

DESIGNING FOR JUSTICE: PANDEMIC LESSONS FOR CRIMINAL COURTS

Cynthia Alkon*

I. INTRODUCTION

In a ten-day period in March 2020, all courts in the United States issued shut down orders.¹ This was a stunning and complete change in how the court system as a whole, and the criminal legal system in particular, worked. There was no playbook. Judges, court staff, and lawyers were all unprepared for this quick change. Although there was unprecedented uniformity in ordering the shut-down of courts nationwide, that is where the uniformity ended. What exactly it meant to shut down a court varied widely from state to state, courthouse to courthouse, and courtroom to courtroom.² The pandemic is not the first time criminal courts in this country have faced a crisis and needed to alter or stop regular case processing.³ What was unique about the pandemic was that it impacted every courtroom in this country and highlighted how unprepared courts are to quickly change and adapt in ways that put justice front and center in the decision-making.

* © 2022, All rights reserved. Professor of Law and Director, Criminal Law, Justice & Policy Program, Texas A&M University School of Law. Thank you to Lisa Blomgren Amsler, Kelly Browe-Olson, Andrea Kupfer Schneider, Amy Schmitz, and Nancy Welsh for their helpful suggestions.

1. The first statewide orders shutting down courts were on March 12, 2020, and by March 22, 2020, all fifty states had statewide court shutdown orders in place. On just one day, March 16, 2020, a total of nineteen states issued court shut down orders. Within five days, by March 17, 2020, only seven states had not yet issued court shut down orders (shutdown orders on file with the author).

2. Sarah Jarvis, *Coronavirus: The Latest Court Closures and Restrictions*, LAW360 (July 1, 2021), <https://www.law360.com/articles/1252836/coronavirus-the-latest-court-closures-and-restrictions> (listing nationwide court closures and restrictions). COVID procedures in civil courts varied depending on geographical location. See Qudsiya Naqui, *National Database of Court Orders Details Pandemic-Related Changes to Operations*, PEW CHARITABLE TRS. (Mar. 26, 2022), <https://www.pewtrusts.org/en/research-and-analysis/articles/2022/03/25/national-database-of-court-orders-details-pandemic-related-changes-to-operations>; see also Alyx Mark et al., *State Courts and COVID Document Archive*, ALYX MARK, <https://www.alyxmark.com/document-archive> (Mar. 26, 2022).

3. See generally *Emergency Preparedness*, U.S. CTS. <https://www.uscourts.gov/topics/emergency-preparedness> (last visited Nov. 6, 2022).

The processes that courts used to decide how to conduct essential business, such as bail hearings, in the first months of the pandemic varied greatly. News reporting and a national survey indicate that there was a widespread failure of the courts to consult with stakeholders, particularly with defense lawyers, before making these changes.⁴ The failure to use a more collaborative process led to concerns about how fair and just the newly adopted processes, such as video arraignments and bail hearings, were. Was justice sacrificed for quick decision-making and expediency?

Courts were likely falling back on how they had traditionally done things. Courts that had a more collaborative and participatory process likely continued to be so. While courts that took a more top-down and more authoritarian approach likely continued to be so. If more courts had an ongoing collaborative process for change, there may have been better decision-making and less criticism and complaints about the changes the pandemic demanded. Many courts may have defaulted to processes in their Continuity of Operations Plans which, as will be discussed, likely were not collaborative and did not suggest the need for ongoing revision and consultation. One approach to institutional change could be through Dispute System Design (“DSD”). This process is justice-centered and collaborative, demanding participation of stakeholders. Using DSD principles and processes could have supported collaborative decision-making and helped courts to focus more on questions of justice as they were reacting quickly to the pandemic.

This Article starts by explaining Dispute System Design, what it is and how it works in general, how it can be applied to the criminal legal system, and the centrality of justice in DSD. This will include an exploration of how justice applies, both to criminal processes in general and to the decision-making process for changes made during the pandemic. Next, this Article considers Continuity of Operation Plans (“COOP”). Both federal and state courts have adopted Continuity of Operation Plans, and this Article discusses how this planning tool may have reinforced a lack of collaboration and kept the focus of courts on managing daily operations and not on larger questions of justice. This Article then focuses on four broad categories of change during the pandemic

4. See generally Cynthia Alkon, *Criminal Court System Failures During COVID-19: An Empirical Study*, 37 OHIO ST. J. ON DISP. RESOL. 453 (2022).

that raised serious questions about the system's ability to deliver fairness and justice: remote proceedings; mask mandates, enforcement and availability; in-custody clients and the spread of COVID-19; and re-opening. Then, this Article reports concerns about the lack of collaborative decision-making from a nationwide survey of defense lawyers, judges, and prosecutors during the first five months of the pandemic.⁵ Finally, this Article suggests lessons for the criminal legal system moving forward. What can courts do to be better prepared for the next emergency when quick decisions and changes need to happen? A key conclusion is that courts should work now to change their decision-making processes to ones that are more collaborative and that put questions of justice at the forefront.

II. DISPUTE SYSTEM DESIGN⁶

Dispute System Design is “the applied art and science of designing the means to prevent, manage, and resolve streams of disputes or conflict.”⁷ DSD has expanded from its roots in labor relations⁸ and is now applied in a wide variety of areas including court annexed and connected dispute resolution, mediation and arbitration programs, and ombuds programs.⁹ DSD has been used in criminal courts and processes, although it is far less common than its use in civil conflicts.¹⁰ Restorative justice programs and problem-solving courts are two areas that have used dispute system design approaches.¹¹

5. *Id.* at 455.

6. *Id.* at 467–68 (analyzing results of a 2020 survey of judges, prosecutors, and defense lawyers on dispute system design).

7. LISA BLOMGREN AMSLER ET AL., DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT 7 (2020).

8. Lisa Blomgren Amsler, *The Dispute Resolver's Role Within a Dispute System Design: Justice, Accountability, and Impact*, 13 U. ST. THOMAS L.J. 168, 171 (2017); Alkon, *supra* note 4, at 466.

9. Lisa Blomgren Amsler, *Dispute System Design and the Global Pound Conference*, 18 CARDOZO J. CONFLICT RESOL. 621, 626 (2017).

10. Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 11 (2008).

11. Andrea Kupfer Schneider & Cynthia Alkon, *Our Criminal Legal System: Plagued by Problems and Ripe for Reform: How and Where Dispute Resolution Professionals Can Help*, DISP. RESOL. MAG., Jan. 28, 2020, at 3–5, https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/2020/criminal-justice-reform/dispute-resolution-magazine-vol-26-1-criminal-justice-reform.pdf.

DSD focuses on incorporating interest-based approaches rather than relying on power-based decision-making.¹² Dispute resolution scholars have identified guiding principles for DSD and an analytical framework.¹³ This section will discuss each principle and how they can be applied in the context of the criminal legal system. Criminal courts have rarely used a DSD approach. It is not realistic to have expected courts that have never used a DSD approach to have adopted it in the midst of immediate shut down orders and the overall uncertainty and chaos of the early months of the pandemic. It is, however, useful to consider how using these guiding principles, and a framework for analyzing DSD, could be applied in the criminal legal system overall and then, later in this Article, how DSD could have assisted courts towards better justice focused decision-making in the midst of this unprecedented emergency.

A. Guiding Principles of Dispute System Design

Lisa Blomgren Amsler, Janet Martinez, and Stephanie Smith identified a list of DSD guiding principles:

- (1) Create a DSD that is fair and just.
- (2) Consider efficiency for the institution and participants.
- (3) Engage stakeholders—including users—in design and implementation.
- (4) Consider and seek prevention.
- (5) Provide multiple and appropriate interest-based and rights-based processes options.
- (6) Ensure users flexibility in choice and sequence of process options.
- (7) Match the design to the available resources, including training and support.

12. AMSLER ET AL., *supra* note 7, at 13–15.

13. Alkon, *supra* note 4, at 466.

(8) Train and educate system providers, users, and other stakeholders.

(9) Make the DSD accountable through transparency and evaluation, with appropriate concern for privacy, to improve it continuously.¹⁴

As will be discussed later in this Article, criminal courts did not consider most of these guiding principles in the early months of the pandemic, with one exception: efficiency for the institution. However, efficiency for individuals, particularly defendants, was not a priority. The pandemic exacerbated the existing problem of defendants who often languished for extended periods of time in custody, waiting for cases and/or waiting for plea offers (or both).¹⁵ Disregarding how efficient a process is from the defendant's point of view is not something that is new in the criminal legal system. Unfortunately, it is well documented, going back decades.¹⁶

Individual criminal courts might decide that one or more of these suggested Guiding Principles are not applicable. For example, due to constraints of criminal practice, it is difficult to offer defendants flexibility “in choice and sequence of process options” without amending most criminal procedure codes.¹⁷ However, problem-solving courts are examples that more flexibility and creativity is possible.¹⁸

Instead, the idea of the Guiding Principles is, as the term suggests, to help guide decision-making. The Guiding Principles could have been a tool to guide courts when they were making quick decisions to change processes in the midst of the pandemic, particularly the early chaotic months of the crisis. Having an agreed list of Guiding Principles would have given courts direction beyond the immediate crisis, which, understandably, was otherwise likely to dominate the decision-making. As will be discussed below, courts seemed to focus predominantly on how to

14. AMSLER ET AL., *supra* note 7, at 14–15.

15. Pamela R. Metzger & Janet C. Hoeffel, *Criminal (Dis)Appearance*, 88 GEO. WASH. L. REV. 392, 392 (2020) (describing the pre-pandemic holding of criminal defendants in pre-trial detention for extended periods of time as the “epidemic of detention-without-process”).

16. *See generally* MALCOM M. FEELY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1992) (describing the hardships on defendants by repeated court appearances).

17. AMSLER ET AL., *supra* note 7, at 14.

18. Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 591–92 (2014).

manage caseloads and how to implement the variety of shut-down orders. There seemed to be more of a compliance mindset in many courts rather than a DSD and justice-focused mindset.¹⁹

The first Guiding Principle is to “create a DSD that is fair and just.” This seems to be a non-controversial statement of what criminal courts should be striving for. However, there is widespread recognition that U.S. criminal courts fall short of this goal.²⁰ As Professor Abbe Smith said, “I generally use the term ‘criminal legal system’ instead of the more conventional ‘criminal justice system’ because there is hardly any justice in our criminal system.”²¹ As Amsler, Martinez, and Smith state, “any dispute system should aim to achieve some measure of justice.”²² In criminal dispute system design, justice should be a central and primary guiding principle.

B. Justice

Before the pandemic, the U.S. criminal legal system suffered from serious inequalities and concerns about justice. Mass incarceration continues to be a feature of the U.S. criminal legal system.²³ The criminal legal system continues to suffer from systemic racism.²⁴ Those who are poor are less likely to be released

19. Thank you to Nancy Welsh for this observation.

20. See Erica Bryant, *Why We Say “Criminal Legal System” Not “Criminal Justice System,”* VERA (Dec. 1, 2021), <https://www.vera.org/news/why-we-say-criminal-legal-system-not-criminal-justice-system>.

21. Abbe Smith, *Can You Be a Feminist and a Criminal Defense Lawyer?*, 57 AM. CRIM. L. REV. 1569, 1575 n.38 (2020).

22. AMSLER ET AL., *supra* note 7, at 14.

23. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLY INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> (showing that total of 1.9 million people or “573 per 100,000 residents” are incarcerated nationwide).

24. *U.S. Incarceration Rates by Race*, PRISON POLY INITIATIVE (2020), <https://www.prisonpolicy.org/graphs/raceinc.html>; Shasta N. Inman, *Racial Disparities in Criminal Justice: How Lawyers Can Help*, A.B.A., https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/public-service/racial-disparities-criminal-justice-how-lawyers-can-help/ (last visited Nov. 6, 2022); see also Anna-Leigh Firth, *Most Judges Believe the Criminal Justice System Suffers from Racism*, NAT'L JUD. COLL. (July 14, 2020), <https://www.judges.org/news-and-info/most-judges-believe-the-criminal-justice-system-suffers-from-racism/> (reporting on a survey of U.S. judges who overwhelmingly responded that systemic racism exists in the criminal justice system).

pre-trial²⁵ and less likely to have competent legal assistance.²⁶ And, reflecting larger inequities, a significant percentage of criminal defendants suffer from serious mental illness,²⁷ substance abuse,²⁸ trauma,²⁹ and cognitive disabilities.³⁰ In short, before the pandemic there were already serious concerns about justice within the criminal legal system. The pandemic exacerbated existing and serious problems.

Justice can be defined in many ways, as Amsler, Martinez, and Smith observed, “the term ‘justice’ takes on many meanings in philosophy, jurisprudence, organizational behavior, social psychology, codes of ethics, and human norms for fairness.”³¹ Amsler, Martinez, and Smith focus on five broad, not mutually exclusive, forms of justice in examining whether a dispute system is achieving “some measure of justice.”³² Three of these forms of justice are most relevant to the discussion below: justice as to outcomes; interactional, informational, and interpersonal justice; and justice as to processes.³³ This Article focuses on the three forms of justice most relevant to how justice can be applied, or could be applied, as part of dispute system design during the pandemic.

25. Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 FORDHAM URB. L.J. 845, 848 (2019); Maria Cramer, *Illinois Becomes First State to Eliminate Cash Bail*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/2021/02/23/us/illinois-cash-bail-pritzker.html>; see also Metzger & Hoeffel, *supra* note 15 (describing people held in pre-trial detention for extended periods of time as the “epidemic of detention-without-process”).

26. Alkon, *supra* note 18, at 576–82 (discussing the structural problems created by underfunding criminal defense services in the United States).

27. *Id.* at 576 n.108 (explaining that if “all mental disorders—including substance abuse disorders—are included the prevalence of mental disorder in incarcerated populations is over 70[%]”).

28. WILLIAM R. KELLY, ROBERT PITMAN & WILLIAM STREUSAND, FROM RETRIBUTION TO PUBLIC SAFETY: DISRUPTIVE INNOVATION OF AMERICAN CRIMINAL JUSTICE 10 (2017) (showing estimates that upwards of 80% of defendants are dependent on, abuse, and/or are addicted to a substance (alcohol and/or drugs)).

29. *Id.* at 10–11.

30. Jim Concannon, *Our Weakest Members: Developmentally Disabled People in the Criminal Justice System*, LEXIPOL (Feb. 13, 2019), <https://www.lexipol.com/resources/blog/developmentally-disabled-people-in-the-criminal-justice-system/>; see also CYNTHIA ALKON & ANDREA KUPFER SCHNEIDER, NEGOTIATING CRIME: PLEA BARGAINING, PROBLEM SOLVING, AND DISPUTE RESOLUTION IN THE CRIMINAL CONTEXT 26 (2019).

31. AMSLER ET AL., *supra* note 7, at 15.

32. *Id.* at 14.

33. See *id.* at 14–15. Justice in community, and formal justice, personal justice, and injustice are not discussed in detail in this Article. For definitions and discussions of these categories refer to *id.* at n.17–20. Both forms of justice are highly relevant to a larger discussion of the justice in the criminal legal system, but less relevant to the focus of this Article on the processes through which courts made, or could have made, change due to the pandemic.

1. *Justice as to Outcomes*

Justice as to outcomes is also referred to as substantive justice and distributive justice.³⁴ This category focuses on the “justice of an outcome produced by a decision process.”³⁵ Whether an outcome was fair and equal can impact how satisfied a party is with what happens on a particular case.³⁶ Distributive justice “focuses on perceptions of and criteria to determine the substantive fairness of the outcomes themselves.”³⁷ In criminal cases, substantive justice could be the verdict on a case, the plea deal, and/or the sentence for a defendant. Substantive justice is also involved in determinative pretrial motions such as bail motions or search and seizure motions. For example, if the defendant wins a search and seizure motion and evidence is suppressed, it may mean that the prosecutor cannot proceed with the case, and it will be dismissed. Also, if a defendant is not released on bail, they are less likely to proceed to trial.³⁸ This is even more likely in less serious cases when the plea deal is time served. This means that if a defendant cannot make bail but pleads guilty, they will be released; but if they decide to reject the plea deal, they will be held in custody until the trial.³⁹ This gives defendants a serious incentive to plead guilty and has been criticized for creating coercion in plea bargaining.⁴⁰

34. *Id.* at 15–16.

35. *Id.* at 15.

36. *Id.* at 16.

37. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 817 (2001).

38. See Beatrix Lockwood & Annaliese Griffin, *The Ins and Outs of Bail*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2020/10/28/the-ins-and-outs-of-bail> (Oct. 28, 2020).

39. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 308 (2011) (“[D]efendants must generally choose between remaining in jail to fight the case or taking an early plea with a sentence of time served or probation. In the Florida study, the ‘most significant predictor of defendants entering a plea of guilty or no contest at arraignment was their custody status. In-custody defendants were more likely to enter a guilty plea than released defendants.’ Incarcerated individuals will find it difficult to ignore the call of immediate freedom, particularly if the person is unaware of the myriad collateral consequences of the guilty plea and thus does not factor these consequences into the cost-benefit analysis of an immediate guilty plea.”).

40. *Id.*; see also Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 715–16 (2017) (analyzing data from Harris County Texas and concluding that “pretrial detention causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, the length of a carceral sentence, and the likelihood of future arrest for new crimes”).

2. Interactional, Informational and Interpersonal Justice

Interactional justice focuses on interpersonal treatment “not proscribed by procedures.”⁴¹ Informational justice “focuses on communication regarding procedures.”⁴² Interpersonal justice “reflects the degree to which authorities treat people with politeness, dignity, and respect.”⁴³ From the defendants’ point of view in most criminal cases, these forms of justice are lacking. This is especially true for defendants who are in custody. Coming to court can be an ordeal that starts early in the morning, involves being chained, handcuffed, repeatedly searched, and fed poorly.⁴⁴ Unless their lawyer is able to explain what to expect in court, or they have prior experience, most defendants enter courtrooms not knowing what will happen. They might get a hurried explanation from the bailiff about where to stand, from the judge about why they are there, and then told to answer yes or no questions. They may or may not have much of a conversation with their lawyer in advance of coming into the courtroom itself.

As to how courts made changes in processes due to COVID, the survey results indicate that there was also a lack of interactional, informational, and interpersonal justice for many defense lawyers in many courts as they were not advised how decisions would be made about changes in court processes due to COVID.⁴⁵ They also complained about a lack of basic information about how courts were going to work (remote or in-person, masks required or not, defendants transported or not, etc.).⁴⁶

3. Procedural Justice

As Nancy Welsh has observed, “procedural justice is concerned with the fairness of the procedures or processes that are used to arrive at outcomes.”⁴⁷ How people perceive the fairness of the process is part of how people assess a final decision, and whether

41. AMSLER ET AL., *supra* note 7, at 17.

42. *Id.*

43. *Id.* at 18.

44. Russell D. Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 241 (2007).

45. Alkon, *supra* note 4.

46. *Id.*

47. Welsh, *supra* note 37, at 817.

they think that decision was fair, even if they did not win.⁴⁸ Procedural justice research finds that the process matters in a wide variety of contexts including legal processes, mediation, policing, and political settings.⁴⁹

In dispute system design analysis (discussed below) procedural justice is the “dominant theoretical frame” for evaluating processes.⁵⁰ Whether people perceive that they have had procedural justice involves four key “process characteristics.”⁵¹ The first is whether people are able to “state their case” to legal authorities, including being able to give their views and concerns.⁵² Second, that people perceive that a third party (such as a judge) considered their views, concerns and evidence.⁵³ Third, that people perceive that they were treated in a “dignified, respectful manner and that the procedure itself was dignified.”⁵⁴ Finally, that the third party decision-maker was neutral and even-handed, also discussed as having “benevolent” intentions.⁵⁵ In the context of this discussion, procedural justice applies both to how criminal cases are handled and to the process courts used to decide what changes to make due to the pandemic.

Standard practices in the criminal legal system regularly fall short of procedural justice.⁵⁶ Trials are, ideally, a process during which defendants can give their side of events. In reality, only a small fraction of criminal cases go to trial, which means that few

48. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 477 (2008) (“When people interact with the legal system in some way, or when they bring a dispute to the legal system for resolution, they care deeply about the fairness of the process that is used to resolve their encounter or dispute, separate and apart from their interest in achieving a favorable outcome.”); see also Welsh, *supra* note 37, at 818–19.

49. Hollander-Blumoff & Tyler, *supra* note 48.

50. Lisa Blomgren Amsler et al., *Dispute System Design and Bias in Dispute Resolution*, 70 SMU L. REV. 913, 924 (2017).

51. Welsh, *supra* note 37, at 820.

52. Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 664 (2007). For a more nuanced definition of procedural justice, see Bingham, *supra* note 10, at 34–37; see also Welsh, *supra* note **Error! Bookmark not defined.**, at 820.

53. Welsh, *supra* note 37, at 820.

54. *Id.*; see also Tyler, *supra* note 52.

55. Tyler, *supra* note 52. For a more nuanced definition of procedural justice, see Bingham, *supra* note 10, at 34–37.

56. Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409–10 (2008) (recommending reforming plea bargaining practices by using procedural justice).

defendants reach this stage.⁵⁷ In contrast, offenders often give restorative justice processes high marks because it is a process where they have voice and are able to explain themselves.⁵⁸ The vast majority of defendants plead guilty⁵⁹ and the only speaking they do in court is during the plea colloquy when they answer a standard set of questions that typically require only a “yes” or “no” answer.⁶⁰ A defendant who pleads guilty may acknowledge that there is a “factual basis” for their plea, but this rarely includes any explanation about what happened or what was going on in their lives that might have influenced the case.⁶¹ During the pandemic trials were suspended for months, so even the small percentage of defendants who might have gone to trial, did not. Without trials, defendants did not have an opportunity to state their case to a neutral decision-maker.

The second category of procedural justice is that people perceive that a third party considered their views, concerns, and evidence. Once again, if a defendant does not go to trial, this is highly unlikely to happen. The defendant will not have an opportunity to speak directly, and their lawyer’s role in court is often focused on getting them through the guilty plea to an already agreed deal, so there is no opportunity for the defendant to present their views, concerns, or evidence. This became even more difficult during the early months of the pandemic, especially as many proceedings moved online and were conducted, as will be discussed below, in ways that made it difficult, if not impossible, for defendants to speak in any meaningful way in front of the judge.

57. *Id.* (recommending reforming plea bargaining practices by using procedural justice); *Missouri v. Frye*, 566 U.S. 134, 143 (2012). High plea-bargaining rates have been the norm since at least the middle of the 20th Century. See also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 495 (2004) (“From 1962 to 1991, the percentage of trials in criminal cases remained steady between approximately 13[%] to 15[%]. However, since 1991, the percentage of trials in criminal cases has steadily decreased (with the exception of one slight increase of 0.06[%] in 2001): from 12.6[%] in 1991 to less than 4.7[%] in 2002.”).

58. Mark S. Umbreit, et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 273–77 (2005).

59. *Frye*, 566 U.S. at 143 (finding that over 94–97% of resolved criminal cases are through resolved through plea bargaining and not trial).

60. FED. R. CRIM. P. 11 (listing what the court must tell the defendant and establish that they understand); see also TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2011) (listing what “the court shall admonish the defendant of”). Like the Federal Rules, most can be answered with a “yes” or “no”.

61. FED. R. CRIM. P. 11(b)(3) (stating that “before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea”).

The third category of procedural justice is that people are treated with dignity. As was discussed above, before the pandemic criminal courts were routinely places that lacked basic dignity for the participants, particularly defendants. It is one of the reasons that problem-solving courts, such as drug courts, are often discussed as an improvement over traditional court processes.⁶² In problem-solving courts, defendants are regularly allowed to speak and engage in conversations with the judge.⁶³ The pandemic did not improve how people were treated in criminal courts, and depending on the court, the treatment might have been worse. In-custody defendants often faced added hardships when attending court in-person including being placed in quarantine in the jail on their return, or increasing their exposure to COVID-19 when they traveled to and from the jail.⁶⁴ Remote video arraignments were also often far less dignified, or, at best, a remote version of the lack of dignity that is so common during in-person arraignments: judges advised large groups of people about their rights at the same time, without counsel, and with only moments of individual attention as the judge read the individual charges.⁶⁵ Videos from many courts are available online and show defendants lined up in front of a video camera, often three or four rows of three or four defendants in each row.⁶⁶ It is unclear from these videos what defendants can see. It is unclear if all of them can hear, until the judge asks them a question.⁶⁷ The defendants are lined up in the company of a jail officer, but there are no lawyers present. Defendants seem to have no one to confer with if they have questions, beyond asking the judge or the jailer.⁶⁸

The fourth category is that there is a neutral authority who is perceived as having benevolent intentions. Judges are often not

62. Cynthia Alkon, *Have Problem Solving Courts Changed the Practice of Law?*, 21 *CARDOZO J. CONFLICT RESOL.* 597, 623–24 (2020).

63. *Id.*

64. Alkon, *supra* note 4, at 481–84.

65. Clayton County Magistrate, *Clayton County Magistrate Court 7's Zoom Meeting*, YOUTUBE (May 21, 2022), <https://www.youtube.com/watch?v=kQzf3RwWj28>; Clayton County Magistrate, *Clayton County Magistrate Court 7's Zoom Meeting*, YOUTUBE (June 29, 2022), <https://www.youtube.com/watch?v=XDWw3OBNq9s>.

66. *Id.*

67. *Id.*

68. *Id.*

viewed by defense lawyers, or their clients, as neutral.⁶⁹ One reason is that many more judges have experience as prosecutors than defense lawyers.⁷⁰ The concern is that judges may be more pro-prosecution in the courtroom and less willing to, for example, grant search and seizure motions or reduce bail. In the survey, concern was expressed that the courts were not protecting the physical safety of people coming before them.⁷¹ Judges themselves also expressed this concern.⁷² At a very basic level, if people do not feel physically safe, it is likely they do not feel that the decision-maker who has put them in that situation by, for example, requiring them to appear in-person and not enforcing mask mandates, would feel that the decision-maker was acting with “benevolent” intentions. The variety of failures to protect the health and safety of those coming to court, in courts around the country, reinforced the concern that courts were more concerned about expediency and managing caseloads than the well-being of those coming before them.

Individual judges have great autonomy and authority to decide how to handle their caseloads. This did not change during the pandemic, although there might have been additional rules, such as mask mandates or suspension of jury trials. As commonly happens, courts took different approaches to decision-making during the pandemic and most did not have in place clear procedures for *how* to change processes, much less how to change processes during a crisis like a pandemic. Procedural justice

69. Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates> (“No prosecutor would relish the prospect of trying a case before a jury half-filled with former criminal defense attorneys—just as no criminal defendant relishes the idea of going before a judiciary half-filled with former government advocates.”).

70. *Broadening the Bench: Professional Diversity and Judicial Nominations*, ALLIANCE FOR JUST. (Feb. 6, 2014), <https://www.afj.org/wp-content/uploads/2021/03/AFJ-2014-Professional-Diversity-Report.pdf>; Emily Hughes, *Investigating Gideon’s Legacy in the U.S. Courts of Appeals*, 122 YALE L.J. 2376, 2381 (2013) “While federal appellate judges have diverse employment histories, including experience as judicial law clerks, private practitioners, and law professors, almost all federal appellate judges share one thing in common: before they became federal appellate judges, they were *not* public defenders. Of the 227 federal appellate judges currently serving in active or senior status in the eleven circuits and the District of Columbia, only four worked as public defenders before their current judicial appointments. Eight represented criminal defendants in some capacity while they were private practitioners. In contrast, eighty-six worked as prosecutors.” *Id.*

71. Alkon, *supra* note 4.

72. *Id.*

literature suggests that the process itself, if it is inclusive and collaborative, could help to reassure the parties that the decision-maker is gathering information before making a decision.⁷³ As will be discussed below, there were serious concerns that judges did not confer with lawyers during the early months of the pandemic before deciding on new processes. As will also be discussed in more detail below, stakeholders were often not given the opportunity to “state their case” as many courts took a top-down approach in making changes due to the pandemic. For example, defense lawyers complained that some judges required lawyers to appear in court, without consulting them.⁷⁴ In another example, some judges declined to enforce mask mandates in their individual courtrooms, often without giving the parties a choice or a voice in the decision-making process.⁷⁵ Lawyers and defendants were often given no option to object or to discuss alternative procedures or approaches.⁷⁶

A previously agreed set of guiding principles that put justice front and center could have helped courts during the first chaotic months of the pandemic. As will be discussed below, another tool that could have aided courts and institutions in making process changes during the pandemic would have been to adopt an analytic framework to analyze dispute system design processes that could have been applied to any proposed pandemic changes.

C. Dispute System Design Analytic Framework

Lisa Blomgren Amsler, Stephanie Smith, and Janet Martinez developed an analytic framework for DSD.⁷⁷ This framework is a helpful starting point to guide “the analysis and design of dispute systems.”⁷⁸ They suggest six elements that should guide any DSD process: (1) identify the goals; (2) identify the stakeholders and their interests; (3) analyze the context and culture; (4) examine the processes and structures; (5) know the financial and human

73. Nancy Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. REV. 721, 734 (2017).

74. Alkon, *supra* note 4, at 477.

75. *Id.*

76. *Id.*

77. AMSLER ET AL., *supra* note 7, at 22–38; *see also* Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 129 (2009) (describing five key elements for the Dispute Systems Analytical Framework).

78. Smith & Martinez, *supra* note 77, at 129.

resources; and (6) evaluation which includes looking at the successes, accountability and learning.⁷⁹ The idea is that the framework can be a useful checklist in the dispute system design process.

1. *Identify the Goals*

Decision-makers should set the goal or goals in designing a dispute resolution system.⁸⁰ As discussed above, justice should also be a goal for the criminal legal system. Beyond that, at first glance it may seem that criminal courts have straightforward goal: follow the law. In reality, it can be more complex. Courts routinely have efficient case processing as a goal. Individual judges may prioritize being responsive to community needs, which may include more rehabilitative approaches. Courts, and judges who face election, may value being trusted. Making courts a safe place may also be a priority. Traditionally, this might have meant placing gun detectors at the entry points to the building and providing support to victims, particularly victims of violent crimes. During a pandemic, safety took on a different meaning. Courts that had a clearly articulated set of goals for non-pandemic times might have more easily transitioned to decision-making that included goals beyond simple expediency.

The criminal legal system may have other, often competing, goals. These are sometimes referred to as theories of punishment.⁸¹ The four basic theories of punishment are: (1) incapacitation/public protection; (2) deterrence; (3) retribution; (4) treatment/rehabilitation.⁸² Problem solving courts such as drug courts and mental health courts are focused on treatment and rehabilitation. Bail hearings often focus on public protection to prevent defendants that are perceived to be a threat from being released pre-trial. Courts imposing sentences may focus more on retribution or deterrence. The same courthouse and even the same courtroom, can regularly have all four goals, or theories of punishment, underlying decisions, thus applying different theories depending on the case and the defendant. However, these four

79. AMSLER ET AL., *supra* note 7, at 24–38 (describing each element in more detail).

80. *Id.* at 27–29.

81. ALKON & SCHNEIDER, *supra* note 30, at 12–14.

82. *Id.*

goals tend to be substantive and less procedural, and therefore the discussion in this Article will not focus on these goals.

2. *Identify and Include Stakeholders*

Stakeholders should be identified, and this should include an analysis of their relationships to each other and their power.⁸³ The basic idea is that the best person to inform the courts about how a particular change will impact, for example, defendants, would be the defendant (or their lawyer).

Most criminal courts could easily tell you who their stakeholders are, even if they may not refer to them using this terminology. The stakeholders are prosecutors, defense lawyers, court staff, defendants, victims, jurors, and the community at large. Some courts make efforts to at least gather information about how some of these stakeholders are experiencing the court process. For example, courts often ask jurors to fill out questionnaires after their jury service so the courts can better understand the juror experience, often with the intention of making changes to improve the experience.⁸⁴ Victims and defendants are challenging groups to bring into stakeholder discussions, especially when their cases are still active. However, it would be possible to include victims and defendants on cases that have finished and/or groups that advocate for victims and defendants. If courts had existing processes pre-pandemic that brought at least some of the stakeholders together regularly to discuss how the courts work or possible changes, the courts would have had an existing process to help in decision-making. But, instead, criminal courts were left to decide on their own how much or if to include any or all of the various stakeholders. As will be discussed below, the COOP process did not encourage or envision regular consultation which may, in part, explain why courts tended towards more top-down processes without consultation.

83. AMSLER ET AL., *supra* note 7, at 29–30.

84. See generally *A Survey and Analysis of Juror Satisfaction in the Billings Municipal Court*, INST. FOR CT. MGMT 4 (May 2006), https://www.ncsc.org/_data/assets/pdf_file/0023/17069/schaubelnikkircedpfinal0506.pdf (since 2008 New Zealand has conducted annual juror satisfaction surveys); see *Juror Satisfaction Survey 2021*, MINISTRY OF JUST., N.Z. 5 (July 8, 2021), <https://www.justice.govt.nz/assets/Documents/Publications/Juror-Satisfaction-Survey-Report-2021-FINIAL-for-release.pdf>. The survey has two objections: “to gain insights into jurors’ overall satisfaction” and “to highlight areas of improvement.” *Id.*

3. *Context and Culture*

“Context is the circumstance or situation in which a system is diagnosed and designed.”⁸⁵ In the criminal legal system, the criminal procedure code is a key part of the context. It is the starting point in analyzing what is possible in terms of where there is flexibility and where the law mandates certain processes. These can include deadlines about when a person who is in custody must be arraigned by a court; when various court appearances must happen; and if a grand jury or preliminary hearing is required for an indictment or for a case to proceed. The criminal code also sets limits on what might be possible with a particular kind of case, for example, when is jail or prison time mandatory?

Culture has many definitions. Amsler, Martinez, and Smith offer this definition, that culture “refers to patterns of being, perceiving, believing, behaving, and sense-making shared by a group of people.”⁸⁶ Within the criminal legal system there are multiple cultures. There is organizational culture which can be different for each group. For example, prosecutors have their own culture—as do public defenders, private defense lawyers, judges, and court clerks. On any given day, criminal courts bring in a wide cross section of professional groups (police officers, social workers, lawyers, administrative staff, court reporters, and more). A diverse group from the wider community is also in court daily as defendants, victims, witnesses, and jurors. All of these different groups come into the same courtroom from different professional, racial, ethnic, socio-economic, and educational backgrounds. Yet, despite the diversity of professional groups and diversity by any other measure, individual courthouses, and even court rooms, have their own culture. Culture is part of why reforming the criminal legal system can be difficult, particularly if reformers do not understand what are deeply embedded parts of the culture.

Part of any cultural analysis is understanding the power structures and how they work. For example, prosecutors’ offices are hierarchical. Prosecutors are often limited by office policies that dictate what can happen on particular kinds of cases. By contrast, public defenders are independent, often fiercely so. Understanding the power dynamics matters. For example, in the

85. AMSLER ET AL., *supra* note 7, at 30.

86. *Id.*

survey one judge said, “[t]he admin at the public defender’s office did not adequately meet and discuss the procedures with their staff. Decisions made by the court’s executive team and the admin of other offices were later objected to by the line attorneys.”⁸⁷

Culture and context together can help to understand how a system is working, how conflict is managed, and what might work when making changes or adopting new processes. The failure to understand, for example, how entrenched plea bargaining is in the culture of criminal practice, led to failed experiments to ban plea bargaining.⁸⁸ Criminal courts likely have an intuitive understanding of the context and culture of their courts, but it is often from the perspective of their roles. For example, judges, particularly judges who came to the bench after being prosecutors, may not understand the defense lawyer culture or how they see their role relative to, for example, managing caseload pressure. It is also likely that many courts do not think about how their courts operate by thinking about culture and context and, therefore, were not thinking about how their courts worked before the pandemic and how this might influence what changes to make during the early months of the pandemic and how those changes might be viewed by various stakeholders.

4. *Identify the Process and Structure*

Criminal courts have established processes under the applicable criminal procedure code. Within the broad structure in the code, every courthouse does things a little differently. Some courts or district attorney offices have days set aside for plea bargaining and plea dispositions.⁸⁹ Some courts have established processes for defendants who might qualify for an alternative process, like diversion or a problem-solving court. Due to these constraints, criminal courts have far less flexibility than a private company might have in designing their dispute resolution process. However, plea bargaining is the dominant dispute resolution process in criminal cases.⁹⁰ Plea bargaining has few rules or set

87. Judge Response 20, app. question 40, p. 23 (on file with author).

88. ALKON & SCHNEIDER, *supra* note 30, at 176–81.

89. Kay L. Levine et al., *Sharkfests and Databases: Crowdsourcing Plea Bargains*, 6 TEX. A&M L. REV. 653, 657–60 (2019).

90. ALKON & SCHNEIDER, *supra* note 30, at 25–26.

processes, beyond how to conduct the plea colloquy.⁹¹ The flexibility of plea bargaining has allowed courts to develop new processes, such as problem-solving courts.⁹² Plea bargaining, due to its informal nature, allows for both more flexibility and creativity.⁹³ Judges and lawyers who practice in particular courts know what the existing process and structure are in their particular court or county. The pandemic forced changes to these processes. For example, pressures for plea bargaining lessened, and in some places, prosecutors stopped making as many offers because the pressure of trial was no longer present.⁹⁴

5. Resources

Amsler, Smith, and Martinez state that the “decision-maker needs to decide what resources, human and financial, can be committed to DSD implementation and evaluation”.⁹⁵ This can be a challenge for criminal courts, as they may not fully control their budgets or resources. For example, one of the big complaints during the early months of the pandemic, from defense lawyers, was how jails around the country were handling transporting their clients to court,⁹⁶ failing to transport them,⁹⁷ or having inadequate facilities for remote communication.⁹⁸ Although judges can order the local jail (often run by a sheriff) to do something, they usually do not control the jail budget and cannot control the resources they have at their disposal. The same can be said for the local prosecutor’s office and public defender. Often, these budgets are controlled at the county level and are kept administratively separate. Criminal courts may rely on certain resources being available, for example, from a probation department, and then learn, in fact, they are not. A challenge during the pandemic was courts ordering changes in process, such as remote proceedings, without having the resources in place to make sure it was possible

91. *Id.*

92. Alkon, *supra* note 18, at 591–94.

93. *Id.*

94. Alkon, *supra* note 4.

95. AMSLER ET AL., *supra* note 7, at 35.

96. See Alkon, *supra* note 4, at 481–82.

97. *Id.*

98. *Id.* at 489.

for all the parties to attend remotely.⁹⁹ Did defendants who were out of custody have access to smart phones? Did jails have adequate technology for remote proceedings? Courts often mandated changes and then scrambled to figure out how to make them work in the face of these realities.¹⁰⁰ The pandemic required quick changes, and given the existing resource limitations, criminal courts were often between a rock and hard place. Courts were ordered to shut down. Criminal courts still needed to conduct arraignments and bond hearings. Remote proceedings, with all the constraints, were thought to be the only option. In the immediate moment, there were no easy fixes. For courts that did not already have some form of collaborative decision-making in place, much less a full dispute system design process, these circumstances made adopting new decision-making approaches all the more difficult.

6. Evaluation

Amsler, Martinez, and Smith discuss evaluation in three parts: success, accountability, and learning. Success can include “not only whether the system achieves its intended goals but also . . . whether it achieves broader societal goals, including fairness and justice.”¹⁰¹ Accountability is a “purpose of evaluation”¹⁰² to understand if the system is working, to identify “opportunities for system improvement,” and for “users to understand how—and how well—the system operates.”¹⁰³ Criminal courts are routinely required to collect data about the cases they handle. This includes reporting on the number of cases filed, the types of crimes, how many went to trial, how many were dismissed, and how many plead guilty.¹⁰⁴

99. *Id.* (giving an example of one county where judges asked defense lawyers to donate iPads to the jail, allowing the courts to conduct remote appearances with defendants in jail because no equipment existed at the jail for remote video court appearances).

100. *Id.* at 483–84.

101. AMSLER ET AL., *supra* note 7, at 37–38; see also Amy J. Schmitz, *Measuring Access to Justice in the Rush to Digitize*, 88 FORDHAM L. REV. 2381 (2020) (identifying variables to evaluate in examining whether online dispute resolution programs advance access to justice).

102. *Id.* at 37.

103. *Id.*

104. Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark, The Need for Transparency in Plea Bargaining*, 22 NEW CRIM. L. REV. 434, 448–49 (2019).

But these reports, and the data collected, are not evaluating for success, accountability, and learning and are instead focused on case processing. Criminal courts do not routinely report on recidivism rates. Criminal courts also do not routinely survey lawyers, defendants, and victims to find out their views about how they were treated or how their cases were handled.

In addition to standard criminal courts, there are also problem-solving courts and restorative justice. There is often more reporting in these contexts than in general criminal courts, but this reporting is also not generally evaluation in the DSD sense of the word. There is a tendency for these alternative processes to need to show success to justify their continued use. Therefore, data collection is built into these processes.¹⁰⁵ Some of these reports may look at the wider questions of success, accountability, and learning in the DSD context. But these specialty programs and their data collection is not a substitute for wider assessments of how criminal courts in general are working and is not generally equivalent to evaluation as it is discussed in the DSD context. Assessments of problem-solving courts, for example, rarely include anything more than collecting data on who has completed, how long it took them, and whether they were rearrested within five years of completion. These reports do not, for example, analyze what parts of the problem-solving court process are more likely to increase the chances that individual defendants will complete the program and/or what may help to prevent recidivism. There are scholarly articles that look more deeply,¹⁰⁶ but these are not the same as courts themselves doing the evaluation and building it into their process.¹⁰⁷ Other programs, such as restorative justice programs, may include evaluation and build evaluations in at the outset.

Criminal courts have data collection built into their process, but they do not have a general culture of justifying their continued

105. Alkon, *supra* note 62, at 621.

106. See *Drug Court Review*, NAT'L DRUG CT. RES. CTR., <https://ndcrc.org/drug-court-review/> (last visited Nov. 6, 2022). *Drug Court Review* is a "peer-reviewed, open-access journal" that publishes scholarly articles analyzing drug courts. *Id.*

107. See also *The Best Practices Self-Assessment Tool*, NAT'L DRUG CT. INST., <https://www.ndci.org/best-assessment/> (last visited Nov. 6, 2022) (containing tools to help courts self-assess, such as the "Best Practices Self-Assessment Tool" be assessing how well programs are "adhering to the Ten Key Components of drug courts). These tools can help individual drug courts to analyze whether they are complying with recommended processes. But they are not required and problem-solving courts more generally report data to support their continued existence instead of taking an approach of using evaluations as recommended by DSD.

existence, much less of measuring success, accountability, and learning to improve, in the sense that Amsler, Martinez, and Smith discuss. The pressure on criminal courts is focused on results, processing their cases, not the process itself. Criminal courts are generally not evaluating, for example, whether their processes have improved justice, successfully reduced recidivism rates, or increased satisfaction rates. Even efforts toward “data driven” policy are not generally directed at the processes in criminal courtrooms, but instead focus more on issues such as how to determine whether to release a defendant from jail or what kind of sentences might be appropriate.¹⁰⁸

III. CONTINUITY OF OPERATIONS PLANS

The terrorist attacks on September 11, 2001, and the widespread disruptions of natural disasters such as Hurricane Katrina in 2005, encouraged courts and a variety of government agencies and institutions to adopt COOP.¹⁰⁹ The Federal Emergency Management Agency (“FEMA”) defines a COOP as “an effort within individual executive departments and agencies to ensure that Primary Mission Essential Functions continue to be performed during a wide range of emergencies.”¹¹⁰ According to FEMA, departments and agencies must first identify what their essential functions are and then develop a continuity plan that is the “roadmap for the implementation of the Continuity Program.”¹¹¹

The National Center for State Courts (“NCSC”) has a *Planning Guide and Template for Courts Continuity of Operations*, which explains what courts should include in their COOP.¹¹² According to the introduction:

108. See Brandon L. Garrett, *Evidence-Informed Criminal Justice*, 86 GEO. WASH. L. REV. 1490, 1494 (2018) (describing the types of data typically collected and discussing whether improved data collection will be used to maintain the status quo or make lasting change).

109. William Raftery, *How State Courts are Preparing for Continuity in Disaster*, JUDICATURE, Winter 2017, <https://judicature.duke.edu/articles/how-state-courts-are-preparing-for-continuity-in-disaster/>.

110. *Continuity of Operations: An Overview*, FEMA, https://www.fema.gov/pdf/about/org/nep/coop_brochure.pdf (last visited Sep. 13, 2022).

111. *Id.*

112. Nathan Hall et al., *Courts Continuity of Operations (COOP) Planning Guide and Template*, NAT'L CTR. FOR STATE CTS. (2021), https://www.ncsc.org/_data/assets/pdf_file/0021/60393/NCSC-COOP-Planning-Guide-and-Template_2021.pdf.

State courts in this country provide important “mission-essential functions” that are critical to maintaining the rule of law and providing justice and equal access for the fair and timely resolution of cases and controversies. It is imperative that these essential functions not be disrupted or compromised during or after a natural disaster or other emergency.¹¹³

Despite starting out with justice front and center, the guide goes on to focus on courthouse operations and the template itself is largely silent on planning for justice. The template does not look more broadly at what the court’s essential functions regarding constitutional rights, such as the right to counsel are. For example, the templates do not ask courts to identify in their COOP what systems will be in place to make sure lawyers can have confidential communications with their clients.¹¹⁴

Continuity of Operations Plans focus on how to do essential court functions in a wide variety of emergencies. For example, COOPs include thinking through what to do in the event of an emergency that requires courts to move to other locations.¹¹⁵ The planning would include having decided how many courtrooms would be needed and how to manage the paperwork/record-keeping, etc.¹¹⁶

The NCSC Guide encourages planning the process before beginning to write the COOP and states that the process will require “time and effort from all court departments/divisions as well as external stakeholders.”¹¹⁷ But, the Guide goes on to discuss who should be a part of the planning team and lists internal court departments.¹¹⁸ Overall, the court COOP process is an internal departmental/institutional process. The NCSC recommends that the COOP process planning team include every department within the institution and “consultation with external partners.”¹¹⁹ In addition to passing references to consulting with stakeholders or external partners in the planning phase when putting the Continuity of Operations Plan together, stakeholders are also mentioned in the context of communications—to explain what is

113. *Id.* at 1.

114. *Id.* at 54–74.

115. *Id.* at 22–24, 59–60 (providing template questions regarding alternate work sites).

116. *Id.* at 22–26.

117. *Id.* at 5.

118. *Id.* at 6.

119. *Continuity of Court Operations: Steps for COOP Planning*, NAT’L CTR. FOR STATE CTS. 9, https://www.ncsc.org/_data/assets/pdf_file/0028/17389/toolkit.pdf (2010).

happening and what changes have been made in the midst of the emergency itself.¹²⁰

The limited references to external stakeholders, consultation, and collaboration may make sense as COOPs are essentially about maintaining core (or essential) court functions in the face of an emergency.¹²¹ Court COOPs, although also now discussed in connection with the pandemic, may have been plans envisioned for shorter-term emergencies, not for operations stretched over several years and they are not intended to be processes for longer term or systemic reform or change. This distinguishes the COOP process from Dispute System Design which is, at its core, about making change either through introducing a new process or changing an existing one.

As will be discussed below, what was actually happening in criminal courts around the country when COVID-19 hit was not simply an operational question of maintaining essential functions. Instead, courts were making changes to processes that have serious implications for justice both in the short term and potentially in the longer term.

IV. PANDEMIC CHANGES TO THE CRIMINAL LEGAL SYSTEM

Every stage of the criminal process has, traditionally, been in-person. Arraignment, bail hearings, pre-trial conferences, pre-trial motions, trial, sentencing, probation progress reports, diversion hearings, diversion progress reports, drug court meetings, and grand juries are just some of the many criminal court processes that have traditionally been in-person. In recent years, some processes in some courts have moved online, or partially online, such as bail hearings.¹²² When the pandemic started, in March of 2020, courts around the country declared judicial emergencies and

120. *Id.* at 31.

121. *Id.* at 5 (finding that it can also be problematic in shorter term emergencies for agencies and institutions to be working in silos).

122. Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMIN. 869, 893 (2010) (finding that defendants who had in-person bond hearings had lower bond amount set, ranging from 54% to 90%, depending on the offense).

ordered jury trials and other processes to be postponed.¹²³ As the pandemic wore on, the dates for judicial emergencies were repeatedly extended.¹²⁴ As all courts shut down, criminal courts faced immediate questions about how to handle essential processes, such as arraignments and bail hearings.¹²⁵ Although arrest rates declined, particularly in the early months of the pandemic in 2020, people were still being arrested.¹²⁶ Defendants had a right to arraignments and bail hearings.¹²⁷ Courts had to quickly figure out how to continue with essential proceedings while complying with both statewide and county-level public health orders. Nearly three years later, criminal courts are still struggling to manage the case backlogs that started during the first few months of the pandemic when plea bargaining slowed down (or stopped) and far fewer cases settled.¹²⁸

There was also a full range of questions about how to handle in-person, or hybrid proceedings, when some parties were in person and others attended via videoconference. For in-person proceedings, would there be social distancing requirements? Would everyone be required to wear a mask and who would enforce

123. Angela Morris, *No Jury Trials in Texas Until October Under New Emergency Order*, LAW.COM: TEX. LAW. (Aug. 6, 2020, 7:30 PM), <https://www.law.com/texaslawyer/2020/08/06/no-jury-trials-in-texas-until-october-under-new-emergency-order/>; Eighteenth Emergency Order Regarding the COVID-19 State of Disaster, 609 S.W.3d 122 (Tex. 2020); Twenty-Second Emergency Order Regarding the COVID-19 State of Disaster, 609 S.W.3d 129 (Tex. 2020).

124. See *Twenty-Second Emergency Order Regarding the COVID-19 State of Disaster*, 609 S.W.3d at 129.

125. Jolie McCullough & Emma Platoff, *Coronavirus Pauses Many Texas Court Proceedings. For Some, that Means More Time in Jail*, TEX. TRIB. (Mar. 19, 2020, 11:00 AM) <https://www.texastribune.org/2020/03/19/texas-courts-coronavirus-jury-trials-defense-attorneys/>.

126. *COVID-19 Spurs 25% Drop in Inmates Held in Local Jails*, OFF. OF JUST. PROGRAMS: BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?datp&tid=39> (last visited Nov. 10, 2022).

127. *COVID-19: Court Information About Essential Functions, Links to Resources*, MICH. INDIGENT DEF. COMM'N (Mar. 23, 2020), <https://michiganidc.gov/covid-19-court-information-about-essential-functions-links-to-resources/> (finding that Michigan courts defined arraignments as an essential function); see also Candice Norwood, *Criminal Defendants in Limbo as Trials Put on Hold During the Pandemic*, PBS NEWS HOUR (May 22, 2020, 11:08 AM), <https://www.pbs.org/newshour/nation/criminal-defendants-in-limbo-as-trials-put-on-hold-during-pandemic> (defining arraignments as an essential functions within Michigan courts).

128. Alan Feuer et al., *N.Y.'s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html>. One of the reasons for the backlog is that plea bargaining was dramatically reduced when the courts shut down. See Alkon, *supra* note 4, at 37.

these requirements?¹²⁹ How would paperwork, such as plea waiver forms, be handled if the defendant was not present in court?¹³⁰ In the early days of the pandemic, it was not clear that COVID-19 was entirely airborne, so there were concerns about touching pens or pieces of paper that others had touched. Would courtrooms install plexiglass partitions? Who would get a partition? Just the clerk, or would counsel table also be outfitted with plexiglass partitions?

In each court, decisions had to be made quickly about *how* these essential proceedings were going to go forward.¹³¹ Were defendants going to be brought to the courtroom for arraignments and bail hearings? Or were they going to attend remotely?¹³² Were the lawyers going to be required to be in court, or allowed to attend via videoconference? What about the judges? How were they going to preside over these proceedings—in-person, or on video conference? What about the general public? Were courts going to be closed to the public (which could pose constitutional problems)? How would drug courts and other problem-solving courts function? How would defendants access services, such as probation? These were complicated questions that needed to be addressed quickly and during a time at the beginning of the pandemic when there was not enough information about how to better protect against COVID-19. The health and safety issues were serious. COVID-19

129. Maura Dolan, *Inside California Courts, Lawyers Fume that Mask Wearing Is Mixed During Pandemic*, L.A. TIMES (July 11, 2020), <https://www.latimes.com/california/story/2020-07-11/courts-masks-coronavirus-public-defenders> (reporting varied compliance with mask rules and who would enforce the rules).

130. Alkon, *supra* note 4, at 478.

131. For an example of some of these issues and decisions in the early days of the pandemic, see Alan Feuer et al., *Coughing Lawyers. Uneasy Jurors. Can Courts Work Under Coronavirus?*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/nyregion/coronavirus-new-york-courts.html>; see also Monivette Cordeiro, *How Central Florida's Legal System is Adjusting to Coronavirus Shutdown*, ORLANDO SENTINEL (Apr. 21, 2020, 5:30 AM), <https://www.orlandosentinel.com/coronavirus/os-ne-coronavirus-courts-still-open-20200421-bbpqmyaudrhnrqm5kj5x5snqq-story.html> (describing how different courts in Central Florida were handling their dockets).

132. James Queally, *L.A. County Courts Launch Video Hearing During Coronavirus Crisis*, L.A. TIMES (Apr. 21, 2020, 6:51 PM), <https://www.latimes.com/california/story/2020-04-21/l-a-county-courts-launches-video-hearing-system-during-coronavirus-crisis> (describing the program that does video arraignments).

killed lawyers and interpreters.¹³³ Professionals throughout the court system fell ill.¹³⁴

The pandemic demanded a variety of changes throughout the criminal legal system, but this discussion will focus on four broad categories of change that raised serious questions about the system's ability to deliver fairness and justice: remote proceedings; mask mandates, enforcement and availability; in-custody clients and the spread of COVID-19; and re-opening. Health and safety concerns, caseload management, complying with the law, and basic issues of justice were recurring questions within each of these categories of change. It is difficult to clearly carve out categories, as one issue can impact another. For example, mask requirements were a general issue in all in-person court proceedings but carried a specific set of concerns in the context of jury trials in, among other things, the context of protecting the constitutional right to confront witnesses.¹³⁵

A. Remote Proceedings

Courts around the country quickly shifted a large variety of court proceedings online. Criminal courts had, in some places, used video arraignments and bail hearings. Some jurisdictions had video conferencing technology for attorney-client communications before the pandemic. But remote processes were not in widespread use until COVID-19. As Andrew Guthrie Ferguson observed, “[w]ith little planning, less academic debate, and almost no input from impacted communities, what the public used to think of as criminal court started becoming a virtual proxy of the real thing.”¹³⁶ According to one source, thirty-eight states have mandated or encouraged the use of virtual hearings since the

133. Craig Clough, *L.A. Courts Criticized for COVID-19 Policies, Interpreter's Death*, LAW360 (Jan. 15, 2021, 9:16 PM), <https://www.law360.com/pulse/articles/1345785/la-courts-criticized-for-covid-19-policies-interpreter-s-death>; see Debra Cassens Weiss, *Prosecutor in Critical Condition with COVID-19 Had Filed an OSHA Complaint*, A.B.A. J. (July 14, 2020, 1:25 PM), <https://www.abajournal.com/news/article/prosecutor-in-critical-condition-with-covid-19-had-filed-an-osha-complaint>.

134. See Lance Benzel, *Colorado Public Defender Tests Positive for COVID-19, Others Wait for Tests*, THE GAZETTE (Mar. 18, 2020), https://gazette.com/news/colorado-public-defender-tests-positive-for-covid-19-others-wait-for-tests/article_5765b756-6944-11ea-a4c2-3f3b867b805d.html; Frank G. Runyeon, *COVID-19 Sickens 17 Judges, Over 150 Court Staffers in N.Y.*, LAW360 (Apr. 27, 2020), <https://www.law360.com/articles/1267819>.

135. U.S. CONST. amend. VI.

136. Andrew Guthrie Ferguson, *Courts Without Court*, 75 VAND. L. REV. 1461, 1464 (2022).

pandemic started.¹³⁷ However, as will be discussed below, courts did not tend to use a collaborative or even a consultative process to determine how best to move proceedings online. In September of 2020, the Brennan Center for Justice published a report on the *Impact of Video Proceedings on Fairness and Access in Court* and concluded that there was a need “for broad stakeholder engagement in developing court policies involving remote proceedings.”¹³⁸

Shifting online was not smooth, as courts lacked funding and struggled to get equipment and technical skills to shift to online practices.¹³⁹ Potential problems with electronic proceedings were clear before the pandemic. For example, a 2010 study found that 37% of courts using video conferencing did not have a system for private attorney-client communications if the attorney and client were in different locations.¹⁴⁰ A pre-pandemic study in Baltimore found that virtual hearings prevented lawyers from being able to confer with their clients.¹⁴¹ In addition, there are concerns about online proceedings disadvantaging defendants in terms of the outcomes. For example, a pre-pandemic study in Cook County, Illinois, found that defendants had worse access to counsel and 50% higher bail when they appeared virtually, as compared to in-person.¹⁴² It is not clear that any court made significant changes to how online proceedings were conducted during the pandemic to address these concerns. Defense lawyers, in the survey I conducted, had significant concerns that remote proceedings and communications during the early months of the pandemic deprived

137. Deniz Ariturk et al., *Virtual Criminal Courts*, 2020 UNIV. CHI. LA. REV. ONLINE 57, 57 (2020).

138. Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access in Court*, BRENNAN CTR. FOR JUST., Sept. 10, 2020, at 1, 3, <https://www.brennancenter.org/media/6631/download>.

139. See generally Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH. L. REV. 197, 216–22 (2021) (analyzing reasons to be cautious about adopting more widespread remote proceedings after the pandemic based on survey results of federal and state judges, prosecutors, and defense lawyers in Texas).

140. Eric Bellone, *Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. INT'L COM. L. & TECH. 24, 44–45 (2013).

141. Ariturk et al., *supra* note 137, at 64.

142. Diamond et al., *supra* note 122, at 897–99. *But see* Avital Mentovich et al., *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 ALA. L. REV. 893, 975 (2020) (finding that online proceedings without video or cameras may decrease implicit bias and did decrease disparate outcomes in traffic violation cases).

their clients of the right to confidential attorney-client communication.¹⁴³

Another concern was that the digital divide meant that not every defendant had equal access to the internet or to a device to access the internet.¹⁴⁴ How could a defendant join a virtual proceeding without a smart phone or computer or access to the internet? What if a defendant did not have basic technology skills, as might be more likely with older defendants? What if the defendant was disabled and that impaired their ability to access the internet? What if jails did not have adequate video conferencing for remote hearings? What if the jails were not equipped with adequate video conferencing for attorney-client meetings? Transitions to remote proceedings happened quickly and courts often did not consider, or have in place fixes, for these potential problems. More importantly, many courts had no process in place to address these questions as they arose and thus could not make adjustments to the new processes.

Remote processes required consent, including remote plea bargains.¹⁴⁵ Some prosecutors refused to consent to virtual plea hearings.¹⁴⁶ On the defense side, there was concern that consent to a virtual hearing could be coerced if that was the only way a defendant could, for example, enter a plea of guilty and be released from jail.¹⁴⁷ Coercion in plea bargaining is a continuing criticism of the process that predates the pandemic.¹⁴⁸ During the pandemic, this concern was exacerbated as plea bargaining could be even more coercive when defendants faced increased risk of exposure to

143. Alkon, *supra* note 4, at 498.

144. COLBY LEIGH RACHFAL, CONG. RSCH. SERV., R46613, THE DIGITAL DIVIDE: WHAT IT IS, WHERE IT IS, AND FEDERAL ASSISTANCE PROGRAMS (Mar. 9, 2021). “The digital divide has been used to characterize a gap between those Americans who have access to telecommunications and information technologies and those who do not. One subset of the digital divide debate concerns access to high-speed internet, also known as broadband.” *Id.*

145. Ariturk et al., *supra* note 137, at 59.

146. Alkon, *supra* note 4, at 502.

147. Ariturk et al., *supra* note 137, at 59.

148. ALKON & SCHNEIDER, *supra* note 30, at 131–33; Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When do Prosecutors Cross the Line?*, 17 NEV. L.J. 401, 415–16 (2017); see also H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. UNIV. L. REV. 63 (2011); John H. Langbein, *Torture and Plea Bargaining*, 46 UNIV. CHI. L. REV. 3, 12 (1978); Steven F. Gillers, *Justice By Consent: Plea Bargains in the American Courthouse*, 5 HOFSTRA L. REV. 217, 223–25 (1976) (reviewing ARTHUR R OSSETT & DONALD R. CRESSY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE (1976)).

COVID-19 in jails and may have been anxious to take any deal that could get them released from custody sooner.¹⁴⁹

Remote processes may not be open to the public.¹⁵⁰ A lack of public access could violate the Constitution.¹⁵¹ This can also have a negative impact on defendants in proceedings like bail hearings.¹⁵² One theory is that judges may change their behavior if they think they are being watched, as compared to when they think they are not and are operating “out of sight with less accountability”.¹⁵³ During the early months of the pandemic, some courts allowed public access to virtual court proceedings and some left it up to individual judges. In some places, such as Los Angeles and Miami, there were no provisions to allow the public to watch.¹⁵⁴

On the positive side, remote proceedings illustrated that it is possible to handle appearances without demanding that the defendant appear. It is well documented that the criminal process, which requires multiple court appearances, can be an undue burden to defendants and may be one of the reasons that defendants plead guilty, as they cannot afford to continue taking days off from their jobs to fight what is often a low-level criminal case.¹⁵⁵ Allowing for increased remote appearances reduces this burden. Remote appearances can lower failure to appear rates.¹⁵⁶ Michigan reported that failure to appear rates decreased from 10.7% to 0.5% in April of 2020, after remote appearances began.¹⁵⁷ Parts of North Dakota reported 100% appearance rates after beginning remote proceedings.¹⁵⁸

149. Ariturk et al., *supra* note 137, at 59; *see also* Thea Johnson, *Criminal Law: Crisis and Coercive Pleas*, 110 J. CRIM. L. & CRIMIN. ONLINE 1, 2 (2020) (describing how COVID-19 increases the risk for coercive pleas and innocent defendants pleading guilty, making recommendations including that judges should take a stronger role in protecting against coercion in plea bargaining).

150. Ariturk et al., *supra* note 137, at 65.

151. U.S. CONST. amend. VI.

152. Ariturk et al., *supra* note 137, at 64.

153. *Id.*

154. *Id.*

155. FEELY, *supra* note 16 (describing the problem of repeated court appearances and the hardships that can create for defendants); *see* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 2 (2018) (finding approximately 80% of criminal cases are misdemeanors).

156. Ariturk et al., *supra* note 137, at 63.

157. *Id.*

158. *Id.*

B. Mask Mandates, Enforcement, and Availability

As in the larger society, the criminal courts faced recurring complaints and concerns around masks. Courts had to decide how to follow existing mask mandates and other health and safety precautions. Lawyers complained that the rules were either unclear or not uniformly enforced. In the nationwide survey of judges, prosecutors, and defense lawyers, respondents repeated the concern that rules were not uniformly followed or enforced. As one defense lawyer said:

Some judges still refuse to wear masks despite orders from the Chief Judge and governor, and they refuse to enforce mask usage in their courtrooms. However, defense lawyer and prosecutors are part of the problem as they often choose not to wear a mask, or they do not wear them properly. It's a four-alarm fire of arrogance, entitlement and stupidity.¹⁵⁹

In Pennsylvania, in June of 2020, in response to similar concerns about people not wearing masks in court, a Judge reaffirmed a prior order that masks were required stating that “not everyone, including judges, is wearing a mask or face covering during court proceedings . . . [n]ot wearing a mask is disrespectful and sends a message to the public and attorneys, that we care more about our personal comfort than we do about their safety.”¹⁶⁰

Another concern was about the lack of masks for clients. In that same survey, one defense lawyer observed that, “[w]hen COVID first occurred they were still bringing inmates to court with no safety measures. Inmates did not wear masks and were not socially distanced.”¹⁶¹ The chaos in the first few months of the pandemic also meant that out of custody clients were turned away from court if they did not have a mask. As one defense lawyer in the same survey explained, “Warrants were issued to [defendants] who didn't appear [because] they were turned away for not having

159. Defense Attorney Response 10, app. question 46, p. 90 (on file with author).

160. Debra Cassens Weiss, *Prosecutor in Critical Condition with COVID-19 Had Filed an OSHA Complaint*, A.B.A. J. (July 14, 2021, 1:25 PM), <https://www.abajournal.com/news/article/prosecutor-in-critical-condition-with-covid-19-had-filed-an-osha-complaint>; see also Kathryn Rubino, *Judge Reportedly Refuses to Wear Mask, Orders Lawyers to Remove Theirs as Well*, ABOVE THE L. (Aug. 13, 2020, 12:48 PM), <https://abovethelaw.com/2020/08/judge-reportedly-refuses-to-wear-mask-orders-lawyers-to-remove-theirs-as-well/>.

161. Defense Attorney Response 11, app. question 46, p. 93 (on file with the author).

a mask. We were continually trying to find masks for our clients so they could get into the courthouse”¹⁶²

C. In-Custody Clients and the Spread of COVID-19

Courts around the country, recognizing the health risks of contracting COVID-19 in jail, expedited bond processes and, in some places, eased the requirements for pre-trial release.¹⁶³ Jails had high rates of COVID-19, with no uniform approach to better protect either lawyers or those who were imprisoned.¹⁶⁴ One lawyer in Texas reportedly died in December of 2020 after contracting COVID-19 from his in-custody client.¹⁶⁵ Some jails decided they could not advise lawyers or the court if a particular defendant had COVID-19 as that would violate HIPPA rules.¹⁶⁶ In the survey, one defense lawyer said, “Dallas jails won’t release who is quarantined and who is not due to HIPPA so there’s no way for the courts to know who has COVID or if they have been exposed.”¹⁶⁷ In the survey, both judges and defense lawyers expressed concern that jails quarantining defendants after court appearances acted as a punishment for going to court and would discourage defendants from future court appearances.¹⁶⁸ In at least one case, the jail failed to inform the court that a defendant who was on trial had tested positive for COVID-19, thereby potentially exposing the jurors and the court staff to COVID-19.¹⁶⁹ There were

162. Defense Attorney Response 23, app. question 48, p. 99 (on file with author).

163. Stephanie Francis Ward, *Where and How Are Criminal Defense Lawyers Making Headway on COVID-19 Bail Motions?*, A.B.A. J. (Apr. 6, 2020, 9:48 AM), <https://www.abajournal.com/web/article/where-and-how-are-criminal-defense-lawyers-making-headway-on-covid-19-bail-motions>.

164. Timothy Williams & Danielle Ivory, *Chicago’s Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars*, N.Y. TIMES (APR. 8, 2020), <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>; see Beth Schwartzapfel et al., *One in Every Five Prisoners in the US Has Tested Positive for COVID-19*, ASSOCIATED PRESS (Dec. 18, 2020), <https://apnews.com/article/pandemics-race-and-ethnicity-prisons-united-states-coronavirus-pandemic-0bef0673013aa579551db5ad61b885e0> (reporting that 1700 had died).

165. Jolie McCullough, *A Texas Man Was Sent to Trial with the Coronavirus. Jurors Weren’t Told They Were Exposed Until After Deliberations Ended*, TEX. TRIBUNE (Jan. 5, 2021), <https://www.texastribune.org/2021/01/05/texas-jury-trials-coronavirus>.

166. Alkon, *supra* note 4, at 30.

167. Defense Attorney Response 35, app. question 48, p. 99 (on file with author).

168. Alkon, *supra* note 4, at 30.

169. McCullough, *supra* note 165.

also problems with jails not acting quickly to release those granted bail or ordered released.¹⁷⁰

D. Re-opening

Some proceedings that had been initially suspended started up again. For example, federal grand juries resumed in June 2020, although with social distancing and, in some places, video conferencing.¹⁷¹ Plans to reopen courts in 2020 were met with concern and complaints about safety.¹⁷² There was also uncertainty about whether jurors would agree it was safe enough to show up for jury duty.¹⁷³ Other jurisdictions found that lawyers were looking to alternate, and previously rarely used proceedings as a way to work around courts not using the standard processes. For example, when New York suspended grand jury deadlines some defense attorneys instead requested preliminary hearings. This was a process which reportedly hadn't been used for decades in New York, and was, due to the pandemic, conducted by video.¹⁷⁴

There were also serious questions about what proceedings were in-person and whether courts were resuming in-person proceedings too quickly. In response to restarting in-person proceedings for traffic and eviction hearings, five non-profit legal service organizations sued the Los Angeles (“LA”) County Superior

170. Alkon, *supra* note 4. Defense lawyer respondents in the survey held judges responsible for the delays. One defense lawyer said, “the judges should also have put their foot down and required clerks and the jail to do their job and get people out in a timely manner. I had a client who posted bond and then waited an additional two weeks for release so he could get a leg monitor.” Defense Attorney Response 57, app. question 48, p. 101 (on file with author).

171. Madison Alder, *U.S. Courts Try Out Social Distancing, Video for Grand Juries*, BLOOMBERG L. NEWS: US L. WEEK (June 8, 2020, 4:50 AM), https://news.bloomberglaw.com/us-law-week/u-s-courts-try-out-social-distancing-video-for-grand-juries_

172. David Brand, *Public Defender Groups Say Court Opening Plan Endangers Clients and Staff*, *Queens Daily Eagle* (July 9, 2020), <https://queenseagle.com/all/public-defender-groups-say-court-opening-plan-endangers-clients-and-staff>; *see also* Nicole Hong & Jan Ransom, *Only 9 Trials in 9 Months: Virus Wreaks Havoc on New York’s Courts*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/12/02/nyregion/courts-covid.html?>

173. Meha Ahmad, *Cook County Jury Trials to Resume Next Month*, WBEZ CHI. (Jan. 21, 2021, 2:46 PM), https://www.wbez.org/stories/cook-county-jury-trials-to-resume-next-month/c39d7a1c-7f78-4204-9ce3-db588e6d3a56_

174. Alan Feuer et al., *N.Y.’s Legal Limbo: Pandemic Creates Backlog of 39, 200 Criminal Cases*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html>.

Court Presiding Judge in February of 2021.¹⁷⁵ The court restarted these proceedings before vaccines were widely available.¹⁷⁶ The concern was that it was unsafe to resume in person proceedings when LA County had high COVID-19 rates and was the “epicenter of the coronavirus pandemic.”¹⁷⁷ Justice was one reason motivating the law suit as one of the lawyers commented that, “[t]he communities we serve are already suffering the worst consequences of this pandemic, with rates of serious illness and death several times higher than those in whiter, wealthier neighborhoods . . . the Los Angeles Superior Court, as the guardian of justice, should be trying to mitigate these inequalities, not exacerbate them.”¹⁷⁸ When the law suit was filed, three LA County Superior Court employees had died from COVID-19.¹⁷⁹ In another example, New York re-opened traffic court, requiring motorists to appear in person, while the police officers were allowed to appear by telephone.¹⁸⁰

Jury trials resumed when mask and social distancing orders were still in force, leading to questions about how to do trials under these circumstances.¹⁸¹ Defense lawyers raised concerns about jurors not being able to see the faces of witnesses when they testify in a mask, arguing that jurors can’t assess the credibility of a

175. Craig Clough, *LA Judge Sued over “Super Spreader” Hearings Amid Virus*, LAW360 (Feb. 9 2021, 10:41 PM), <https://www.law360.com/pulse/articles/1353906/la-judge-sued-over-super-spreader-hearings-amid-virus>.

176. *COVID-19 Vaccines*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/coronavirus/covid-19-vaccines/index.html> (last visited Oct. 23, 2022); *Secretarial Directive on Eligibility to Receive COVID-19 Vaccines*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Mar. 17, 2021), <https://www.hhs.gov/sites/default/files/secretarial-directive-eligibility-for-covid-19-vaccines.pdf>. COVID-19 vaccines were first approved in the United States in December 2020. On March 17, 2021, the U.S. Secretary of Health and Human Services directed that COVID-19 vaccines should be made available to “all persons eligible to receive the COVID-19 vaccine” by May 1, 2021. See *COVID-19 Vaccines*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/coronavirus/covid-19-vaccines/index.html> (last visited Nov. 11, 2022). Eligible people were those 16 years and older at that time. *Id.* The vaccine was approved for those age 12–15 years on May 10, 2021. *Id.*

177. Clough, *supra* note 175.

178. *Id.*

179. *Id.*; see also Matt Hamilton, *Workers in LA’s Courts Are Dying of COVID-19 as In-Person Hearings, Trials, Continue*, L.A. TIMES (Feb. 5, 2021), <https://www.latimes.com/california/story/2021-02-05/covid-complicates-in-person-trials-la-courthouses>.

180. Kathleen Culliton, *Cops Phone in Testimony as Traffic Courts Rake in Cash*, SPECTRUM NEWS (Aug. 12, 2020, 7:00 AM), <https://www.ny1.com/nyc/all-boroughs/news/2020/08/05/cops-phone-in-testimony-as-traffic-courts-rake-in-cash>.

181. See Sarah Jarvis, *NY, Los Angeles Join Piecemeal Jury Trial Restart Across US*, LAW360 (Aug. 25, 2020), <https://www.law360.com/articles/1303948/ny-los-angeles-join-piecemeal-jury-trial-restart-across-us>.

masked witness.¹⁸² Social distancing rules created problems also, as one lawyer objected to their client being seated six feet away during trial concerned that it would leave the perception that “I don’t trust [my client], that I don’t want to be near him. There is an implication of guilt.”¹⁸³ The distance also created problems of attorney-client communication, with the judge in one proceeding saying, “the days of counsel whispering to a client seated next to them with the pandemic is bluntly, over.”¹⁸⁴ In addition, there were, inevitably, examples of COVID-19 exposures during trial.¹⁸⁵

A concern with resuming jury trials while COVID-19 rates were still high was the impact it might have on the diversity of potential jurors, including reducing the numbers of African American and Latinx jurors.¹⁸⁶ A law firm in Texas surveyed potential jurors in Dallas and Houston and reported that a majority said they would only respond to a juror summons if there were adequate safety precautions in place.¹⁸⁷ African American and Latinx respondents were more likely to express concern about safety.¹⁸⁸ The President of the Texas Criminal Defense Lawyers Association said that

We know that African Americans, Latinos and other people of color have been disproportionately affected by COVID-19 . . . [i]f they don’t show up for jury service in as great a percentage as they have in previous years, it may be impossible for minority defendants to have anything close to a jury of their peers.¹⁸⁹

Some judges were less than sympathetic to those concerns. Texas State District Judge Ralph Strother said:

We summon people for jury duty all the time against their will. What’s the difference? We are not going to put an end to disease.

182. Maria Dinzeo, *Judge Orders Transparent Masks for Witnesses in Criminal Trial*, COURTHOUSE NEWS SERV. (July 16, 2020, 10:31 AM), <https://www.courthousenews.com/judge-orders-transparent-masks-for-witnesses-in-criminal-trial/>.

183. *Id.*

184. *Id.*

185. Rochelle Olson, *First Hennepin County Jury Trial Since Pandemic Results in Quarantine for Judge, Staff*, STAR TRIB. (June 11, 2020, 5:17 AM), <https://www.startribune.com/first-hennepin-county-jury-trial-since-pandemic-results-in-quarantine-for-judge-and-her-staff/571165002/>; McCullough, *supra* note 165.

186. McCullough, *supra* note 165.

187. *Id.*

188. *Id.*

189. *Id.*

We have maladies that affect the human race every day. People make this an issue and say we don't care about lives. Of course we care about lives. But, I could make the argument that if we stopped driving cars, we could save 50,000 to 60,000 lives a year. Are we going to stop driving cars? No.¹⁹⁰

As these examples highlight, courts did not adopt a uniform approach. Underlying these changes and complaints about the changes were concerns about justice.

V. LACK OF COLLABORATIVE DECISION-MAKING DURING THE PANDEMIC

A DSD design approach to making decisions is, by definition, one that is inclusive, interest-based (not power-based), and uses the analytic framework as a starting point, with a focus on how these changes might impact justice. Some courts did seek views of stakeholders before setting policy. For example, Harris County (Houston, Texas) conducted a survey of local attorneys in May of 2020, asking when jury trials should resume and seeking views on various health and safety precautions.¹⁹¹ Among the findings, 74% of respondents opposed the idea of remote jury trials.¹⁹² However, adopting inclusive interest-based processes to determine what processes to adopt and what policies to enact, was not a norm in terms of how the courts responded to COVID-19, nor has it been prior to COVID-19. For example, during the ten-day period in March of 2020 when courts around the country shut down, the basic DSD approach was not used. These were not collaborative processes. The decision to shut down was top down—either by a

190. Tommy Witherspoon, *McLennan County Judges, Court Officials Prepare for Return of Jury Trials*, WACO TRIB.-HERALD (Apr. 29, 2020), https://wacotrib.com/news/local/mclennan-county-judges-court-officials-prepare-for-return-of-jury-trials/article_625d2bab-4864-59ac-a1d1-d02dbe9b0504.html.

191. Angela Morris, *Most Houston Lawyers Don't Want Jury Trials Back Before Fall, Survey Says*, TEX. LAW. (June 1, 2020), <https://www.law.com/texaslawyer/2020/06/01/most-houston-lawyers-dont-want-jury-trials-back-before-fall-survey-says> (stating that jury trials did resume in 2020 in Harris County, but at much lower rates); see Samantha Ketterer, *No 'Meaningful Relief': Harris County Trials Plunge from 1,600 a Year to 52 Since COVID*, HOUS. CHRON. (Feb. 10, 2021), <https://www.houstonchronicle.com/news/houston-texas/crime/article/covid-jury-trials-harris-county-attorneys-rights-15939448.php> (finding that jury trials did resume in 2020 in Harris county, but at much lower rates); Jessica Willey, *High Profile Trials to Start Next Week in Push to Impact Harris County Case Backlog*, ABC 13 NEWS (Apr. 22, 2022), <https://abc13.com/harris-county-criminal-courthouse-backlog-high-profile-cases-begin/11781574/>.

192. Morris, *supra* note 191.

governor's order, the statewide court administration, or local presiding judges. The shutdown decisions were not open for discussion or debate. Given the scope of the public health crisis, these initial decisions did need to be made quickly. However, in most courts, decisions on how to manage questions beyond the initial shut down were also top-down. These decisions would have benefitted from a more collaborative and inclusive process.

Not surprisingly, there was more focus, both by courts and by lawyers, on the end result—final decisions and policies—and not on the decision-making process itself. For example, the National Association of Criminal Defense Lawyers (NACDL) published a *Statement of Principles and Report* on how criminal courts should approach reopening during COVID-19.¹⁹³ This report listed ten core principles for reopening.¹⁹⁴ The ten core principles were:

- (1) In-Person Proceedings Must Be Certified by Independent Medical Experts to Present Minimal Risk of COVID-19 Transmission
- (2) High-Risk Individuals Should Not be Required to Participate in In-Court Proceedings in Which There is a Risk of Infection in the Courthouse, Nor Should That Person or the Accused Suffer Any Penalty or Loss of Rights for Declining to Participate
- (3) Any Measures Implemented to Address the Pandemic Must Be Limited to the Duration of the Pandemic and Tailored to Meet an Articulated Public Health Need
- (4) Criminal Proceedings Require That Conditions Are Restored That Ensure Defense Counsel Can Meet Their Sixth Amendment Obligations, Including the Conditions Necessary for Robust, Ethical Attorney-Client Relationships
- (5) Criminal Proceedings Require That Conditions Are Restored That Ensure Effective Representation by Conflict-Free Defense Counsel

193. *Criminal Court Reopening and Public Health in the COVID-19 Era: NACDL Statement of Principles and Report*, NAT'L ASS'N OF CRIM. DEF. LAWS. (June 2, 2020), https://www.fd.org/sites/default/files/covid19/live_courtroom_proceedings/criminal-court-reopening-and-public-health-in-the-covid-19-era.pdf.

194. *Id.* at 1.

- (6) Constitutional Rights Must Not Be Abridged
- (7) Use of Virtual Mechanisms Must Be Temporary, Limited, and Consistent with Constitutional Rights
- (8) Use of Virtual Mechanisms Requires the Informed and Voluntary Consent of the Accused Based on a Robust Attorney-Client Relationship
- (9) Any Measures Implemented to Address the Pandemic Must Not Exacerbate the Well-Recognized Historic Failures of the Criminal Legal System
- (10) Courts Should Use Pre-Trial Release and Other Mechanisms to Minimize the Pressures on the Accused During the Pandemic, Including Affording an Accused the Unilateral Right to Elect a Bench Trial Where that Right Does Not Already Exist.¹⁹⁵

This thoughtful and thought-provoking list did not include a requirement that defense counsel be consulted in the process of deciding when or how to reopen courts. The document also does not discuss the process by which these ten core principles will be protected. Instead, it gave criteria and recommendations for the circumstances under which reopening could occur. Arguably, Core Principle VIII recognized the need for input as it stated that the “[u]se of [v]irtual [m]echanisms [r]equires the [i]nformed and [v]oluntary [c]onsent of the [a]ccused [b]ased on a [r]obust [a]ttorney-[c]lient [r]elationship.”¹⁹⁶ However, there is no further explanation given about how it would be determined that there is a “robust attorney-client relationship.”¹⁹⁷

Overall, however, the list is outcome or substantive justice focused. It is not focused on procedural justice or the process by which courts will make these decisions. This is just one example of how the professionals in the system seemed to not expect more inclusive decision-making. This is understandable as criminal courts are rights-based systems and this is part of the existing culture in criminal courts. It means there might not have been a demand for collaborative decision-making, much less a recognition

195. *Id.*

196. *Id.* at 5.

197. *Id.*

that how decisions are made could determine whether the ten core principles would be protected. This list from this national organization clearly recognizes that defense lawyers wanted to be part of the conversation and part of the process to put better policies in place and was a clear effort to have voice in courts nationwide as these decisions were being made.

An indication of how disconnected defense lawyers felt from the decision-making during the early months of the pandemic was from a nation-wide survey that I conducted during the first five months of the pandemic in 2020.¹⁹⁸ A total of 549 people responded to the survey, of those, 39% were judges 46% were defense lawyers, and just over 10% were prosecutors.¹⁹⁹ Overall, the survey results reflected a more power-based, rather than interest based and inclusive form of decision-making during the early months of the pandemic. Although the survey results indicate that some jurisdictions were more collaborative, the results indicate that there were widespread failures to look more broadly at the impact of these decisions. Goals were not set, and stakeholders were not consulted. Often, decisions were made to move processes online, without the resources to do so, much less with any consideration on the impact that moving these processes online might have for issues of justice.²⁰⁰

The survey results reveal that defense lawyers overwhelmingly did not think they had been consulted in these decisions.²⁰¹ Judges often disagreed with this assessment and thought they had consulted with prosecutors and defense lawyers.²⁰² There are also differences of opinion between the professional groups about what the goals of these changes in process were: was it safety or efficient case processing, or safety for some groups (such as judges and court personnel) and not others? Defense lawyers overwhelmingly reported concerns about the lack of justice for their clients in numerous ways including breakdowns in attorney-client communication, custody issues, and concerns

198. See Alkon, *supra* note 4 (containing a more detailed analysis of the survey results).

199. *Id.* at 463. When reporting survey data throughout this Article, the percentages have been rounded up or down. Any answer that is .00–.50 (such as 10.49%) will be reported rounding down (10%). Any answer that is .60–.99 (such as 10.79%) will be reported rounding up (11%). *Id.*

200. *Id.* at 467.

201. *Id.*

202. *Id.*

about delays in case processing and poor outcomes in plea bargaining (including not being able to plea bargain cases).²⁰³

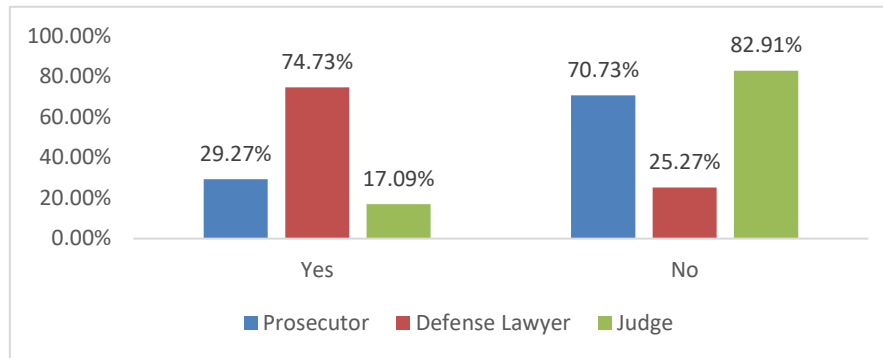


Table 1: Were there changes that should have been made with defense input, but were not?

The largest number of defense responses to this question identifying a specific area in which they should have been consulted, but weren't, reported they were not consulted about attorney client communication. One respondent said there was "[n]o input on how defenders talk to their clients."²⁰⁴ Another defense lawyer observed that "[t]he defense bar was left to figure out how to communicate with their jailed inmates."²⁰⁵

Some defense lawyers reported that if they were consulted, their suggestions were ignored. One defense lawyer said that the "[j]udges ignore all of our input, and in fact strive to do the exact opposite."²⁰⁶ Another said that the "[c]ourt asked but did not implement one suggestion. It was a farce."²⁰⁷ One defense lawyer reported that "[a]lthough our concerns are taken under consideration, none have seem[ed] to be addressed."²⁰⁸ Others, however, reported that courts did change practices. One defense lawyer responded that, "[t]here were several false starts in making changes. When we pointed out that we as a defense bar were not included in some of them the courts invited us to participate."²⁰⁹

203. *Id.*

204. Defense Attorney Response 26, app. question 40, p. 77 (on file with author).

205. Defense Attorney Response 133, app. question 40, p. 81 (on file with author).

206. Defense Attorney Response 88, app. question 40, p. 80 (on file with author).

207. Defense Attorney Response 78, app. question 40, p. 79 (on file with author).

208. Defense Attorney Response 60, app. question 39, p. 74 (on file with author).

209. Defense Attorney Response 49, app. question 40, p. 78 (on file with author).

A smaller number of defense lawyers responded to this question by saying that the failure to consult was a long-standing practice that pre-dated the pandemic. As one stated “[t]here was no consulting with defense lawyers, but then again, there never is.”²¹⁰ Another defense lawyer said that “[i]n the courts in which I work, the defense bar is never consulted regarding court procedures.”²¹¹ One defense lawyer said “I have been practicing in the same jurisdiction for over 10 years and am not aware of any efforts to request input from defense counsel.”²¹² One defense lawyer commented that the “defense bar is largely left out of the initial decision-making process. We are brought in later after we complain.”²¹³ Other defense responses to this question reported “[n]o defense input was sought for a single change that was made.”²¹⁴

In addition to noting the lack of consultation, defense lawyers commented on the impact on their clients. As one reported, “[t]here had been zero consideration of the impact of these changes on the constitutional rights of criminal defendants.”²¹⁵

In contrast to the defense lawyers, both judges and prosecutors reported more consultation between groups. Over 70% of prosecutors and 80% of judges did not think that there were any changes that should have been made with defense input but were not.”²¹⁶

Some judges commented on the importance of consulting other groups. As one commented, “I think all input is valuable and necessary to make these changes . . . successful.”²¹⁷ Judges did not give answers reporting that they had excluded the defense bar from the decision-making process.²¹⁸ Seven judges, out of twenty seven answers in total on this point, admitted that they did not know if there were changes that should have been made with defense input, but were not. It is possible that these respondents were not directly involved in planning.²¹⁹

210. Defense Attorney Response 106, app. question 40, p. 80 (on file with author).

211. Defense Attorney Response 42, app. question 40, p. 78 (on file with author).

212. Defense Attorney Response 14, app. question 40, p. 77 (on file with author).

213. Defense Attorney Response 76, app. question 40, p. 79 (on file with author).

214. Defense Attorney Response 68, app. question 40, p. 79 (on file with author).

215. Defense Attorney Response 22, app. question 40, p. 77 (on file with author).

216. Judge and Prosecutor Responses to question 40, p. 24 (on file with author).

217. Judge Response 5, app. question 40, p. 24 (on file with author).

218. Judge Responses app. question 40, p. 24 (on file with author).

219. Judge Responses app. question 40, p. 24 (on file with author).

Contrasting perceptions around including defense lawyers in the decision-making process, all three groups largely agreed that prosecutors had been adequately consulted.

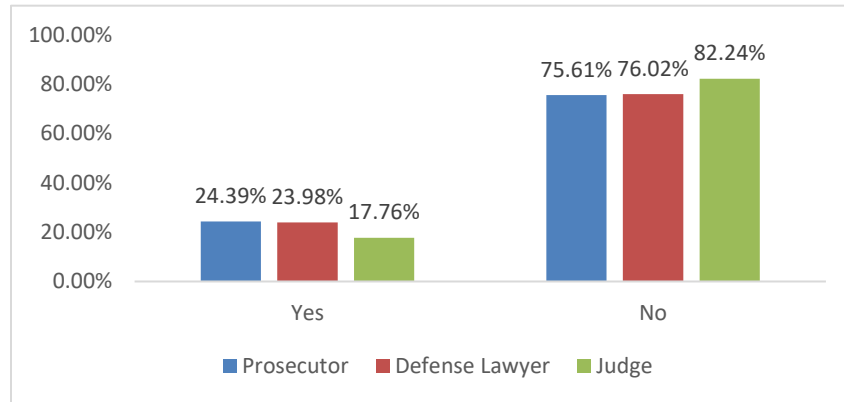


Table 2: Were there changes that should have been made with prosecutor input, but were not?

VI. DESIGNING FOR JUSTICE: LESSONS FOR THE FUTURE

One key lesson for the criminal legal system from the pandemic is that courts around the country need better on-going processes in place to manage change in a way that focuses on justice. The pandemic is not the first or only crisis that criminal courts have had or will have. Los Angeles County declared a judicial emergency and courts were shut and speedy trial, and other, rights suspended following the unrest that followed the not guilty verdict for the police officers who were captured on tape brutally beating Rodney King in 1992.²²⁰ Hurricane Katrina shut down courts in New Orleans.²²¹ Climate change will bring more

220. *Been There, Done That: War Stories Make Better Reading*, TEX. MUN. CTS. EDUC. CTR. 27, <https://www.tmcec.com/public/files/File/On%20the%20Docket/Disaster%20Materials/Disaster%20Recovery%20Planning%20for%20Courts.pdf> (last visited Oct. 18, 2022) (describing the judicial emergency was declared during the riots, which suspended all time limits affecting criminal case processing); see also Paul Lieberman & Greg Braxton, *Riots' Felony Cases Challenge Prosecutors*, L.A. TIMES (May 14, 1992), <https://www.latimes.com/archives/la-xpm-1992-05-14-mn-2992-story.html>.

221. Greg G. Guidry, *The Louisiana Judiciary: In the Wake of Destruction*, 70 L.A. L. REV. 1145, 1175 (2010) (describing the damage and chaos in the court system due to Hurricane Katrina in 2005); see also Victoria Terranova, *A Perfect Storm: A Call to Revise Louisiana's*

weather emergencies and potentially more pandemics.²²² As these examples illustrate, although COVID-19 was unique as a global event, it is not the only time courts have had to deal with sudden circumstances demanding quick action and decisions, and it will not be the last time. It is therefore important for courts to not go back to business as usual, without considering what processes should be in place to better manage future crises.

Moving forward, courts should consider how to include dispute system design processes into their planning and decision-making. Criminal courts dramatically increased their use of online processes during the pandemic. It is unclear what online processes will continue to be heavily used. Courts should be careful to not continue, for example, video bail hearings, simply because they are perceived to be a more efficient court process than in-person bail hearings. Courts should study the impact of these online proceedings focusing on issues such as justice and fairness. One clear finding from the pandemic is that courts should consider dropping the requirement that criminal defendants have to appear in person in court every time the case is on calendar, and shift instead to allowing remote appearances, or allowing, as is common

Court Disaster Management Scheme Regarding Suspension of Legal Deadlines, 67 LOY. L. REV. 547, 566 (2021) (calling for better disaster management by the judiciary for future natural disasters to better protect individual rights).

222. See generally DEP'T OF DEF., DEP'T OF DEF. CLIMATE RISK ANALYSIS (2021), <https://media.defense.gov/2021/Oct/21/2002877353/-1/-1/0/DOD-CLIMATE-RISK-ANALYSIS-FINAL.PDF>; see also *Impacts of Climate Change*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/climatechange-science/impacts-climate-change> (last visited Oct. 17, 2022) (describing the variety of disruptions climate change may cause both nationally and worldwide); Working Grp. II to the Sixth Assessment Rep. of the Intergovernmental Panel on Climate Change, *Summary for Policymakers*, in CLIMATE CHANGE 2022: IMPACTS, ADAPTION AND VULNERABILITY 1, 5 (Feb. 27, 2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf; U.S. Glob. Change Rsch. Program, *Chapter 14: Human Health*, in IMPACTS RISKS, AND ADAPTION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT 541, 545 (2018), <https://nca2018.globalchange.gov/chapter/14/>; *In Conversation: Why Climate Change Matters for Human Health*, MED. NEWS TODAY, (Apr. 22, 2022) <https://www.medicalnewstoday.com/articles/in-conversation-why-climate-change-matters-for-human-health> (“[T]here are fears that, even as we are still navigating the COVID-19 pandemic, more epidemics—or even other pandemics—may soon arise, and climate change will, at least in part, be to blame. In November 2021, Australian Academy of Science Fellow Prof. Edward Holmes expressed his worry that climate change will be responsible for the next pandemic: ‘[Pandemics are] going to happen more and a key driver of this is climate change. As climates change animals will change their distribution; they’ll probably group together more allowing viruses to jump more easily between them. With more humans living closer to wildlife, this opens the gate for potentially deadly viruses to then jump to human hosts.’”).

in civil practice, lawyers to appear for their clients.²²³ However, before a decision is made to finalize keeping certain processes online or remote courts in that jurisdiction should be careful to talk to all the stakeholders and, when appropriate, study the impact of these changes before finalizing them. It is beyond the scope of this Article to analyze what worked and did not work in the online processes in detail, but following a dispute system design process, courts should consult with stakeholders and build careful analysis and evaluation into any decision-making about whether to adopt online processes more permanently.

As the above discussion illustrates, there are serious justice implications when courts change *how* they work. Shifting online is not simply a logistical issue. It was undoubtedly challenging for courts to think more expansively when the pandemic began. Courts were confronted with the immediate and unprecedented national crisis of closing the courthouse doors. This crisis made it likely that many courts were in a continuity of operations mode and focused on the logistics of continuing to provide essential services. Courts were not in a DSD mode of thinking that would have put justice first and kept it as a central goal.

Courts should think more expansively and consider the impact that any changes in operations will have on justice. Justice is, or should be, an essential court function. Justice should include protecting basic constitutional rights, such as the right to lawyer, which includes within it the right to confidential communications. Moving forward, courts should, for example, consider adding confidential attorney-client communication as an essential function into their COOP. Courts are not just about the outputs; it is not just about having a hearing, it matters how courts conduct hearings. Courts only considering logistical issues as essential functions would be similar to universities focusing only on the technology of how to move all classes online without thinking about how students learn, and the pedagogical changes needed to provide effective online classes.²²⁴

Court COOP templates need to be expanded to include a wider concept of court essential functions, including analyzing what

223. See generally Ferguson, *supra* note 136, at 1482–83 (recommending increased online proceedings and removing the physical centrality of criminal courts and that doing so could have a number of advantages including shifting power away from the courts and into the community at large).

224. Thank you to Andrea Kupfer Schneider for this comparison.

constitutional rights are essential functions. While speedy trial rights might be rightly suspended, the right to competent assistance of counsel should not be. And, courts need to have a more expansive planning process, that includes defense lawyers and prosecutors, to delineate more fully what are court essential functions. The narrow view of core functions means that even logistical questions, with serious justice implications, were overlooked. One lesson learned from the pandemic is that a narrow view of essential functions led to a widespread failure to protect justice as courts focused on operations and not on what is required for operations to fully work.

Courts should also consider how to improve their planning processes, both for COOPs and for longer term change and reform. In both categories, courts should strive to institutionalize inclusive and collaborative processes that include not just internal court staff, but also the wider stakeholder group including defense lawyers and prosecutors. COVID-19 was not a short-term crisis that required one approach. The virus has changed. There have been different variants and scientists have developed effective vaccines and treatments. Courts have had to adapt to the changes in terms of community spread rates and risks. Courts will benefit from moving beyond what may have been largely static and inflexible COOPs to building in processes that allow for a more flexible response as situations change.