Civil Jury Trial Pilot Project arranged for the jury trials to be broadcast in their entirety over the Courtroom View Network, with the provision that the jurors’ faces would be blurred in accordance with a local administrative order that prohibits the recording or photographing of jurors.¹⁵⁸ Thus, even though the media and members of the public were not able to enter the courthouse, the broadcasting of the trials offered public access to the jury trials.

153. *Id.*

154. Bandes & Feigenson, *supra* note 22, at 1285.

155. Rose et al., *supra* note 119, at 310.

156. The proceedings are available through live streaming at *Public Access to Remote Proceedings*, US TAX COURT, https://www.ustaxcourt.gov/remote_proceedings.html (last visited Jan. 14, 2022). The audio proceedings are not archived, however. The Texas courts have taken the same approach to live streaming, and they remove the recording to the legal proceeding once it has concluded.

157. *Id.*

158. REMOTE CIVIL JURY TRIAL PILOT PROJECT, *supra* note 60, at 78–79.

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

CONCLUSION

The phenomenon of virtual juries has emerged in an unusual moment. Courts have struggled mightily to adapt the civil jury, the seemingly most in-person of all legal proceedings, to the demands of the pandemic. Thanks to the energy and diligence of courts, judges, lawyers, trial consultants, and most importantly, jurors, prospective jurors have been questioned and selected, virtual jury trials have proceeded, and virtual jury deliberations have led to binding verdicts in civil cases.

Data suggest that remote videoconferencing and audioconferencing have increased litigants' access to the courts.¹⁵⁹ The decisions of a number of courts to live stream or record proceedings, including jury trials, have increased access to court proceedings by members of the public as well. Many of the jurors who participated in pilot or early virtual jury trials also evaluated the experience positively.¹⁶⁰

Judges have also been generally positive, sometimes to their own surprise. Judge Anderson, who led the Remote Civil Jury Trial Pilot Project, observed that although he was initially excited about presiding over a virtual jury trial, his enthusiasm was "tempered by visions of a remote courtroom experience that could resemble binge-watching the introduction of Hollywood Squares and The Brady Bunch and [his] fears that jury selection could be reduced to a 'Zoom Happy Hour.'"¹⁶¹ Nonetheless, he concluded that the Remote Civil Jury Trial Pilot Project was a success. As noted earlier, judges in Texas and Washington State who have presided over virtual jury trials have also expressed enthusiasm and largely positive evaluations of the experience.¹⁶² Judge Pamela Gates and her collaborators who participated in a task force to examine the operation of virtual juries reflected on their observations: "When we started this process, we asked whether

159. *See supra* Part VIII.

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

161. REMOTE CIVIL JURY TRIAL PILOT PROJECT, *supra* note 60, at xii.

162. *Id.*

we should conduct virtual jury trials. The answer is yes, particularly in civil cases and given the building backlog of cases.”¹⁶³

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

Even so, the introduction of virtual jury trials in response to the pandemic has introduced a new approach to civic participation in legal decision making. There is much to learn about whether and how virtual civil jury trials differ from their in-person equivalents. I have discussed the representativeness of virtual juries, the impact on evidence interpretation and decision making, the nature of virtual jury deliberation, and public access. Trial by jury also has educational and civic engagement effects. We do not know whether participation as a virtual juror boosts subsequent civic engagement as in-person jury service does.¹⁶⁴ Jury trials also help to legitimize the court system; will virtual jury trials be accepted as legitimate by the litigants and the public? As courts resume in-person trials, it will be interesting to see whether the alternative of a virtual jury trial becomes increasingly appealing to some litigants and their lawyers, or whether they will quickly reject virtual options when in-person participation becomes advisable. The jury, as they say, is still out.

163. Pamela Gates, Jeffrey Frederick & Karen Lisko, *Virtual Juries: We Can, But Should We? And If So, How?*, 47 ABA LITIG. 12, 17 (2021).

164. JOHN GASTIL, E. PIERRE DEESS, PHIL WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 69–71 (2010) (finding that jury service in criminal trials increases subsequent voting rates among low propensity voters); Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 710–12 (2014) (finding civic engagement effects in civil jury service).

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

Ease of access: Advantages of virtual jury

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

Advantage in your own home.

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

Being able to do it remotely from home.

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

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

Trial and deliberation experience: Advantages of virtual jury

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

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

More collaborative-smaller group with all participating very well.

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

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

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

I liked being able to take notes.

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

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

This was quicker.

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

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

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

Not really any advantage over being in person.

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

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

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

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

Trial and deliberation experience: Disadvantages of virtual jury

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

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

There's less of that human connection.

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

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

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

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

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

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

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

Being able to mute made me feel invisible so I only spoke when actually addressed. On the other hand, it was very good to concentrate on listening and not just quickly try to say something.

Less diversity of backgrounds. Shorter deliberation virtually.

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

Note. Comments come from 27 virtual mock juror participants in the Cornell Virtual Jury Experiment who had previous experience as sworn jurors. Virtual jury participants were asked: "For those who previously served on a (real) jury, what were the advantages and disadvantages of the virtual jury, compared with your in-person jury experience?" Source: Krystia Reed, Valerie P. Hans, Vivian Rotenstein & Valerie Reyna, *Guiding Jury Damage Award Decision Making in Virtual versus In-Person Civil Juries: Experimental Evidence* (Cornell Law School, 2021).