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Behind the Screen: Examining the Human Consequences and Constitutional Ramifications of the Virtual Criminal Defendant

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Abstract

Defendants are waiting behind a screen to learn their fate in their criminal proceedings. This Note sounds the alarm that having incarcerated defendants appear virtually for their criminal proceedings will lead the criminal justice system further down a path of mass incarceration and destruction. This Note demonstrates and argues that there are no benefits for having an incarcerated defendant appear virtually because there are no real benefits to the defendant themselves. Courts further try to argue that video appearances are efficient as they save time and money but as this Note shows those arguments are misleading and miss the point of who the court system should work for and protect. This Note offers three solutions to combat this problem 1) release all defendant pre-trial so that defendants can appear in-person 2) have incarcerated defendants bring an Equal Protection Clause claim against their state of prosecution for being treated differently than defendants who are not in custody pre-trial and 3) if video appearances do not stop then courts must get the informed consent of incarcerated defendants to appear virtually through a Rule 11 type colloquy.

* J.D. Candidate, May 2023, Washington and Lee University School of Law. I would like to thank Professor Hasbrouck, Professor King, and my note editor Emma Burri for helping me bring this note to life. I would also like to thank my friends and family who supported me during the note writing process and believed in me even when I did not believe in myself. This note is dedicated to all those who have been thrown into the criminal justice system, we hear you and we see you.

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I. Introduction

A defendant is seen on the screen peering through his meal hole slot in his cell awaiting to hear the judge's decision on his release from jail.[1] He stares at the correction officer who is propping up an iPad outside his cell door. He struggles to see the judge and his attorney who just appear almost as tiny dots on the screen the officer holds out in front of him. He hears the judge ask his name to which the defendant responds. He hears through his cell door the case currently against him and why the prosecution wants him to stay incarcerated and then he hears his attorney ask for his release. The judge requests the defendant mute himself because of the background noise in the jail and notes the defendant may request to unmute by raising his hand. The judge decides only a few minutes later to keep the defendant incarcerated. After the judge's decision, the officer takes away the iPad and moves to the next cell for the next bail hearing. The defendant's whole life changed without him even moving a step.

Another defendant is ushered out of his cell and told he is going to court. He is not actually going to the courthouse but rather a room located in the jail that has a camera transmitting his image over video into the courtroom. After he is taken out of his cell, he receives a call from his attorney who states that the prosecutor just offered him a plea deal. After a few minutes of contemplation, he tells his attorney over the phone that he accepts the plea offer. He then goes to the empty room with a monitor and goes to court. He tells the judge that he accepts the plea deal. After the judge finds his decision voluntary, the video connection is turned off and he is

1. The following two paragraphs contain hypotheticals.

ushered back to his cell. This virtual courtroom is the reality of many defendants today.[2]

This Note sounds the alarm on behalf of defendants.[3] Virtual courtrooms and virtual defendants seriously erode the criminal justice system and without an outright stop to the use of this virtual reality there will be dark days ahead.[4] Everyone involved in the criminal justice system including defense attorneys, prosecutors, judges, sheriffs, and court staff need to act immediately to have defendants appear in-person when deciding issues of the defendant's liberty and freedom.[5]

If there is no immediate end to the use of video technology, the deeply rooted problems and inequalities already in the criminal justice system will continue to expand.[6] If judges do not see and experience a defendants' humanity the criminal justice system will criminalize and incarcerate more people.[7] This alleged "justice" system will begin to churn out convictions at an even faster rate than previously imagined all without having the defendant ever meeting the judge deciding their fate face to face.[8]

This Note addresses how virtual criminal proceedings affect a virtual defendant's rights.[9] Specifically, examining the effect appearing virtually has on a defendant's Fourteenth and Sixth

2. *See* Jason Tashea, *The Legal and Technical Danger in Moving Criminal Courts Online*, BROOKINGS (Aug. 6, 2020) (highlighting that online criminal courtrooms are becoming the "new normal") [perma.cc/WK7J-FTQ4].

3. *See infra* Part II–III (establishing that video appearances harmfully impact defendants and their rights).

4. *See* Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV 197, 271 (2021) (explaining that the use of video technology in courts creates a call for concern).

5. *See* Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020) (proposing that actors of the criminal justice system such as prosecutors and defense attorneys should help determine the operation of virtual appearances) [perma.cc/65H8-7SQD].

6. *See infra* Part II.

7. *See* Diamond et. al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 897 (2010) (finding that incarcerated defendants who appeared via video received higher bail amounts).

8. *See infra* Part II.

9. *See infra* Part II–III.

Amendment rights.[10] This Note argues that defendants receive no benefits when forced to appear virtually in their criminal proceedings, but rather defendants only face detrimental costs to their procedural and substantive rights.[11] Most importantly, this Note calls for the elimination of video appearances, so that these appearances do not become the future of criminal proceedings in the United States.[12] Video appearances are harmful to defendants because the virtual process physically removes and distances the defendants from the callous proceedings by which their future will be decided.[13]

This Note analyzes and critiques video appearances arguing that these appearances exacerbate already pervasive problems within the criminal justice system.[14] Since the beginning of the COVID-19 pandemic, federal and state courts have made more and more defendants appear virtually in their criminal proceedings.[15]

This transition has a negative impact on defendants.[16] A study conducted in Cook County, Illinois has revealed major problems with having defendants appear virtually for their bail hearings.[17] The Cook County study evaluated and compared bail decisions in Cook County both eight years before and eight years after the courts in that county transitioned to using closed-circuit television procedure (CCTP) for their bail hearings.[18]

In 1999, Cook County began forcing some incarcerated defendants to appear via CCTP in their bail hearings.[19] The study concluded that the average amount of bail per defendant increased

10. *See infra* Part II.

11. *See infra* Part II.

12. *See infra* Part III (proposing ways to eliminate the use of video appearances in criminal courtrooms).

13. *See infra* Part II (offering that a defendant's virtual appearance removes them both physically and emotionally from their criminal proceedings).

14. *See infra* Part II.

15. *See* Bannon & Adelstein, *supra* note 5, at 2 (explaining how courts have evolved since COVID-19).

16. *See infra* Part II.

17. *See generally* Diamond et. al., *supra* note 7 (2010).

18. *See id.* at 870 (explaining the time period of the Cook County study).

19. *See id.* at 869 (noting when Cook County began having defendants appear virtually for their bail hearings).

for defendants who appeared via the CCTP system.[20] Specifically, out of all of the 645,117 cases studied, "[t]he average bond amount for the offenses that shifted to televised hearing increased an average of 51% across all of the CCTP cases."[21] The study then contrasted this dramatic increase with the results for bond hearings that remained in-person, during the same time period, which "changed an insignificant 13%."[22] The study concluded that the change of having defendants appear via video "led to a large and abrupt increase in the average bond amount."[23]

This large bail increase for virtual defendants matters because it means that a defendant appearing via video has an increased chance of receiving a higher bail amount, and assuming they cannot afford that amount, has a higher chance of remaining incarcerated pre-trial.[24] Higher bail amounts force indigent defendants to remain incarcerated while rich defendants who can afford their bail are free during their pre-trial proceedings.[25]

Pre-trial incarceration allows for the criminal justice system to gain a stronger hold on indigent defendants.[26] Specifically, pre-trial incarcerated defendants will be more likely to take plea

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20. *See id.* at 897 (finding defendants who appeared virtually received higher bail amounts than defendants who appeared in-person).

21. *Id.*; *see* Edie Fortuna Cimino et. al., *Charm City Televised & Dehumanized: How CCTV Bail Reviews Violate Due Process*, 45 UNIV. BALT. L. F. 57, 75 (2014) (describing the impact of the Cook County study).

22. *See* Diamond et. al., *supra* note 7, at 897 (noting the insignificant change in bond amounts for defendants appearing in-person over the years even when those in-person defendants were charged with serious felonies, such as sexual assault).

23. *See id.* at 897–98 (finding that the bail amounts in Cook County increased because defendants appeared via video).

24. *See* Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018, 7:30 AM) (explaining that higher bail amounts disproportionately force poor people of color to remain incarcerated until the end of their criminal proceedings) [perma.cc/M7ZL-TPPP].

25. *See id.* ("The rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail.") (internal quotations and citations omitted).

26. *See* Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015) ("But as bail has evolved in America, it has become less and less a tool for keeping people out of jail, and more and more of a trap door for those who cannot afford to pay.") [perma.cc/F9NA-49DU].

deals even if innocent of the crimes charged.[27] Indigent defendants can also slip further into poverty when detained pre-trial.[28] Therefore, the Cook County study clearly shows that video appearances do not answer any of the criminal justice system's problems but in fact only make the system's current problems worse.[29]

This Note will break down how courts became virtual and will propose ways to unplug from this new virtual reality, specifically focusing on situations in which the defendant is virtual but all other parties appear in-person.[30] Each Part will formulate building blocks for how to unplug from this virtual reality.[31] Part I outlines the constitutional framework of the rights of defendants that courts violate when forcing defendants to appear virtually for their criminal proceedings.[32] This Part also examines the limited Supreme Court jurisprudence discussing video appearances.[33]

Once the Note establishes the constitutional and Supreme Court framework, this Note will then explain how the use of technology first emerged in the courtroom.[34] Specifically, this Note will address how the COVID-19 pandemic accelerated the move to online courtrooms and virtual defendants.[35]

Then, this Note will examine the federal and state rules and jurisprudence governing video appearances and technology, highlighting discussion of the constitutionality of virtual defendants.[36]

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27. *See id.* ("[B]ail is the grease that keeps the fears of the overburdened system turning. Faced with the prospect of going to jail for want of bail, many defendants accept plea deals instead, sometimes at their arraignments."); *see id.* ("Across the criminal-justice system bail acts as a tool of compulsion, forcing people who would not otherwise plead guilty to do so.").

28. *See id.* (articulating how pre-trial detention causes defendants to lose their jobs).

29. *See* Diamond et. al., *supra* note 7, at 897–98 (explaining the negative implications of the Cook County study).

30. *See infra* Part III.

31. *See infra* Part I.A.

32. *See infra* Part I.A.

33. *See infra* Part I.A.

34. *See infra* Part I.B.

35. *See infra* Part I.B.

36. *See infra* Part I.C.

After laying the foundational framework, Part II of this Note will debunk the alleged benefits of video appearances and instead highlight the burdensome costs to defendants when they appear virtually.[37]

Finally, this Note in Part III will conclude by proposing a way forward and offer three solutions for how to address the concerns raised by video appearances.[38] The first solution takes a more radical approach, advocating for the elimination of pre-trial detention.[39] This solution of decarceration removes the court's power to compel defendants to appear virtually.[40] The second solution takes a more moderate approach advocating for incarcerated defendants to file an Equal Protection claim citing unequal treatment compared to out-of-custody pre-trial defendants.[41] This litigation would mandate courts to return in-person, thus eliminating virtual appearances.[42] The third solution proposes that if states do not eliminate video appearances, then states must receive a defendant's informed consent before allowing them to appear virtually, giving defendant's the choice to appear in-person.[43] Specifically, the court must provide a colloquy to the defendant, similar to the colloquy conducted under Rule 11 for guilty pleas, in order to make sure the defendant understands the rights lost as a result of the defendant appearing via video.[44] In order to understand the impact of these solution, this Note first examines the constitutional rights of defendants.[45]

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37. *See infra* Part II.

38. *See infra* Part III.

39. *See infra* Part III.A.

40. *See infra* Part III.A.

41. *See infra* Part III.B.

42. *See infra* Part III.B.

43. *See infra* Part III.C.

44. *See* FED. R. CRIM. P. 11(b) (establishing questions the court must ask when determining whether a defendant's plea is voluntary); *see also infra* Part III.C (arguing for the expansion of Rule 11 to include a mandatory colloquy to inform defendants about the rights they give up when they appear virtually).

45. *See infra* Part I.

A. Constitutional and Supreme Court Framework of the Rights of Defendants

This Part will address the Supreme Court and constitutional framework of both the Fourteenth Amendment Equal Protection Clause and the Sixth Amendment right to counsel.[46] This Part creates a foundational understanding of what constitutional rights are at stake when defendants appear virtually in their criminal proceedings.[47]

1. The Fourteenth Amendment: Equal Protection Clause

This discussion around video appearances requires an understanding of the constitutional rights afforded defendants such as the Equal Protection Clause.[48] The Fourteenth Amendment contains the Equal Protection Clause which articulates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[49]

The Supreme Court found that to determine if a state has denied someone equal protection, the court must ask whether the denied right created some form of inequality against that person.[50] Specifically, the Equal Protection Clause aims to stop state actions which create inequality between individuals in that state.[51] The clause's purpose is to hold the government accountable for discriminating between "classes of individuals whose situations

46. *See infra* Part I.A.

47. *See infra* Part I.A.

48. *See infra* Part I.A.

49. U.S. CONST. amend. XIV.

50. *See* J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 946 (1975) ("The first and basic step in equal protection analysis must consist of asking just what kind of equality has been denied.").

51. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 559 (1982) ("[T]he equal protection clause is all encompassing; it governs all state action . . . (1) regulations affecting the exercise of 'fundamental rights'; (2) regulations classifying people on the basis of criteria that are constitutionally 'suspect'; and (3) all remaining regulations.").

are arguably indistinguishable."[52] In other words, the state must treat "similarly situated" people in the same manner as each other.[53] To make a successful Equal Protection claim one must prove "that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[54]

The Equal Protection Clause also has a particularity requirement.[55] This requirement means that "a litigant must prove not only that a government actor was motivated by a discriminatory purpose, but also that the discriminatory act affected the outcome of *his* case."[56] When analyzing an Equal Protection claim, the court applies a variable level of scrutiny based on the right in question.[57] If the right in question is ranked as fundamental, the court will most likely apply what is known as strict scrutiny.[58] The Supreme Court defines a fundamental right as "a right that is considered by a court to be explicitly or implicitly expressed in the Constitution."[59]

Throughout the decades, the Supreme Court's evaluation of Equal Protection claims and what rights rise to the level of fundamental has evolved.[60] Importantly, the Court provides some

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52. *See* Ross v. Moffit, 417 U.S. 600, 609 (1974) (articulating the purpose of the Equal Protection Clause).

53. *See* Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (defining "similarly situated").

54. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

55. *See* Edward K. Cheng, *Constitutional Risks to Equal Protection in the Criminal Justice System*, 114 HARV. L. REV. 2098, 2098 (2001) ("Historically, the Supreme Court has required a showing of particularized harm to prove an equal protection violation.").

56. *Id.* at 2100.

57. *See* Wilkinson, *supra* note 50, at 951 (noting how fundamental rights receive a higher level of scrutiny compared to non-fundamental rights).

58. *See Village of Willowbrook*, 528 U.S. at 564 (explaining that the Equal Protection Clause protects people from "intentional and arbitrary discrimination" by the state (citing Sioux City Bridge Co. v. Dakota Cnty., 260 U.S. 441, 445 (1923)); *see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (describing a fundamental right as a right "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny").

59. *See San Antonio Indep. Sch. Dist.*, 411 U.S. at 17 (defining fundamental right).

60. *See* Betrall L. Ross, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CAL. L. REV. 1565, 1568

guidance on Equal Protections claims of unequal treatment between the rich and the poor.[61] The Court in evaluating an Equal Protection Claim based on indigence examines whether the class at issue has lost a meaningful opportunity due to their indigence.[62] However, the Court argues "that no constitutional violation" exists if "the state had provided some adequate substitute."[63]

The Supreme Court previously in *Griffin v. Illinois*[64] addressed whether the viability of an Equal Protection claim when a state treats indigent defendants and defendants who can afford their own counsel differently.[65] There, the Court reasoned that the state must provide the indigent defendant "as adequate appellate review as defendants who have enough money to buy transcripts."[66] Therefore, *Griffin* opens the door for indigent defendants to bring Equal Protection claims against the state for inequities in their criminal prosecutions.[67]

(2013) (discussing the evolution of the Supreme Court's analysis of Equal Protection claims).

61. *See San Antonio Indep. Sch. Dist.*, 411 U.S. at 19–20 (addressing whether a suspect class exists when classifying between poor and rich people in school districts).

62. *See id.* at 20 ("[B]ecause of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.").

63. *Id.* at 21 (internal citations omitted); *see* Lemuz v. Fieser, 933 P.2d 134, 143 (1997) (defining an adequate substitute as a 'remedy' to replace the remedy which has been restricted" (quoting Bonin v. Vannaman, 929 P.2d 754, 768 (Kan. 1996))).

64. *See* Griffin v. Illinois, 351 U.S. 12, 19–20 (1956) (finding that state courts could allow for indigent defendants to receive free transcripts).

65. *See id.* (finding that depriving indigent defendants of the ability to get trial transcripts which are available to a more financially well-off defendant violates the indigent defendant's right to equal protection).

66. *See id.* at 19 (explaining what states must do to protect indigent defendants and their rights).

67. *See id.* ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."); *see* Philip Fahringer, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 396 (1964) (discussing the effects of the *Griffin* decision on indigent defendant's rights).

2. The Sixth Amendment: Right to Counsel and Right to Fair Trial

The fundamental rights a defendant should cite to in their equal protection claim comes from the Sixth Amendment.[68] The Fourteenth Amendment likewise contains the Due Process clause.[69] The Due Process clause gives the Sixth Amendment its teeth and power—specifically regarding the right to counsel.[70] The Sixth Amendments states that "[i]n all criminal prosecutions, the accused shall . . . have assistance of counsel for his defense."[71]

The Court in *Gideon v. Wainwright*[72] interpreted the Sixth Amendment's language to mean that there is a fundamental right to counsel afforded to defendants in their criminal prosecutions.[73] The Court considers the right to counsel so fundamental that if a criminal defendant cannot afford counsel, a court must provide counsel to that defendant.[74] However, even before *Gideon*, the Supreme Court in *Powell v. Alabama*[75] recognized the importance and impact of counsel on a defendant's ability to have a fair trial.[76] The Court in *Gideon* emphasized "the need for legal knowledge and expertise at a criminal trial, concluding that 'lawyers in criminal

68. *See generally* U.S. CONST. amend. VI.

69. *See* U.S. CONST. amend. XIV ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law.").

70. *See* P.M. Bekker, *The Right to Counsel at Trial for a Defendant in the Criminal Justice System of the United States of America, Including the Right to Effective Assistance of Counsel*, 38 COMPAR. & INT'L L.J. S. AFR. 453, 457 (2005) (explaining that the denial of the right to counsel is a denial of due process).

71. U.S. CONST. amend. VI.

72. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (finding that there is a fundamental right to counsel).

73. *See id.* (establishing a fundamental right to counsel).

74. *See id.* (detailing that if a defendant cannot afford counsel the court shall appoint counsel to that defendant).

75. *See* Powell v. Alabama, 287 U.S. 45, 71–72 (1932) (concluding that counsel shall be appointed for indigent defendants in capital cases).

76. *See id.* at 72 (discussing the impact counsel has on the defendant's right to be heard).

courts are necessities, not luxuries."[77] Therefore, the right to counsel and fair trial go hand in hand.[78]

The Supreme Court has determined that to fulfill the constitutional right to counsel, counsel must not only be present but must also be effective.[79] The Court in *Wright v. Van Patten*[80] evaluated effectiveness of counsel when a defendant's counsel participated in court via phone.[81] Even though the Court admitted they prefer in-person representation, the Court found that the counsel's phone participation did not *per se* amount to ineffective assistance.[82]

Importantly, the Court in *Wright* makes clear that their decision does not consider the "merits of telephone practice" finding that is for "another day."[83] The Court with this opinion seemingly left the law surrounding video appearances undefined and open for discussion and interpretation in federal and state courts.[84] Since the *Wright* decision, the Court has not addressed a situation in which the defendant appears via video.[85] With the Supreme Court's jurisprudence leaving the issue of video appearances open for interpretation, states and federal courts

77. Bekker, *supra* note 70, at 460 (quoting *Gideon*, 372 U.S. at 344).

78. *See* Argersinger v. Hamlin, 407 U.S. 25, 33 (1972) ("The requirement of counsel may well be necessary for a fair trial even in petty-offense prosecution.").

79. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) ("For that reason, the Court has recognized that 'the right to counsel is the right to effective assistance of counsel.'" (citing McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970))).

80. *See* Wright v. Van Patten, 552 U.S. 120, 125 (2008) (finding that defense counsel's participation via phone did not constitute ineffective assistance of counsel).

81. *See id.* at 121–22 (explaining the facts of the case).

82. *See id.* at 125 (reasoning that counsel's physical presence would have been more beneficial than counsel's phone appearance but the phone appearance did not amount to a total absence).

83. *See id.* at 126 (highlighting that the Court did not discuss the benefits and consequences of telephone appearances).

84. *See* Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1273 (2008) ("[T]he Court made clear that there is no uniform or defining interpretation in this field.").

85. *See id.* (observing that the Court has left the field of virtual appearances open).

during the ongoing COVID-19 pandemic have created their own interpretations.[86]

B. Introducing the History and Role of Technology in Courts and How the COVID-19 Pandemic Did Not Start this Transition to the Virtual Defendant

Virtual court appearances for defendants did not originate during the COVID-19 pandemic. Rather, the pandemic has allowed courts to heavily rely on, and sometimes exclusively use, video technology in criminal courtrooms.[87] The idea of having defendants appear virtually for court proceedings originated with prisoners' rights litigation.[88]

However, now, virtual appearances have spread to criminal courtrooms.[89] Courts began using video technology to move through their lengthy dockets at a faster rate.[90] The first recorded use of technology in a courtroom occurred in 1972 in Illinois.[91] Then,"[b]y 2002, over half of the states permitted some types of criminal proceedings to be held by videoconference."[92] A 2009 study by the Pretrial Justice Institute found that "[f]ifty-seven percent of current pretrial programs report that the defendant's initial court

86. *See* Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1880 (2021) (explaining that since the start of the COVID-19 pandemic, the use of video technology in courts has expanded).

87. *See* Turner, *supra* note 4, at 201 ("In many jurisdictions, videoconferencing technology has been used for select criminal proceedings for a few decades.").

88. *See* Johnson & Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 L. & POL'Y 211, 213 (2006) (discussing how the use of teleconferencing technology in courts became widespread with civil litigation).

89. *See* Turner, *supra* note 4, at 201 (explaining the expansion of technology to criminal courtrooms).

90. *See* Diamond et. al., *supra* note 7, at 869 (identifying why courts have moved to using technology in the courtroom).

91. *See id.* at 877 ("An Illinois court first used video technology to conduct videophone bail hearing in 1972.") (internal citations omitted).

92. *Id.* at 878.

appearance is conducted via video."[93] Courts now utilize video appearances in criminal proceedings "ranging from bail to sentencing."[94]

Courts requiring defendants to appear virtually does not seem to be slowing down, as now certain jurisdictions are having virtual trials in which even the jury members can adjudicate guilt from their bedrooms.[95] It seems that the criminal justice system does not seem willing to go back in-person but rather diving headfirst into a virtual platform.[96]

Courts have always wanted to move online, and the pandemic provided the justification they needed to make virtual courtrooms the new norm.[97] Courts have been wanting to move online for years as indicated by the Cook County study where virtual appearances began in 1999, over twenty years before the pandemic.[98] Courts are now just using the pandemic to justify why they are forcing defendants to appear virtually.[99]

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93. *2009 Survey of Pretrial Service Programs*, PRETRIAL JUST. INST. 1, 47 (2009); *see id.* at 10 (explaining that pretrial programs assist courts in determining a defendant's bail).

94. *See* Diamond et. al., *supra* note 7, at 877 (highlighting that video appearances are used in an array of criminal proceedings).

95. *See* David Lee, *Texas Judge Holds First Virtual Jury Trial in Criminal Case*, COURTHOUSE NEWS SERV. (Aug. 11, 2020) (discussing that the first ever virtual jury occurred over Zoom) [perma.cc/682R-CZUQ].

96. *See* Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forces Seismic Change*, BLOOMBERG L., (July 30, 2020, 4:50 AM) (noting that court officials want virtual proceedings to be the way of the future) [perma.cc/SN4H-BN3W].

97. *See* Brett Milano, *Online Courts: Reimagining the Future of Justice*, HARV. LAW TODAY (Dec. 4, 2020) ("Even if there was no COVID-19, online courts would still be the way of the future.") [perma.cc/QP35-SE4E].

98. *See* Diamond et. al., *supra* note 7, at 869 (highlighting that the pandemic did not start video appearances in criminal courtrooms but rather encouraged their expansion).

99. *See Court Operations During Covid-19: 50 State Resources*, JUSTIA (identifying that states are moving court cases back in-person) [perma.cc/JN5E-B42W].

C. The Federal and State Rules Governing Defendant's Appearance via Video in Pre-trial Criminal Proceedings Do Not Effectively Discuss the How and in What Manner this Video Technology Should be Used

For federal courts, the Federal Rules of Criminal Procedure govern the use of video appearances.[100] Federal Rule of Criminal Procedure 43(a), states that "[u]nless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at: (1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing."[101]

As Rule 43 highlights, Federal Rules of Criminal Procedure 5(f) which governs initial appearances states that "[v]ideo teleconferencing may be used to conduct an appearance under this rule if the defendant consents."[102] Additionally, under Rule 10(c), "[v]ideo teleconferencing may be used to arraign the defendant if the defendant consents."[103] The Advisory Committee Notes on the 2002 amendment of Rule 10 articulate that Section c creates an exception for the typical rule which requires a defendant to be physically present in the courtroom for their arraignments.[104] Specifically, the Committee specifies that courts should use video technology "when the defendant is at a different location."[105]

When discussing the caliber of technology required for video appearances, the Committee notes only require that the technology not be "deficient".[106] Most notably, the notes do not

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100. *See generally* FED. R. CRIM. P.

101. FED. R. CRIM. P. 43(a); *see* Gerald G. Ashdown & Michael A. Menzel, *The Convenience of the Guillotine: Video Proceedings in Federal Prosecutions*, 80 DENV. U. L. REV. 63, 71 (2002) ("The basic provision of Rule 43 of the Federal Rules of Criminal Procedure defines when a defendant is required to be present in federal court and when a defendant may waive his right to be present.").

102. FED. R. CRIM. P. 5(f).

103. FED. R. CRIM. P. 10(c).

104. *See* FED. R. CRIM. P. 10(c) (statement of the Advisory Committee) (noting the exceptions created in the 2002 amendment of the rule); *see* Ashdown & Menzel, *supra* note 101, at 67 n. 22 (finding that the Advisory Committee drafts and revises the Federal Rules of Criminal Procedure).

105. FED. R. CRIM. P. 10 (statement of the Advisory Committee).

106. *See id.* ("Although the rule does not specify any particular technical requirement regarding the system to be used, if the equipment or technology is

provide a definition for the term "deficient".[107] The notes also do not discuss what, if any, repercussions courts face for using deficient technology.[108] It appears from the Federal Rules of Criminal Procedure and its Committee notes, that each court has the discretionary power to make critical decisions of when, what, and how to use video technology within its courtroom.[109]

In addition, due to the pandemic, Congress enacted the CARES Act which has specifically allowed federal courts to have virtual criminal proceedings.[110]

States have also enacted rules allowing for a defendant to appear in court virtually.[111] For example, Virginia's Code states:

If two-way electronic video and audio communication is available for use by a district court for the conduct of a hearing to determine bail or to determine representation by counsel, the court shall use such communication in any such proceeding that would otherwise require the transportation of a person outside of the jurisdiction of the court in order to appear in person before the court.[112]

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deficient, the public may lose confidence in the integrity and dignity of the proceedings.").

107. *But see id.* (highlighting that the Advisory Committee does not define the word deficient).

108. *But see id.* (showcasing that the committee notes only argues that "if the equipment or technology is deficient, the public may lose confidence in the integrity and dignity of the proceedings").

109. *See id.* (concluding that it is up to courts whether and at what capacity to allow for video technology in their courtrooms).

110. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); *see* Bannon & Keith, *supra* note 86, at 1881 ("The CARES Act federal stimulus package likewise authorized the use of video and phone for key aspects of federal criminal proceedings, including arraignments, preliminary hearings, initial appearances, detention hearings, probation hearings and more.").

111. *See* Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1103 (2004) ("[M]any states already authorize the courts to conduct a wide range of proceedings by videoconferencing when the defendant is incarcerated.").

112. VA. CODE ANN. § 19.2-3.1 (2021).

The Virginia Code also sets standards that the technology must meet.[113] Other states have enacted similar statutes governing the use of video appearances.[114]

D. There is Minimal Federal and State Jurisprudence Determining the Constitutionality of the Virtual Defendant

This Part discusses the minimal jurisprudence at both the federal and state level surrounding the constitutionality of virtual defendants.[115] This Part begins with jurisprudence at the federal level.[116]

1. Federal Court Decisions

As discussed previously the Supreme Court has not officially addressed issues surrounding video appearances, but lower federal courts have discussed video appearances in some detail.[117] Specifically, Circuit Courts have interpreted whether the right for a defendant to be present means the right to be physically present in the courtroom.[118]

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113. *See id.*

> Any two-way electronic video and audio communication system shall be used for an appearance shall meet the following standards: 1. The persons communicating must simultaneously see and speak to one another; 2. The signal transmission must be live, real time; 3. The signal transmission must be secure from interception through lawful means by anyone other than the persons communicating; and 4. Any other specifications as may be promulgated by the Chief Justice of the Supreme Court.

114. *See* 725 ILL. COMP. STAT. ANN. 5/106D-1 (LexisNexis 2021) (articulating in what criminal proceedings video technology can be used for the appearance of a person in state custody); *see* MONT. CODE ANN. § 46-7-101 (2021) (finding that a defendant's initial appearance can be conducted virtually at the court's discretion); *see* Turner, *supra* note 4, at 223–25 (explaining different states' rules when using video technology in criminal proceedings).

115. *See infra* Part I.C.

116. *See infra* Part I.C.

117. *See* Ashdown & Menzel, *supra* note 101, at 73 (explaining that federal circuit courts have interpreted the impact of appearing virtually differently).

118. *See id.*

The Ninth Circuit in *Valenzuela-Gonzalez v. United States District Court*[119] found that the defendant's virtual arraignment violated the federal rules governing appearances.[120] However, after 2002, this precedent became void when the Federal Rules of Criminal Procedure began to allow defendants to appear virtually.[121]

Since the beginning of the pandemic, only a select few defendants have attempted to bring constitutional claims against courts for requiring them to appear virtually.[122] For example, the D.C. Circuit addressed the question of whether a violation of a defendant's constitutional rights occurs when the court forces the defendant to appear virtually.[123] There, the defendant argued that his video appearance violated his right to effective assistance of counsel.[124] The court found the defendant's counsel did effectively assist the defendant during the defendant's virtual appearance even though some of their conversations may not have remained confidential.[125] The court in their analysis heavily relied on safety

> The Fourth, Fifth, and Ninth Circuits defined presence under Rule 43 to mean physical presence. The Fourth and Fifth Circuit cases dealt with the defendant's presence during sentencing; the Ninth Circuit case dealt with the defendant's presence during arraignment. In each case, the court of appeals held that presence under Rule 43 meant physical presence, and thus conducting the proceedings using video teleconferencing violated the rule. (internal citations omitted).

119. *See* Valenzuela-Gonzalez v. U.S. Dist. Ct., 915 F.2d 1276, 1281 (9th Cir. 1990) (finding that the federal rules require in-person appearance of defendants as Congress has not said otherwise).

120. *See id.* (concluding that the defendant's appearance via video, while convenient, is not necessary).

121. *See* FED. R. CRIM. P. 10(c) (statement of the Advisory Committee) (noting the exceptions created in the 2002 amendment of the rule).

122. *See* United States v. Lattimore, 525 F. Supp. 3d 142, 146–50 (D.C. Cir. 2021) (discussing the impact of video conferencing on a defendant's constitutional rights); *see* United States v. Boatwright, No. 2.19-cr-00301-GMN-DJA-2, 2020 U.S. Dist. LEXIS 74080, at *2–3 (D. Nev. Apr. 28, 2020) (discussing that since the pandemic, courts can conduct criminal proceedings via video without addressing the appropriateness of this technology).

123. *See Lattimore*, at 144;146–51 (reasoning out whether a constitutional violation has occurred).

124. *See id.* at 150 (explaining the defendant's argument).

125. *See id.* (expressing that there are ways to alleviate the concern that corrections officers can overhear a defendant and their counsel's conversation).

and health concerns, but admitted their preference for holding pre-trial hearings in-person.[126]

Similarly, an Ohio district court, even before the pandemic, dismissed a defendant's claim that his virtual appearance for a resentencing hearing was unconstitutional.[127] The defendant argued that his virtual appearance denied him his due process, equal protection, and liberty rights under the Fourteenth Amendment.[128] The court rejected the claim, reasoning that the Ohio statute allowed the court to have defendants appear virtually regardless of whether the defendant consents.[129]

2. State Courts

Most defendants who seek to vindicate their rights do so in state courts. In Illinois, a defendant argued that the court violated his right to counsel when he appeared virtually at his arraignment.[130] There, the court reasoned that they could make the defendant appear via video because the defendant did not expressly object to his virtual appearance.[131] The court also found that the virtual appearance did not violate his right to counsel.[132]

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126. *See id.* at 151 (concluding that while the court would prefer to hold these hearings in-person the pandemic would not make in-person hearings a safe option).

127. *See* Brown v. Harris, No. 3:17-cv-080, 2018 U.S. Dist. LEXIS 57923, at *62–63 (S.D. Ohio Apr. 5, 2018) (dismissing the defendant's claim).

128. *See id.* at *59–60 (describing the defendant's claim that his video appearance violated his constitutional rights).

129. *See id.* at *60 ("The cited statute is the Ohio General Assembly's to provide a mechanism for these remands to impose post-release control and specifically authorizes video conferencing appearance on the trial court's own initiative whether or not a defendant consent.").

130. *See* People v. Lindsey, 772 N.E.2d 1268, 1274 (Ill. 2002) (explaining the defendant's argument that the court impaired his right to counsel when he appeared virtually and that the court did not follow correct procedures for his unconsented video appearance).

131. *See id.* (noting that the defendant did not ask to appear in-person).

132. *See id.* at 1277 ("[W]e find that the record does not demonstrate that defendant's physical absence from the courtroom contributed to the unfairness of the proceedings or caused him to be denied any underlying constitutional right."); *see id.*

> The record indicates that the closed circuit system provided defendant with the ability to hear and see the proceedings

Reasoning that "[t]he record indicates that the closed circuit system provided defendant with the ability to hear and see the proceedings taking place in the courtroom and, at the same time, allowed the judge and other persons in the courtroom to hear and see the defendant."[133]

Other courts have reached similar conclusions, such as in Illinois, where they found no constitutional violation occurs when a defendant appears virtually.[134] While other courts, however, only allow for virtual appearances if the defendant has knowingly waived his or her right to be present in-person.[135]

II. Analysis of the Current Virtual Defendant Problem

When evaluating whether virtual appearances should continue, it is vital to examine the impact these appearances have on the substantive rights of defendants.[136] This Part will argue that defendants receive no benefits from a virtual judicial system because the courts, not the defendants, are the only ones who receive benefits from a defendant appearing virtually.[137]

This Part will analyze the costly burdens placed on defendants and their rights when they appear virtually.[138] Some costs include the diminishing humanity of the defendant and the inability of a defendant to have effective assistance of counsel.[139] Specifically,

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> taking place in the courtroom and, at the same time, allowed the judge and other persons in the courtroom to hear and see defendant. The record demonstrates that defendant was able to interact with the court with relative ease.

133. *Id.*

134. *See* Montana v. Old Bull, 2001 Mont. Dist. LEXIS 1962, at *9 (Mont. Dist. Ct. Sept. 5, 2001) (finding that video appearances do not violate the defendant's constitutional rights because video appearances are no less degrading than in-person appearances).

135. *See* Hawkins v. Indiana, 982 N.E.2d 997, 1002–03 (Ind. 2013) (concluding that for a defendant to appear virtually they must sign a waiver and the prosecution must consent); *see* Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 648–49 (2005) (articulating the "voluntary, knowing, and intelligent standard used today for most attempted waivers of important trial rights").

136. *See infra* Part II.A.

137. *See infra* Part II.A.

138. *See infra* Part II.B.

139. *See infra* Part II.B.

when examining the call for concern about the use of video appearances, this Part will examine the impact of the defendant's consent to appear virtually and how voluntary and/or coercive the current practice of obtaining a defendant's consent is.[140]

A. Defendants Do Not Benefit When Appearing Virtually Because All Benefits Cited are Courts Creating a Misleading Efficiency Narrative

Some scholars have incorrectly found that both defendants and the court benefit when defendants appear virtually.[141] Specifically, some scholars believe that video appearances will become a permanent fixture in criminal proceedings.[142]

Scholars and courts have cited two major reasons for using video appearances: time and money.[143] Courts argue that video appearances save time which allows the court to move through their dockets at a quicker pace which they claim makes the court more efficient.[144] Courts argue that forcing defendants to appear from their cell or from a location within the jail, saves the courts the time it would take to transport that defendant to the courtroom.[145]

However, courts should consider defendants' interests, not judges' because the defendants' not the judges' lives change based on what occurs in the courtroom.[146] Efficiency occurs when courts take the time to bring incarcerated defendants to the courtroom to

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140. *See infra* Part II.C.

141. *See* Bannon & Keith, *supra* note 86, at 1886–87 (explaining the potential benefits of having defendants appear via video during the pandemic).

142. *See* Reed & Alder, *supra* note 96 ("We're going to be doing court business remotely forever.").

143. *See* Turner, *supra* note 4, at 212 ("Video proceedings are often adopted because of their perceived efficiency and cost savings.").

144. *See* Bannon & Keith, *supra* note 86, at 1888 (noting that virtual appearances of parties can be beneficial by saving time).

145. *See* Bryce Covert, *Video Hearings: The Choice 'Between Efficiency and Rights'*, THE APPEAL (Jun. 5, 2019) (arguing that courts cite efficiency when ordering defendants to be "transported to a holding area in the basement of the courthouse and then appeared before the judge via video feed") [perma.cc/4S89-ULAZ].

146. *See id.* (explaining that the court's efficiency argument misses the point).

participate in their own defense.[147] If judges want to truly administer justice, courts should take the time to get to know each defendant.[148] If judges take the time to get to know defendants they will realize it is not a waste time or inefficient to slow down dockets in an effort to uphold a defendant's rights.[149]

This claim of efficiency creates a misleading narrative as efficiency is not the only value or norm important to the justice system.[150] A key and arguably more important norm is fairness which virtual appearances do not uphold.[151] The court can also achieve efficiency in ways that do not directly violate defendants' rights. For example, prosecutors can charge less people with crimes which will lessen courts' dockets saving courts more time.[152]

A second argument courts and scholars make for why defendants should appear virtually instead of in-person is because video appearances save money.[153] Specifically, courts save money by not transporting incarcerated defendants to the courtroom.[154] However, this argument does not work because courts can reduce costs without reducing defendants' rights in many ways such as

147. *See* Diamond et. al., *supra* note 7, at 902 (stressing the inefficiency of video appearances as they "can result in a decision that deprives the accused of his liberty despite the presumption of innocence and may interfere with his ability to effectively prepare a defense").

148. *See id.* (highlighting that "[w]hen the legal system is pressured by heavy caseloads and limited resources, quick fixes promised by new technology threaten to damage rather than promote justice").

149. *But see id.* at 885 (explaining that in the Cook County study of video bail appearances "the cases were heard rapid-fire . . . in so short a time frame it was impossible for the court to give any meaningful, individualized consideration. . . .").

150. *See* DRESSLER & THOMAS, CRIMINAL PROCEDURE: PROSECUTING CRIME 42, 42 (7th ed. 2020) (discussing that efficiency is one of the norms impacting the criminal justice system).

151. *See id.* at 39 (expressing the importance of treating defendants fairly within the criminal justice system).

152. *See* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 196 (2014) (highlighting the discretion of prosecutors to decide when to charge people with crimes).

153. *See* Turner, *supra* note 4, at 212 (explaining that states argue that they save more money when having defendants appear virtually instead of in-person).

154. *See id.* ("Video proceedings can save costs for counties by eliminating the need to transport detained defendants from the jail to the courtroom.").

decarceration.[155] Decarceration in context of this Note means that courts should be releasing more defendants on bail, thereby decreasing the number of defendants held pre-trial.[156] The evidence is also clear that decarcerating jails save states more money both in the short term and in the long term.[157]

Additionally, video technology can cost more money than this technology is worth because technology is costly and does not always work the way it should.[158] Technology often malfunctions, and technology failures force courts to delay their dockets pushing cases back and making that courtroom more inefficient than before.[159]

B. Virtual Appearances Create Burdensome Costs to the Incarcerated Defendant and their Fundamental Rights

When incarcerated defendants appear via video for their criminal proceedings, that video appearance will negatively impact the defendants' rights and the outcome of their case.[160]

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155. *See Prison Spending in 2015*, VERA INST. OF JUST. (establishing that between all fifty states it costs a state on average $33,274 per year to incarcerate one person) [perma.cc/EXZ2-ZPTT].

156. *See* Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POL'Y INITIATIVE BLOG (Nov. 17, 2020) ("As Covid-19 makes jails more dangerous than ever, people are looking closer at policies and programs that keep people out of jail and in their homes pretrial.") [perma.cc/Q9EY-PYPT].

157. *See* Dennis Schrantz et. al., *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions*, SENT'G PROJ. (Sept. 5, 2018) 1, 25 (reporting, for example, that when Mississippi implemented reforms that reduced their state's prison population, they projected over "$266 million anticipated savings within 10 years of the 2014 reforms").

158. *See* Camille Gourdet et. al., *Court Appearances in Criminal Proceedings Through Telepresence*, PRIORITY CRIM. JUST. NEEDS INITIATIVE, 1, 5–6 (2020) ("Securely storing the large quantities of video and audio data generated by video-conferencing that must be preserved according to court policies can be both costly and burdensome."); *see id.* at 12 ("If the camera, monitor, or other equipment used for telepresence is not functioning properly, either in the courtroom or in the location of the person participating reportedly, it can cause disruptive delays that could end up being costly to the court and even to the parties involved.").

159. *See id.* ("Rather than increasing efficiencies, delays because of technological issues can cause further backlog and result in additional costs from defendants being held in jail for longer periods.").

160. *See infra* Part II.B.

First, the defendant can become detached from the process and the people deciding their fate and freedom when appearing virtually.[161] This detachment occurs because video appearances separate the defendant from their his or her community, which provides essential support to that defendant.[162] It is essential for defendants to have their community present at bail hearings because the community's presense provides judges the opportunity to see that if released the defendant has a strong support network.[163] It is also important for the defendant to know that their community is present in the courtroom because it shows the defendant that their loved ones support them.[164]

Second, video appearances negatively impact defendants because that process dehumanizes defendants. Over video, judges cannot understand and discern the defendant's emotions.[165] Specifically, studies show that virtual defendants are "evaluated more negatively in virtual courts than in-person hearings or trials."[166]

Video appearances remove the physical presence of defendants which includes the real-time movements, body language, and emotions of the defendant.[167] Specifically, video appearances make it difficult for judges to discern whether a

161. *See* Covert, *supra* note 145 (noting that video appearances separate the defendant from the judge and other court actors).

162. *See id.* (stressing the importance that the defendant have a strong, supportive community when facing criminal prosecution).

163. *See id.* ("We know that two things that are most vital in a bail hearing to ensuring that someone . . . has the best chance of not being detained is representation, number one, and two, showing family support and showing communities ties. . . .Video prevents that from happening.").

164. *See id.* (highlighting that most times when defendants appear virtually, the defendant is not able to see their loved ones in the courtroom).

165. *See* Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFFALO L. REV. 1275, 1292–93 (2020) ("Several studies, for instance, support the view that it's harder for decision-makers to empathize with those testifying on screen, at least in the immigration, bail, and parole contexts.").

166. *Id.* at 1292.

167. *See* Cimino, *supra* note 21, at 71 ("A technology-based mode of communication creates distance between the interactants, which deprives them of the richness of social and sensory information that is available face to face.") (internal quotations omitted).

defendant is maintaining eye contact.[168] When appearing virtually, judges may find it difficult to decipher where or who the defendant is looking at and vice versa for the defendant, creating a barrier between the virtual defendant and his decisionmaker.[169] Studies show that the inability of a judge to discern a defendant's eye contact over video can incorrectly signal to the judge that the defendant is not credible.[170] One study found that witnesses who appeared via video were determined to be less credible than in-person witnesses even though the in-person witnesses were less factually accurate than virtual witnesses.[171] These studies all indicate video appearances in criminal proceedings do have an impact on the outcome of a defendant's criminal case.[172]

On the other hand, when a defendant appears via video it can affect the defendant's demeanor because their physical separation removes them from the seriousness of the proceedings.[173] Virtual

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168. *See* Bandes & Feigenson, *supra* note 165, at 1294 (describing the impact that video appearances have on the judge's perception of a defendant's eye contact).

169. *See id.*

> [E]ven with people with extensive videoconferencing experience will often look at the screen display instead [of the camera], because they want to see how their words are being received and because the images of others' faces are more visually interesting . . . [w]hen they look at the screen instead of the camera, they will not appear to be looking at the viewer. Viewers may then construe this apparent lack of eye contact, or the frequent shifting of eyes away from the direct contact and back again as a sign that the speaker is being uncertain or even dishonest.

see Cimino, *supra* note 21, at 73 ("The logistics of a videoconference make eye contact impossible, further aggravating the judge's ability to form an adequate assessment of the defendant on the other end of the camera.").

170. *See* Bandes & Feigenson, *supra* note 165, at 1295 (finding that judges evaluate credibility through a defendant's eye contact or lack thereof).

171. *See* Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 L. & POL'Y 211, 221 (2006) ("Although video presentation did not affect verdicts, mock jurors rated the children who testified via closed-circuit television as less believable than those who testified in person, despite the fact that they were actually more accurate.").

172. *See* Diamond et. al., *supra* note 7, at 897–98 (explaining the detrimental impact that appearing via video has on a defendant and their rights).

173. *See* Gourdet et. al., *supra* note 158, at 9 ("[W]hen the defendant is removed from the courtroom setting, they might not fully grasp the importance of

appearances can also cause the defendant to not feel a part of their criminal proceedings and feel unable to fully participate in their own defense.[174] Additionally, even when the virtual incarcerated defendant tries to participate in their own defense, often times their microphone will pick up negative sounds such as background noise from the jail.[175]

Third, technology can and does fail which prevents defendants from participating in their own defense.[176] For example, technology can stop working or glitch resulting in defendants not fully hearing aspects of proceedings.[177] Additionally, the camera angles used only show a glimpse of the defendant which makes it difficult for the judge to determine the defendant's sincereness.[178] Even more worrisome is that virtual defendants that require interpreters are assigned interpreters who are in the physical courtroom and not with the defendant which can cause inaccurate translations.[179] Virtual defendants also heavily rely on court actors like attorneys who often do not use their microphones, leaving defendants unable to hear the case against them.[180]

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the situation, the implications of the proceedings, or the weight of what it means to be appearing in court.").

174. *See id.* ("The defendant might shift from an active participant to a passive observer.").

175. *See* Turner, *supra* note 4, at 217–18 ("Distractions in the background can interfere with the ability to focus on the proceedings. And when defendants appear on video in detention, the coercive environment of the jail may negatively affect their perceptions and behavior during the proceedings.").

176. *See id.* at 217 ("Technology can malfunction, leading to interruptions in sound or image.").

177. *See* Jenia Turner, *Virtual Guilty Pleas*, 24 U. Penn. J. CONST. L. 1, 39 (2021) (detailing how technology can glitch or fully fail during virtual criminal proceedings).

178. *See* Tashea, *supra* note 2 ("[V]ideo takes away the fact-finder's ability to assess non-verbal cues; and that conferencing technology can actually filter out voice frequencies associated with human emotion, which are critical to assessing credibility.").

179. *See* Gourdet, *supra* note 158, at 12 (reasoning that because of the power that interpreters hold in the courtroom if technology fails it can cause the defendant to not understand their criminal proceedings).

180. *See* Covert, *supra* note 145 (discussing that prosecutors and defense attorneys do not consistently use their microphones in the courtroom).

Finally, video appearances impact a defendant's right to effective assistance of counsel.[181] Specifically, video technology leaves no ability for incarcerated defendants and their counsel to communicate privately, if at all, due to the constant surveillance of defendants by corrections officers.[182] A study conducted by the National Center for State Courts found for 36.9% of the state courts who allow for virtual appearances of defendants, the defendant did not have the ability to speak privately with his or her attorney.[183] This physical barrier then leads to an emotional barrier between the defendant and their counsel causing the counsel to not effectively assist the defendant because the defendant may not fully trust their counsel with sensitive information.[184]

C. An Incarcerated Defendant's Consent to Appearing Virtually Does Not Eliminate Concern as an Incarcerated Defendant's Consent Is Not Truly Voluntary

Even though some defendants during the pandemic want to appear virtually for health and safety reasons,[185] a more prevalent and concerning trend has started of courts forcing defendants to consent to virtual appearances.[186] While federal and state rules

181. *See* Cimino, *supra* note 21, at 82 (arguing that when a defendant appears via video it is governmental interference of the defendant's right to counsel).

182. *See id.* at 85 ("Whether intentional or unintentional, correctional officers often deny the opportunity to meet privately and to communicate with their client prior to, or during, a video bail docket.").

183. *See* Eric T. Bellone, *Private Attorney-Client Communications and Effect of Videoconferencing in the Courtroom*, 8 J. INT'L COMMERCIAL L. & TECH. 24, 44 (2013) (discussing the study conducted by the National Center for State Courts).

184. *See id.* at 28 ("Via video, a defendant's confidence in his counsel, may be reduced, and the crucial trust between attorney and client is minimized.").

185. *See* United States v. Hiramanek, No.616-po-00345-MJS, 2017 U.S. Dist. LEXIS 53224, at *10–11 (E.D. Ca. Apr. 5, 2017) (articulating that the defendant wanted to appear via video due to his health problems); *see* United States v. Jones, 410 F. Supp. 2d 1026, 1022, 1033 (D.N.M. 2005) (concluding that the defendant needed to be present in-person for his sentencing even though he wanted to appear virtually).

186. *See* Deniz Ariturk et. al., *Virtual Criminal Courtrooms*, U. CHI. L. REV. ONLINE (2020) (finding that courts place enormous pressure on defendants to consent to appear virtually) [perma.cc/G2MM-TLYY].

discuss the need for defendants to consent to video appearances, obtaining consent is not as simple as it sounds.[187]

Consent of the defendant can be a tricky issue as demonstrated by *United States v. Souza*.[188] There, the defendant did not originally consent to appearing virtually, resulting in the court requiring the defendant to quarantine, then take a COVID test, then be transported to the jail near that court before he could appear and then after his appearance the court would make him quarantine for an additional fourteen days.[189] The defendant then filed a motion to reconsider and said based on this information he would consent to a virtual appearance.[190] This obstacle course put in place by the court makes clear that the court forced Souza into appearing virtually.[191] However, Souza is not alone as courts have forced other defendants to consent to appearing virtually.[192]

When addressing the issue of consent like at issue in *Souza*, the main question to ask is whether a defendant can voluntarily consent to appearing virtually.[193] Courts use a "voluntary, knowing, and intelligent standard" when determining if a defendant has waived a right.[194] While courts have not specifically applied this voluntary standard to waivers of appearing in-person,

187. *See* Ashdown & Menzel, *supra* note 101, at 87–88 (explaining that the drafters of FED. R. CRIM. P. 5(f) did not want to include the need for a defendant to consent to appear via video but decided to include the consent requirement because of public opinion).

188. *See* United States v. Souza, No. 2.19-cr-00213KJD-NJK, 2020 U.S. Dist. LEXIS 116121, at *6–7 (D. Nev. July 1, 2020) (granting the defendant's motion to reconsider).

189. *See id.* at *2 (detailing the long process the defendant must go through if they did not consent to appear virtually).

190. *See id.* at *2–3 ("Finally, Defendant submits that he is now willing to consent to appear at the hearing over the video link and that his counsel 'can file a waiver' of his right to appear in person.").

191. *See id.* at *2 (articulating all the obstacles the defendant would have to go through to appear in-person).

192. *See* Ross v. Ryan, No. CV 13-01845 PHX JAT (MEA), 2014 U.S. Dist. LEXIS 183354, at *33 (D. Ariz. Dec. 8, 2014) (discussing that it did not matter whether the defendant consented as the Arizona statute allows for the court to make defendants appear via video for arraignments).

193. *See* Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 648–49 (2005) (explaining the "voluntary, knowing, and intelligent standard used today for most attempted waivers of important trial rights").

194. *Id.*

because a defendant's right to be present is a vital trial right, this standard would apply.[195] However, an incarcerated defendant's consent to appear virtually can never be considered voluntary as this voluntary standard fails defendants.[196] This standard sets defendants up for failure because incarcerated defendants do not have true autonomy within the criminal justice system.[197] Specifically, defendants do not have true "free choice" in major decisions impacting their criminal cases.[198]

Moreover, defendants cannot meaningfully consent to appearing via video because courts do not take the time to inform defendants of what their consent actually means.[199] Additionally, incarcerated defendants face pressure to consent to appear virtually out of fear of what will happen if they do not consent. For example, they may fear that courts will push back their court dates further resulting in further incarceration.[200] While, Kate Weisburd's article primarily focuses on consent surrounding

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195. *But see id.* (articulating the decision in *Johnson v. Zerbst* which created the voluntariness standard "for waiver of important trial rights"); *see* Johnson v. Zerbst, 304 U.S. 458, 464 (1938)

> A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.;

see FED. R. CRIM. PRO. 43(a) (discussing the right of a criminal defendant to be present at pre-trial, trial, and post-trial proceedings).

196. *See* Toone, *supra* note 193, at 650 ("(D]efendants lack the necessary conditions for the exercise of autonomy, in any meaningful sense of the term.").

197. *See id.* (explaining that defendants do not have the same level of autonomy as those living outside the grab of the criminal justice system).

198. *See id.* at 638 (describing the importance of a defendant's "free choice").

199. *See* Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 737 (2020) (describing that defendant's consent has been used to justify unconstitutional actions by government actors and courts); *see* Jenia I. Turner, *supra* note 177, at 6 ("[M]ost judges conducted on brief inquiries into the validity of guilty pleas, did not ask defendants whether they consented to the use of virtual format, and did not inform defendant of the right to speak privately with counsel during the virtual hearing.").

200. *See* Weisburd, *supra* note 199, at 723 (articulating that defendants fear incarceration and that fear motivates defendants to consent to conditions that are not beneficial to them).

electronic surveillance on parole, her article provides vital insight into issues surrounding a defendant's ability to consent.[201] Weisburd highlights that defendants often "underappreciate the risks" of what they are consenting to.[202]

Applying this underappreciation theory to video appearances, when defendants consent to these appearances, no one instructs them on the risks that come with waiving their right to be present in-person.[203] A court cannot consider a defendant's consent voluntary and knowing when that court does not educate defendants about the risks to appearing virtually.[204] This consent is not voluntary because "consent assumes transparency, equal access to knowledge, and opportunity for defendants to make a decision in their own best interest."[205] If incarcerated defendants knew about the impact that appearing virtually would have on their chances of success, such as their chance at receiving affordable bail, defendants would never consent to video appearances.[206]

For a defendant's consent to be truly voluntary and knowing, the defendant would need an opportunity to learn all the risks that come with the defendant appearing virtually.[207] However, with court dockets moving faster than ever, defendants will never have enough time to learn about the issues surrounding their video appearances.[208]

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201. *See generally id.* (highlighting Kate Weisburd's argument).

202. *See id.* at 740 (discussing how courts do not tell defendants all the risks that come with a defendant's decision).

203. *See supra* Part II.B (analyzing the risks associated with defendants appearing via video).

204. *See* Weisburd, *supra* note 199, at 740 (explaining that because defendants do not understand the unknown risks to what they are consenting to their consent is not knowing and voluntary).

205. *Id.* at 741.

206. *See supra* Part I (describing the Cook County study in which defendants appearing via video received higher bail amounts than defendants who appeared in-person for their bail hearings even when charged with the same crimes as those appearing in-person).

207. *See* Weisburd, *supra* note 199, at 742 (arguing that defendants need "to gain necessary information before waiving procedural rights. . . .").

208. *See* Turner, *supra* note 4, at 213 ("Remote proceedings are also said to expedite the processing of cases by giving judges greater flexibility and predictability in scheduling criminal proceedings and moving cases along more speedily.").

III. The Solution to the Virtual Defendant Problem

This Part will offer three solutions, ranging in impact, that will help eliminate video appearances.[209] The first solution offers an overhaul of the current practices in the criminal justice system by advocating for the release of more defendants pre-trial which will eliminate the need for video appearances.[210] The second solution proposes that the defendant take their concerns about virtual appearances to the courts.[211] The third solution proposes that if courts continue having defendants appear virtually, the court must get the informed consent of the defendant.[212]

A. Courts Should Release More Defendants Pre-Trail, Allowing for Decarceration of Jails and the Elimination of Video Appearances

This first solution would work as proposed. First, all bail hearings must be conducted in-person.[213] Second, courts' default position on bail would be to release more defendants pre-trial on their own recognizance.[214] This new default position would leave less defendants incarcerated pre-trial which will reduce the need for video appearances.[215] This solution is not an overnight venture but a proposal for states to begin the important process of decarcerating their jails of pre-trial defendants.[216]

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209. *See infra* Part III.

210. *See infra* Part III.A.

211. *See infra* Part III.B.

212. *See infra* Part III.C.

213. *See* Diamond et. al., *supra* note 7, at 898 (concluding that video appearances harm defendants and their chances at lower bail).

214. *See* Mark V. Pettine, *Trends in Own Recognizance Release: From Manhattan to California*, 5 PAC. L.J. 675, 696 (1974) (arguing that courts should release more defendants on their own recognizance).

215. *See id.* at 697 (emphasizing the positive impact on a defendant when free pre-trial).

216. *See* Jennifer Peirce et. al., *A Toolkit for Jail Decarceration in Your Community*, VERA (Oct. 2021) (stressing that decarceration "does not happen overnight") [perma.cc/YG7J-2G6L].

This solution takes an abolitionist approach making it no longer a norm to incarcerate defendants pre-trial.[217] If the defendant is no longer incarcerated, that freedom allows them to appear in-person for their proceedings because their pre-trial freedom gives the defendant the responsibility of bringing themselves to court.[218]

Most importantly, having fewer defendants incarcerated eliminates courts' misleading arguments of efficiency. It eliminates this argument because it is more efficient economically and better for public health if defendants are released pre-trial.[219] Courts and states can save more money letting defendants return home rather than incarcerating those defendants and forcing them appear to virtually.[220] This idea of incarcerating less defendants is not radical or inconsistent with current sentiment surrounding the criminal justice system and its incarceration rate.[221] Moreover, the pandemic has notably stirred a strong movement for decarceration of the United States' prison and jail populations.[222]

To continue this movement for decarceration, as indicated by the troubling data from the Cook County study, bail hearings need to be in-person. Bail hearings determine whether a defendant will

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217. *See Pandemic a "Natural Experiment" for Reducing Incarceration, Prosecutors Say,* ARIZ. STATE UNIV. NEWS (May 7, 2020) (arguing that incarceration is not the proper path of the criminal justice system) [perma.cc/RML7-RUG8].

218. *See id.* (highlighting that if defendants are not incarcerated pre-trial, they are able to appear in-person for their court proceedings).

219. *See* Casey Kuhn, *The U.S. Spends Billions to Lock People Up, But Very Little to Help Them Once They're Released*, PBS (Apr. 7, 2021, 5:18 PM) ("The U.S. Spends $81 billion a year on mass incarceration according to the Bureau of Justice Statistics, and that figure might be an understatement.") [perma.cc/WM85-XZ8W]; *see also* Alia Nahra, *How Covid–19 is Still Battering the Criminal Legal System*, BRENNAN CTR. JUST. (June 16, 2021) (highlighting the importance of reducing the population in jails as jails are not prepared for COVID-19 outbreaks) [perma.cc/LM7M-NT9N].

220. *See* Kuhn, *supra* note 219 (highlighting the enormous costs of incarcerating defendants and that those costs could be eliminated by releasing defendants on bail).

221. *See Reducing Jail and Prison Population During Covid–19 Pandemic*, BRENNAN CTR. JUST. (Mar. 27, 2020) (last updated Jan. 7, 2022) (discussing how since the pandemic began states have slowly reduced their incarcerated populations) [perma.cc/A6VB-TP3N].

222. *See id.* (explaining that the COVID–19 pandemic creates an opportunity to decrease the incarcerated population of the United States).

be incarcerated pre-trial, which in turn also determines whether that defendant will appear virtually.[223]

Having defendants appear in-person is crucial because when courts force incarcerated defendants to appear virtually, that process problematically increases the chances that the defendant will be denied bail and remain incarcerated pre-trial.[224] The Cook County Study shows that video appearances allow courts to comfortably deny bail to defendants.[225] If the defendant appears virtually, judges will, consciously or not, choose to incarcerate defendants or make bail unaffordable resulting in that defendant's pre-trial incarceration.[226] The process of decarcerating jails through releasing more defendants pre-trial forces the criminal justice system to slow down from its current hyper speed.[227] This process also makes judges take the time to get to know each defendant and see their humanity upfront and in-person.[228]

Most importantly, not incarcerating defendants pre-trial gives defendants the autonomy to appear in-person for all their pre-trial proceedings, thereby taking away power from the courts.[229]

This solution would have real effects on giving freedom and autonomy back to Black Americans who the criminal justice

223. *See* Diamond et. al., *supra* note 7, at 897–98 (describing the Cook County study in which defendants who appeared via video for their bail hearings received higher bail amounts than defendants appearing in-person for their bail hearings); *see* Dressler & Thomas, *supra* note 150, at 825 (describing a bail hearing as when "a determination is made whether the defendant will be held in custody or released pending trial").

224. *See* Diamond et. al., *supra* note 7, at 897–98 (showcasing the catastrophic effects on a defendant's freedom when appearing via video).

225. *See id.* at 901 ("Ironically, an overeager welcome of technology can impose costs of its own. By boosting bond levels and decreasing the ability of defendants to obtain release pending trial, videoconferenced bail hearings may actually impose additional financial costs on the justice system by leading more pretrial incarceration of defendants who would otherwise be released.").

226. *See id.* at 897–98 (discussing the results of the Cook County study).

227. *Contra* Turner, *supra* note 4, at 213 (finding that video appearances allow courts to move more quickly through their criminal dockets).

228. *See Virtual Justice? A National Study Analyzing the Transition to Remote Criminal Court,* STAN. CRIM. JUST. CTR. 1, 91 (Aug. 2021) (articulating the lack of humanity and empathy that results from defendants appearing virtually).

229. *See* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 BOS. U. L. REV. 1147, 1153 (2010) (discussing that courts need to allow defendants to make decisions without the courts or the government's interference).

system prosecutes at an alarmingly high rate.[230] This is because the criminal justice system overwhelmingly targets Black defendants.[231] This discrimination occurs when prosecutors, through their unsupervised discretionary power, ask for the pre-trial incarceration of Black defendants more than any other group of defendants.[232] Virtual proceedings only exacerbate this unequal treatment. Forcing courts to physically see defendants and their humanity can provide defendants an opportunity for some justice in an unjust system.[233]

To preemptively address critics who oppose pre-trial release for defendants, cities and counties who have decarcerated their jails did not see any increase in crime or risk to public safety, but rather in most places, crime went down.[234] To the same effect, "new arrests of those released pretrial are also infrequent with arrests for violent crimes rare."[235] Pre-trial detention's goal is to assure defendants come to court, "but, in fact, failure to appear at trial is rare and often due to mundane reasons."[236]

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230. *See* Elizabeth Hinton, et. al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. 1, 2 (May 2018) ("[B]urden of the tough on crime and mass incarceration era has not fallen equally on all Americans but has excessively and unfairly burdened Black people.").

231. *See Criminal Justice Fact Sheet*, NAACP ("One out of every three Black boys born today can expect to be sentenced to prison, compared to 1 out 6 Latino boys; one out of 17 white boys.") [perma.cc/5VNP-HKUY].

232. *See* Hinton, *supra* note 230, at 8 (highlighting that "[a] greater number of studies found that people of color are more likely to be prosecuted, held in pretrial detention, and to receive other harsh treatment").

233. *See e.g., id.* ("A 2013 review of 50 years of studies on racial disparities in bail practices found that Black people are subject to pretrial detention more frequently, and have bail set at higher amounts, than white people who have similar criminal histories and are facing similar charges.").

234. *See* Herring, *supra* note 156 ("[A]fter the adoption pretrial reforms. All but one of these jurisdictions saw decreases or negligible increase in crime after implementing reform.").

235. Pamela K. Lattimore, Cassia Spohn, & Matthew DeMichele, *Reimagining Pretrial and Sentencing*, BROOKINGS 1, 19 (Apr. 2021) [perma.cc/UL56-SUC4].

236. *Id.*

B. Incarcerated Defendants Can Challenge their Forced Virtual Appearances by Bringing an Equal Protection Claim against their State of Prosecution

If states do not eliminate the use of video technology, defendants can take their concerns to the courts and eliminate virtual appearances that way.[237] This solution would work as such: incarcerated defendants would file a suit against the state of their criminal prosecution.[238]

Pre-trial incarcerated defendants would claim that the state denies their right to equal protection under the Fourteenth Amendment when courts force them to appear virtually as it denies their fundamental right to counsel.[239]

Incarcerated defendants receive different and unfair treatment compared to out-of-custody defendants even though in-custody and out-of-custody defendants' situations are arguably indistinguishable.[240] Out-of-custody and in-custody pre-trial defendants both face criminal charges and the same risks of loss at trial, but courts force incarcerated defendants to appear virtually which can harmfully impact the outcome of their pre-trial proceedings.[241]

Defendants can point to the Cook County Study as evidence of this inequality.[242] The Cook County study articulates empirical evidence that defendants who appeared virtually received higher bail amounts than defendants charged with the same crime who appeared in-person "an average of 51%" of the time.[243]

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237. *See infra* Part III.B.

238. *See* Fahringer, *supra* note 67, at 397 (noting the requirements to file a valid Equal Protection Clause claim).

239. *See* Ross v. Moffit, 417 U.S. 600, 609 (1974) (finding that Equal Protection claims arise when states treat "classes of individuals whose situations are arguably indistinguishable" differently).

240. *See id.* (explaining the Equal Protection Clause standard).

241. *See* Diamond et. al., *supra* note 7, at 897 (discussing that defendants appearing in-person for their criminal proceedings have a greater chance of receiving a lower bail amount than incarcerated defendants).

242. *See id.* (articulating the importance of the Cook County study).

243. *See id.* (concluding that video appearances cause defendants to receive higher bail amounts and decrease the defendant's chance of being released pre-trial).

The Cook County study highlights what the Equal Protection Clause is designed to protect. Virtual appearances completely deprive incarcerated defendants the ability to meaningfully participate in their own case and showcase their humanity.[244] The meaningful opportunity that incarcerated defendants would cite is that the incarcerated defendant is not receiving their full right to effective assistance of counsel due to an inability to confidentially speak to their attorney or meaningfully participate in their defense.[245]

Then for the particularity requirement of an Equal Protection claim, the incarcerated defendant needs to show that the state or its actors "was motivated by a discriminatory purpose, but also that the discriminatory act affected the outcome of *his* case."[246] The discriminatory purpose the defendant would articulate is that courts are forcing incarcerated defendants to appear virtually in order to move through their dockets quicker.[247] Then defendants would again use the Cook County study to show that this virtual appearance did affect the outcome of their case. For the second prong, the defendant would argue that the virtual appearance affected the outcome of their case.[248] Specifically, the defendant would argue that their virtual appearance took away their opportunity to discuss in-person and confidentially with their counsel during their proceedings causing them to lose their case or lose a motion.[249]

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244. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20 (1973) ("[B]ecause of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."); *see supra* Part II.B (highlighting the costs of using video technology to defendants such as the loss of their Sixth Amendment rights to effective assistance of counsel).

245. *See supra* Part II.B (highlighting the impact of virtual appearances on the attorney-client relationship).

246. *See* Cheng, *supra* note 55, at 2100 (defining particularized harm).

247. *See supra* Part II.A (arguing against the court's efficiency argument).

248. *See* Diamond et. al., *supra* note 7, at 897 (describing that the Cook County study found that defendants appearing virtually for their bail hearings were on average more likely to receive higher bail amounts than defendant charged with the same crime who appeared in-person for their bail hearing).

249. *See supra* Part II.B (detailing the inability for incarcerated defendants to talk confidentially and privately with their attorneys with appearing virtually).

The incarcerated defendant then after pointing to their particularized harm would need to show that the right denied is fundamental.[250] Specifically, the defendant would point to their fundamental Sixth Amendment right to effective assistance of counsel as this right is both explicitly and implicitly highlighted in the Constitution.[251] Specifically, the defendant would argue that virtual appearances destroy the attorney-client relationship as defendants cannot have private communications with their attorney where they can meaningfully participate in their defense.[252] Moreover, the defendant and the attorney's communications can never be confidential as an incarcerated defendant is never truly alone in the jail making it harder for the defendant to build trust with their attorney. [253]

Then, because defendants pointed to a loss of a fundamental right, their claims force the court to apply strict scrutiny.[254] Strict scrutiny requires that the state show that virtual appearances of incarcerated defendants "promote[s] a *compelling* governmental interest."[255] As the pandemic lessens, the court's ability to cite health and safety governmental interests becomes weaker. Additionally, after disproving state's efficiency arguments by showcasing the inefficiencies of video technology as outline in Part II of this Note, the state will have a hard time proving a compelling state interest.[256]

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250. *See San Antonio Indep. Sch. Dist.*, 411 U.S. at 17 (defining fundamental right as a right "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny").

251. *See* U.S. CONST. amend. VI ("[I]n all criminal prosecutions, the accused shall . . . have assistance of counsel for his defense.").

252. *See* Cimino, *supra* note 21, at 81–82 (noting that lawyers cannot confidentially answer a defendant's questions or obtain vital information from defendants if defendants appear virtually).

253. *See id.* at 85 (detailing that even if defendants can speak with their attorneys third parties such as corrections officers often disrupt confidential communications between defendants and their attorneys).

254. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (explaining that fundamental rights require "strict judicial scrutiny").

255. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 U.C.L.A. L. REV. 1267, 1282 (2007) (discussing the strict scrutiny test and what the state must show to allow for their actions to stand as constitutional) (internal citations and quotations omitted).

256. *See supra* Part II.A (discrediting the court's efficiency argument).

Most importantly, the state cannot show an adequate substitute to fix the injustice of defendants appearing virtually as the only adequate substitute is for the defendants to appear in-person.[257] These rights deserve equal protection under the law as the Constitution does not have an exception which allows courts to disregard a defendant's rights.[258] The Supreme Court has also made it clear that the pandemic does not create an exception within the Constitution that allows courts to violate an incarcerated defendants' fundamental rights.[259]

This solution allows for defendants to unmute themselves to effect change by helping expand the fundamental right to counsel.[260] Impact litigation would also slow down the courts and force judges to examine the harmful impacts of video appearances on incarcerated defendants.[261] Additionally, while not explicitly discussed, this solution addresses race and the impact of pre-trial incarceration on Black defendants.[262] In 2002, Black defendants made up 43% of pre-trial defendants while only making up 12.2% of the U.S. population at the time.[263] Thus, this litigation would impact problematic racial classifications.[264]

257. *See San Antonio Indep. Sch. Dist.,* 411 U.S. at 21 (reasoning that that there is no constitutional violation if the state can show an "adequate substitute" for the issue in question).

258. *But see* U.S. CONST. amend. XIV (highlighting there is no discussion to the exception of the Equal Protection Clause); U.S. CONST. amend. VI (showcasing that there is no exception to the Sixth Amendment right to counsel and right to a fair trial).

259. *See* Ilya Shapiro, *Supreme Court Rules that Constitution Matters, Even in a Pandemic*, CATO INST. (Nov. 30, 2020, 7:47 PM) ("Even in a pandemic, the Constitution cannot be put away and forgotten.") [perma.cc/SE5K-3897].

260. *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (concluding that the Sixth Amendment right to counsel is a fundamental right).

261. *See supra* Part II.B (examining the harmful impact that video appearances have on defendants).

262. *See* Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, PRISON POL'Y INITIATIVE BLOG (Oct. 9, 2019) (articulating the racial bias in pre-trial detention) [perma.cc/J4Q8-GJ4F].

263. *See id.* (identifying the racial disparity in who is incarcerated pre-trial).

264. *See id.* (establishing a cause for concern that Black defendants are more likely to be incarcerated pre-trial than white defendants).

C. If Courts Do Not Completely Eliminate Video Technology, Courts Must Be Required to Obtain Informed and Voluntary Consent from the Defendant Before Allowing the Defendant to Appear Virtually

While this Note seeks to eliminate the use of video technology, if courts do not eliminate video technology, there should be ways to limit the harm caused by these appearances. A way to limit and possibly eliminate video appearances would be to require defendants to give their fully informed consent if asked to appear virtually.[265] This solution requires the informed consent of defendants, not just defendants' waiver of their in-person appearance.[266]

This solution works in two steps. First, an incarcerated defendant and his counsel must have a meeting in which counsel discusses with the defendant the risks associated with the defendant appearing virtually.[267] Specifically, courts must "ensure that the accused have had the opportunity to talk confidentially to a lawyer prior to the hearing and that both participate in the hearing."[268] Having defendants meet in-person with their counsel before the defendant's proceeding allows incarcerated defendants to have the time to talk with their counsel about the benefits and consequences of appearing virtually from the jail.[269] Most significantly, the conversation would allow defendants to gain knowledge about the video appearance process.[270]

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265. *See Is Virtual Justice Really Justice?*, INCARCERATION NATIONS NETWORK 1, 7 (2020) (arguing that certain requirements should be in place before a defendant can consent to appearing via video) [perma.cc/XMT4-U6LT].

266. *See supra* Part II.C (detailing how most courts currently do not obtain informed consent from defendants).

267. *See Is Virtual Justice Really Justice*, *supra* note 265, at 7 (requiring a defendant's counsel to meet with the defendant to discuss the consequences of that defendant participating in their criminal proceedings virtually).

268. *Id.*

269. *See id.* (explaining the need for incarcerated defendants to speak confidentially with their counsel about video appearances before the courts allows the defendant to appear virtually in their case).

270. *See id.* (highlighting that the ability for a defendant to speak freely with their attorney before appearing virtually is an important first step in restoring a defendant's constitutional rights).

Defendants would be instructed that their humanity will most likely not be effectively seen by their presiding judge if they consent to appear virtually.[271] Additionally, counsel should inform the defendant about how to use the technology provided if the defendant waives their right to be in-person.[272] After discussing those risks, the defendant must consent in writing to appear virtually for the defendant's next criminal proceeding.[273]

The second step of this solution applies only if the defendant, after hearing from his counsel the benefits and costs of video appearances, consents to appear virtually. Then, the judge at the proceeding must reiterate those benefits and costs to the defendant.[274]

Therefore, if the defendant ultimately decides to appear via video, his consent would satisfy the voluntary and knowing standard.[275] Jenia Turner proposes this solution for guilty pleas proposing that defendants could only plead guilty via video if they know about all the risks they face when appearing virtually.[276] This Note proposes to apply Turner's approach to virtual guilty pleas to all criminal proceedings in which courts want defendants to appear virtually.[277] Therefore, before a defendant can appear virtually, both their counsel and the judge presiding over the

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271. *See supra* Part II.B (arguing that judges cannot see a defendant's humanity as clearly when the defendant appears virtually).

272. *See* Turner, *supra* note 177, at 53 (advocating that the attorney should inform the defendant about all aspects of the technology before the defendant consents to appear virtually).

273. *See id.* at 56 (proposing that the defendant's consent to appear virtually must be in writing).

274. *See id.* ("In implementing this approach, judges could begin remote plea hearing by asking the defendant whether she has discussed the advantages and disadvantages of proceeding remotely with her counsel. Some judges may choose to go further and actually mention some of the potential disadvantages of the remote format . . . .").

275. *See id.* at 52 ("[J]udges should not proceed with a virtual plea hearing until they ensure that the defendant is making a voluntary and informed choice to waive the protection of in-person proceedings.").

276. *See id.* (articulating Turner's proposal for courts to get the informed consent of defendants to appear virtually).

277. *See id.* at 62 (finding that if courts continue to use video appearances for guilty pleas the court must make sure that the defendant is making an informed decision).

proceeding must inform the defendant of the risks associated with virtual appearances.[278]

This Note also takes Turner's proposal a step further by requiring judges to provide a colloquy, like in Rule 11 for guilty pleas, for defendants before courts accept the incarcerated defendant's consent to appear virtually.[279] The colloquy would consist of four questions that the judge must ask the defendant: 1) are you aware that you have the right to be physically present in the courtroom and by appearing virtually you are giving up that right, 2) are you aware of the risks associated with appearing via video, 3) are you aware that you have the right to effective assistance of counsel and while appearing virtually you may not be able to confidentially talk or talk at all with your counsel, and 4) are you aware that by appearing virtually you may not be able to fully participate in your own defense which is your right?[280]

Overall, this solution and most notably this colloquy would enhance the current consent standards.[281] By creating a tailored definition of consent specific to virtual appearances allows defendants to see the risks of video appearances, making them more likely to elect to appear in-person.[282] However, even if the defendant chooses to appear virtually, then that defendant has now been educated on the worrisome costs of that choice.[283]

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278. *See supra* Part II.B (highlighting that a judge cannot discern a defendant's humanity through a screen).

279. *See* FED. R. CRIM. P. 11(b) (requiring that the judge advise the defendant that by pleading guilty the defendant gives up his right to trial and all rights that come with that right to trial such as cross examining the witnesses against him).

280. See *id.* for reference for how a judge should approach determining whether a defendant's consent is voluntary.

281. *See* Turner, *supra* note 177, at 28–29 (noting that different states take different approaches on whether a defendant must consent to appear via video in their criminal case); *but see id.* (highlighting that the discussion surrounding consent in the rules of criminal procedure do not discuss what a defendant's consent should look like).

282. *See id.* ("For plea and sentencing hearing, the proposed emergency federal rule is even stricter and requires that the defendant request the use of video *affirmatively and in writing*. This rule can serve as a model for states that permit the use of remote plea hearings as it reduces the risk that defendants would be pressured to agree to the remote format.").

283. *See id.* (arguing that when judges inform defendants of the risks surrounding video appearances it allows for defendants to consent both voluntarily and knowingly to their video appearance).

The wording of this solution requires that defendants opt into virtual appearances instead of opting out of appearing in-person which gives defendants true autonomy in their choice of appearance according to the Nudge theory.[284] This theory proposes that by having defendants consent to video appearance instead of waiving their in-person appearance, defendants maintain free will to voluntarily consent to video appearances.[285]

A disciplinary action also needs to be in place to make sure that judges take the time to make sure that a defendant both knowingly and voluntarily consents to appear via video. This is something judges have not been following through on.[286]

This solution allows defendants to learn about the legal system and legal jargon which courts leave undefined or do not explain thoroughly to defendants.[287] Courts administer justice when they take the time for defendants, who overwhelmingly did not attend law school, to understand the impact a virtual proceeding will have on their constitutional rights.[288] Justice isn't just about the outcome of the proceedings but also about how judges handle a defendant's case procedurally.[289] The current consent standard underrepresents the defendant and their needs

284. *See* Cass Sunstein, *The Ethics of Nudging*, 32 YALE L. J. REG. 413, 417 (2015) ("Nudges are interventions that steer people in particular directions but that also allows them to go their own way . . . a nudge must fully preserve freedom of choice.").

285. *See id.* at 416 (emphasizing that "when nudges are in place, human agency is retained [because freedom of choice is not removed] and that agency always takes place in the context of some kind of choice architecture").

286. *See* Turner, *supra* note 177, at 37 (explaining that some judges within Texas and Michigan, even though required, did not inquire with the defendant about the voluntariness of their consent to appear virtually).

287. *See* Rachel Swaner et. al., *What Do Defendants Really Think: Procedural Justice and Legitimacy in the Criminal Justice System*, CTR. FOR CT. INNOVATION 1, 34 (2018) ("Just seeing people not even understanding [what a] 'no contest' [is] . . . Certain language that the judges use it's like how people don't even understand certain words. You don't know what that mean and agreeing to something that you don't even understand.") [perma.cc/5GGM-2PLB].

288. *See id.* at 8 (highlighting that out of a survey of 807 people who had been in contact with the criminal justice system about 23% did not have a high school diploma and/or a GED).

289. *See* The Justice Collaboratory, *Procedural Justice*, YALE L. SCH. ("Procedural justice speaks to the idea of fair processes, and how people's perception of fairness is strongly impacted by the quality of their experiences and not only the end result of their experiences.") [perma.cc/KDX4-5SDJ].

as it leaves the incarcerated defendant without a voice.[290] This underrepresentation impacts incarcerated defendants even more because they are often poor people of color who have been silenced both inside and outside of the courtroom.[291]

IV. Conclusion

This Note, as discussed at the outset, sounds the alarm on the use of video appearances in criminal courtrooms.[292] While the pandemic forced the world to move online, as this Note shows, the criminal justice system cannot operate or administer justice in the virtual world.[293]

To demand justice and not go further down the dark path of mass incarceration, all courts at both the state and federal level must eliminate the use of video appearances for incarcerated defendants.[294]

As this Note shows, video appearances allow judges to dehumanize defendants and speed up the criminalization of the United States' population.[295] Most importantly, this Note debunks courts' arguments that defendants benefit when appearing virtually.[296] This theory is debunked as the only benefits ever cited are red herrings to hide the court's true goal of speeding up their dockets.[297] However, all the costs of video appearances only hurt incarcerated defendants and their procedural and substantive rights.[298] Courts force defendants to appear virtually, but defendants are not able to voluntarily consent to virtual

290. *See id.* (highlighting that procedural justice gives people "a chance to express their concerns and participate in decision-making processes by telling their side of the story").

291. *See* Sandra Feder, *Mass Criminalization is a Root Cause of Racial Inequality Within the U.S.*, STAN. NEWS (Jun. 8, 2020) ("[C]ourt officials often silence poor people of color who strive to learn their rights and prove their innocence.") [perma.cc/3H8T-2K59].

292. *See supra* Part I.

293. *See supra* Part I.

294. *See* supra Part II.

295. *See supra* Part II.B.

296. *See supra* Part II.A.

297. *See supra* Part II.B.

298. *See supra* Part II.B.

appearances because they are never fully informed of the impact that these appearances will have on their constitutional rights.[299]

There are a few ways that this Note highlights for the virtual defendant to be brought out from behind the screen.[300] One solution proposes that courts embrace decarceration and release more defendants on bail.[301] Allowing defendants to be free pre-trial gives defendants the ability to appear in-person for their criminal proceedings and gives them complete and confidential access to their counsel.[302]

A second solution allows for defendants to take their concerns to the courts filing an equal protection claim against the state of their prosecution.[303] Using the Cook County study as the defendant's guide, incarcerated defendants would argue that having to appear virtually while out-of-custody defendants get to appear in-person deprives the in-custody defendant of his fundamental right to counsel.[304]

The third solution provides a course of action if courts do not get rid of video appearances.[305] This solution requires courts to slow down and acquire a defendant's informed and voluntary consent to appear virtually.[306] This voluntary consent requires courts and defendant's counsel to share with the defendant all the risks associated with appearing virtually and the negative impact it can have on a defendant's case.[307] The judge must also before beginning the virtual proceedings perform a colloquy similar to the one required in Rule 11 to make sure the defendant is aware of the rights they are giving up when appearing virtually.[308]

As this Note shows, change must occur now because defendants should not wait behind a screen to hear the fate of their freedom.

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299. See supra Part II.C.
300. *See supra* Part III.
301. *See supra* Part III.A.
302. *See supra* Part III.A.
303. *See supra* Part III.B.
304. *See supra* Part III.B.
305. *See supra* Part III.C.
306. *See supra* Part III.C.
307. *See supra* Part III.C.
308. *See supra* Part III.C.