

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19: AN EMPIRICAL STUDY

CYNTHIA ALKON*

- I. INTRODUCTION
- II. THE SURVEY
 - A. *Methodology*
 - B. *Responded Profile*
- III. DISPUTE SYSTEM DESIGN
- IV. COVID-19 “CHANGED EVERYTHING”: TRANSITION FROM IN-PERSON TO PANDEMIC COURTROOMS
 - A. *“All input is valuable and necessary to make these changes . . . successful.”: Consultative Process for Change*
 - 1. *WHO MADE DECISIONS?*
 - 2. *WAS THERE FLEXIBILITY TO MAKE CHANGES?*
 - B. *Protection for Professionals*
 - 1. *“IT’S A FOUR-ALARM FIRE OF ARROGANCE, ENTITLEMENT AND STUPIDITY”: PROTECTION FOR DEFENSE LAWYERS*
 - 2. *“WE ARE ALL AT RISK WHEN WE COME TO COURT”:
PROTECTION FOR PROSECUTORS*
 - 3. *“WE DON’T HAVE THE CAPACITY AND EQUIPMENT”:
PROTECTION FOR COURT PERSONNEL*
 - C. *Protection for Civilians*
 - 1. *“THE JAILS ARE A NIGHTMARE”:
PROTECTION FOR DEFENDANTS*

* Professor of Law, Director of the Criminal Law, Justice & Policy Program, Texas A&M University School of Law. Thank you to Kim Campbell, Sarah Cole, Susan Fortney, Elayne Greenberg, Jill Gross, Jonathan Marshall, Lucy Martin, Kelly Browe Olson, Peter Reilly, Aaron Retteen, Jenny Roberts, Andrea Kupfer Schneider, Donna Shestowskey, Nancy Welsh, and to my wonderful co-panelists at the 2021 Southeastern Association of Law Schools Discussion Group on Police to Prisons: Pandemic & Post-Pandemic Reforms in the Criminal Legal System and the Discussion Group on Is Remote Justice Still Justice? Shifting Dispute Resolution Processes Online. Thank you also to my research assistants, Ian Perez-Routledge, Yasmeen Aboelhasan, Tiffany Daniels, Brenna Miller, Jeffrey Nelson, Sarah Marie Petrus, Griffin Tolle, and Dominick Chionchio. Finally, thank you to all the respondents who took the time to fill out the survey and all of those who helped to distribute it.

2. *“I WAS TOLD NO FACE-TO-FACE MEETINGS”*: PROTECTION FOR VICTIMS AND WITNESSES
- V. “I HAVE NO IDEA WHO IS IN CHARGE OF DECIDING TO IGNORE THE CONSTITUTION.” PROTECTING DEFENDANTS’ RIGHTS
- A. *“I’m being asked to choose between either attorney-client privilege or my personal health”* Communication Concerns
 1. CONFIDENTIAL COMMUNICATION
 2. ATTORNEY-CLIENT COUNSELING
 3. *“ELECTRONIC JUSTICE IS INJUSTICE.”*: THE RIGHT TO BE PHYSICALLY PRESENT IN COURT
 - B. *Incarceration*
 1. CLIENTS ARE *“IN JAIL WAITING FOR TRIALS INDEFINITELY.”*: THE RIGHT TO A SPEEDY TRIAL
 2. *“THE COURTS DEFER ENTIRELY TO THE JAIL”*: THE RIGHT TO BE FREE FROM CRUEL AND INHUMAN TREATMENT.
 - C. *“Human Interaction leads to better cooperation”*: Plea bargaining and case outcomes
- VI. PLEA BARGAINING
- A. *“Human Interaction leads to better cooperation”*: Plea bargaining Process
 - B. *Plea Bargaining Outcomes*
- VII. CONCLUSION

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Abstract

How did the criminal legal system respond to the early months of pandemic in 2020? This article reports the results of a unique national survey of judges, defense lawyers, and prosecutors that gives a snapshot of how the criminal legal system responded to the COVID-19 in the first five chaotic months. Criminal courts in the United States rely on in-person proceedings and formal and informal in-person communications to manage caseloads. The survey results detail, in ways not previously fully understood, how crucial these in-person communications are and how ill-prepared the criminal courts and legal professionals were to deal with the quick change to online and remote platforms.

Criminal Courts also tend to have top-down, non-consensual decisionmaking, and have not traditionally been heavy users of dispute system design approaches to change and reform. This means that there were not processes already in place to consult with all the professionals as changes were being made. This may be one reason for the critical system failures reported in the survey on issues such as confidential attorney-client communications, as well as serious concerns surrounding physical safety inside courthouses and jails. The responses to the survey paint a picture of state courts that are chaotic, unpredictable, and facing serious case backlogs, as they have not been doing normal case processing since mid-March of 2020. As with many other parts of our society, the criminal courts were unprepared to deal with the pandemic and are still struggling with how to adapt. One truism of the pandemic has been that we may all be on the same rough seas, but we are not all in the same boat. This survey highlights that reality.

I. INTRODUCTION

COVID-19 devastated criminal courts around the county. Within a ten-day period in March of 2020, courts around the country shut down and normal case processing stopped. Courts had to decide what was essential, what could be delayed, and how to conduct essential processes (like bail hearings) during a pandemic.¹ Judges, prosecutors, and defense lawyers faced immediate questions about how to do their jobs. Jails and prisons became hotspots for COVID-19 outbreaks.² The spread of COVID-19 in jails created serious risks for defendants and defense lawyers, and serious problems in deciding how (or if) to bring defendants to court for appearances such as arraignments.³ And, jails shut down to outside visitors, including lawyers. Jury trials were suspended nationwide and, as of this writing, courts are still backlogged. Some courts may take years to dig out and return to pre-pandemic caseloads and processing.⁴

Long before the pandemic, the criminal legal system in the United States had serious problems.⁵ Criminal courts are chronically underfunded,

¹ The first statewide orders shutting down courts were on March 12, 2020, and by March 22, 2020, all fifty states had statewide court shutdown orders in place. On just one day, March 16, 2020, a total of 19 states issued court shut down orders. Within five days, by March 17, 2020, only seven states had not yet issued court shut down orders (orders on file with the author).

² See, e.g., Bill Chappell, *Crowded U.S. Jails Drove Millions of COVID-19 Cases, A New Study Says*, NAT'L PUB. RADIO (Sept. 2, 2021, 11:00 AM), <https://www.npr.org/2021/09/02/1033326204/crowded-jails-drove-millions-of-covid-19-cases-a-new-study-says>; Olivia Lechtenberger, *The Impact of COVID-19 in Jails and Prisons Across America*, HARV. CIV. RTS.—C.L. L. REV. (Oct. 7, 2021), <https://harvardcrcl.org/the-impact-of-covid-19-in-jails-and-prisons-across-america/>; Eddie Burkhalter et al., *Incarcerated and Infected: How the Virus Tore Through the US Prison System*, N.Y. TIMES (Apr. 10, 2021), <https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html>; *Covid-19's Impact on People in Prison*, EQUAL JUST. INITIATIVE, <https://eji.org/news/covid-19s-impact-on-people-in-prison/>, (Apr. 16, 2021).

³ See, e.g., *One in Every Five Prisoners in US Has Tested Positive for Covid-19*, THE GUARDIAN (Dec. 18, 2020, 12:12 PM), <https://www.theguardian.com/us-news/2020/dec/18/us-prisoners-coronavirus-stats-data>.

⁴ See, e.g., Shelly Bradbery, *Colorado's Court Grapple with COVID-19 Trial Backlog That Could Take Years to Clear*, THE DENVER POST (Apr. 18, 2021, 6:00 AM), <https://www.denverpost.com/2021/04/18/colorado-courts-jury-trial-backlog-covid/>.

⁵ See, e.g., Benjamin Levin, *Criminal Law in Crisis*, 92 COLO. L. REV. F. 1, 2021, at 1 (recognizing that the problems in the U.S. criminal system existed long before the pandemic).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

under-resourced, and over-crowded. Criminal defendants struggle to get competent assistance of counsel as few states put adequate resources into fully funding criminal defense services.⁶ The criminal legal system is plagued by mass incarceration⁷ and systemic racism.⁸ Whether someone remains in custody before trial is often decided by whether they have enough money to bail themselves out.⁹ The United States holds large numbers of people in pretrial detention in county jails that often suffer from over-crowding and fail to give even basic medical treatment.¹⁰ A significant percentage of criminal

⁶ See, e.g., Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CON. L. Q. 561, 576–582 (2014) (discussing the structural problems created by underfunding criminal defense services in the United States).

⁷ See, e.g., Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> (showing that a total of 2.3 million people or 698/100,000 are incarcerated).

⁸ See, e.g., *U.S. Incarceration Rates by Race*, PRISON POL'Y INITIATIVE (2020), <https://www.prisonpolicy.org/graphs/raceinc.html>; Shasta N. Inman, *Racial Disparities in Criminal Justice: How Lawyers Can Help*, A.B.A., https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/public-service/racial-disparities-criminal-justice-how-lawyers-can-help/ (last visited May 10, 2022); Anna-Leigh Firth, *Most Judges Believe the Criminal Justice System Suffers from Racism*, NAT'L JUD. COLL. (July 14, 2020), <https://www.judges.org/news-and-info/most-judges-believe-the-criminal-justice-system-suffers-from-racism/> (reporting on a survey of U.S. judges who overwhelmingly responded that yes, systemic racism exists in the criminal justice system).

⁹ See, e.g., Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 FORDHAM URB. L. J. 845, 852–854 (2019); Maria Cramer, *Illinois Becomes First State to Eliminate Cash Bail*, N.Y. TIMES (Feb. 23, 2021), <https://www.nytimes.com/2021/02/23/us/illinois-cash-bail-pritzker.html?searchResultPosition=4>; see also, Pamela R. Metzger & Janet C. Hoeffel, *Criminal (Dis)Appearance*, 88 GEO. WASH. L. REV. 392 (2020) (describing the “epidemic of detention-without-process” where people are held in pre-trial detention for extended periods of time).

¹⁰ See Sawyer & Wagner, *supra* note 7; *Voices of Pretrial Detention in Texas*, TEX. JAIL PROJECT (Aug. 22, 2016), <https://www.texasjailproject.org/2016/08/6945/> (explaining that over 555,000 people are incarcerated pre-trial through personal stories of pre-trial detention); see also Michael Sainato, *Why Are so Many People Dying in US Prisons and Jails?*, THE GUARDIAN (May 26, 2019, 2:00 PM), <https://www.theguardian.com/us-news/2019/may/26/us-prisons-jails-inmate-deaths>.

defendants suffer from substance abuse,¹¹ serious mental illness,¹² trauma,¹³ and cognitive disabilities.¹⁴

The criminal legal system is highly resistant to reform.¹⁵ Some institutional actors, such as prosecutors, hold extraordinary power that they are slow to give up.¹⁶ Police are notoriously difficult to reform.¹⁷ Despite attention to the problem, incarceration rates have only slowly decreased.¹⁸ Even reform-minded prosecutors often face a struggle and backlash against their efforts to change how the system works in their jurisdictions.¹⁹

¹¹ See, e.g., WILLIAM R. KELLY, ROBERT PITMAN & WILLIAM STREUSAND, FROM RETRIBUTION TO PUBLIC SAFETY: DISRUPTIVE INNOVATION OF AMERICAN CRIMINAL JUSTICE 10 (2017) (showing estimates that upwards of 80% of defendants are dependent on, abuse, and/or are addicted to a substance (alcohol and/or drugs)).

¹²*Id.* (explaining that approximately 40% suffer from a diagnosable mental illness).

¹³ *Id.* at 10–11.

¹⁴ See, e.g., Jim Concannon, *Our Weakest Members: Developmentally Disabled People in the Criminal Justice System*, LEXIPOL (Feb. 13, 2019), <https://www.lexipol.com/resources/blog/developmentally-disabled-people-in-the-criminal-justice-system/>; see also CYNTHIA ALKON & ANDREA KUPFER SCHNEIDER, *NEGOTIATING CRIME: PLEA BARGAINING, PROBLEM SOLVING, AND DISPUTE RESOLUTION IN THE CRIMINAL CONTEXT* 26 (2019) [hereinafter *NEGOTIATING CRIME*].

¹⁵ See, e.g., MALCOM M. FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* (2013) (discussing the challenge of meaningful reform and why so many good ideas go astray); *NEGOTIATING CRIME*, *supra* note 14, at 164–195 (discussing recommendations and attempts to reform plea bargaining).

¹⁶ See *Independent Lens Season 22, Part 1: Philly D.A.*, PUBL. BROAD. SERV. (Apr. 20, 2021), <https://www.pbs.org/video/philly-da-vuyiid/> (showing the challenges that Larry Krasner has had in trying to reform the Philadelphia District Attorney's Office); see also, Chad Flanders & Stephen Galoob, *Progressive Prosecution in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 685, 690 (2020).

¹⁷ See, e.g., Nancy LeTourneau, *Why Have Police Reform Efforts Failed?*, WASH. MONTHLY (June 2, 2020), <https://washingtonmonthly.com/2020/06/02/why-have-police-reform-efforts-failed/>.

¹⁸ Jacob Kang-Brown et al., *The New Dynamics of Mass Incarceration*, VERA INST. JUST. 6 (June 2018), <https://www.vera.org/downloads/publications/the-new-dynamics-of-mass-incarceration-report.pdf> (explaining if annual rates of decline in incarceration rates continue at the same rate as they have since 2007, the United States will reach the incarceration rates of 1970 in 2166).

¹⁹ See, e.g., Richard A. Oppel Jr., *These Prosecutors Promised Change. Their Power is Being Stripped Away*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/us/prosecutors-criminal-justice.html?searchResultPosition=7>; Tim Arango, *Los Angeles Just Elected a Liberal D.A., He's Already Facing a Recall Effort*, N.Y. TIMES (June 19, 2021), <https://www.nytimes.com/2021/06/19/us/george-gascon.html?searchResultPosition=1>.

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Criminal practice has traditionally relied heavily on in-person processes and communication. Prior to the pandemic, each stage of a criminal case, from arraignment to sentencing, was overwhelmingly in-person and in-court. Prosecutors and defense lawyers, particularly at the state level, tend to rely on in-person meetings, often rushed and in courtrooms or hallways, to exchange discovery, discuss future settings, and plea bargain cases. Criminal defense lawyers rely on in-person meetings with their clients to build trust and the attorney-client relationship.²⁰ Although only a small percentage of criminal cases actually go to trial,²¹ the fact that every case could go to trial has traditionally acted as a pressure point to focus both prosecutors and defense lawyers on possible plea deals, particularly in jurisdictions with clear speedy trial rules mandating when a case must either settle or go to trial. There have been efforts to bring some processes online, such as bail hearings, but these efforts have faced serious criticism that they disadvantage defendants.²² In short, day-to-day criminal practice already faced serious challenges before the pandemic.

Normal case processing ended when the pandemic began. Jury trials stopped. Plea bargaining was drastically reduced or stopped altogether. The pandemic forced courts to shut down, go online, and to figure out how essential proceedings could continue to be held in the face of COVID-19. Underfunded courts struggled to acquire equipment and technical skills to shift to online processes.²³ The pandemic demanded immediate action and decisions in institutions that are not naturally quick to change and adopt reforms. All of this was complicated by the need to protect defendants'

²⁰ See, e.g., Chrissy Madjar et al., "How Do I defend People Now?" *Public Defenders Rely on In-Person Confidential Meetings with Clients. They Say COVID-19 Makes Their Jobs Nearly Impossible.*, MARSHAL PROJECT (Apr. 17, 2020), <https://www.themarshallproject.org/2020/04/17/how-do-i-defend-people-now>.

²¹ See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 495 (2004) ("From 1962 to 1991, the percentage of trials in criminal cases remained steady between approximately 13 percent to 15 percent. However, since 1991, the percentage of trials in criminal cases has steadily decreased (with the exception of one slight increase of 0.06 percent in 2001): from 12.6 percent in 1991 to less than 4.7 percent in 2002.").

²² See, e.g., Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 880–897 (2010) (finding that average bail amounts increased when bail hearings were conducted on closed circuit TV).

²³ See generally Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH. L. REV. 197, 216–222 (2021), for an excellent analysis of reasons to be cautious about adopting more widespread remote proceedings after the pandemic based on survey results of federal and state judges, prosecutors, and defense lawyers in Texas.

constitutional rights while protecting the health and safety of all those coming into the courts including court staff, prosecutors, defense lawyers, defendants, victims, and witnesses.²⁴

This article reports the results of a nationwide survey of defense lawyers, judges, and prosecutors conducted in the first months after the pandemic hit the United States in March of 2020. The survey was intended to obtain data on the impact of the pandemic on criminal courts, providing a national snapshot of how the criminal legal system was responding during these early months. Overall, the survey responses paint a picture of court systems that struggled to find workable practices in what was (and is), arguably, an unworkable environment. Courts around the country relied on decision making that did not reflect the best dispute system design practices, but were instead often haphazard, inconsistent, and not consultative. The professionals working in the criminal courts report serious problems in transitioning to remote technology and raise serious concerns about whether health and safety was protected at the expense of defendants' constitutional rights. At the same time, there were serious concerns about failures to protect the health of all those in the criminal legal system including defendants, lawyers, court staff, witnesses, and judges. The survey results illustrate how heavily reliant the criminal legal system is on in-person communication.

This article will start by describing the survey, the methodology, and the respondents. This article will then discuss dispute system design and how it can work for better decisions on changing processes. Then this article will discuss what the survey results reveal about how courts around the country transitioned from in-person courts to pandemic courts, comparing the practices reported by survey respondents to good dispute system design practices. Next, this article will examine the protection of defendants' rights. Finally, this article will examine plea bargaining, which reduced dramatically in the early months, as the leverage of trial disappeared. Survey respondents reported reduced overall plea bargaining and changes in plea bargaining practices and outcomes during the early months of the pandemic. Plea bargaining practices have relied on trial, and the survey results illustrate how the complete stopping

²⁴ See, e.g., Matt Hamilton, *Workers in LA's Courts Are Dying of COVID-19 as In-Person Hearings, Trials Continue*, L.A. TIMES, (Feb 5, 2021, 5:00 AM) <https://www.latimes.com/california/story/2021-02-05/covid-complicates-in-person-trials-la-courthouses>; Debra Cassens Weiss, *Prosecutor in Critical Condition with COVID-19 Had Filed an OSHA Complaint*, A.B.A. JOURNAL (July 14, 2020, 1:25 PM) <https://www.abajournal.com/news/article/prosecutor-in-critical-condition-with-covid-19-had-filed-an-osha-complaint> (workers in courts around the country contracted COVID-19).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

of trials turned plea bargaining practices upside down and dramatically decreased case dispositions, creating backlogs that continue to exist.

II. THE SURVEY

I started to draft the survey questions in late March and early April 2020—just weeks after the pandemic shutdowns began. At that early stage it was clear that criminal courts, along with the rest of the United States (and the world) were changing quickly to try to adapt to the pandemic. However, it was less clear what those changes were and how they were impacting practices in criminal courts around the country.

Because the survey was drafted just weeks after the pandemic began, it was a challenge to narrow in on particular questions or topics as it was unclear what issues were or would be most important.²⁵ As a result, the survey asked questions in many areas and gave respondents the opportunity to write text responses. I wanted to be sure that I captured the flavor and feeling of what was going on and that I did not constrain the responses to multiple choice options of what I thought the answers might be. The survey included questions for all respondents and posed particular questions to classes of respondents. For example, only defense lawyers were asked specific questions about attorney-client communications.²⁶ But, all of the respondents were asked questions about when the courts shut down and what kinds of processes stopped, were delayed, or changed (for example, changed to a remote process). The survey covered plea bargaining, asking defense lawyers and prosecutors what had changed both in how plea bargaining was conducted since the pandemic (for example, were there more electronic communications) and if there had been changes in plea bargaining outcomes (for example, were defendants getting better deals).²⁷ The judges were asked questions specifically about their role in deciding about changes in court practices and how specific courts, such as drug courts, adapted to the changes.²⁸ All three groups were asked how well protected each group was from the threat of contracting COVID-19 and, in line with a dispute system design approach, asked whether each group was adequately consulted about the changes to court practices and protections.²⁹ Respondents had multiple choice or check box answers, and in many questions also had the option of clicking “other” and explaining in text. In addition, there were a large number of questions that

²⁵ See *infra* app. for the complete survey.

²⁶ See *infra* app. questions 9–18.

²⁷ See *infra* app. questions 26–30.

²⁸ See *infra* app. questions 77, 79–80.

²⁹ See *infra* app. questions 39–40, 42–43, 45–46, 48–49, 51–52, 54–55, 71, 82–85.

asked “if yes (or no) please explain.” For example, if a defense lawyer responded that yes, they were concerned about confidentiality in their communications with their clients, they were asked to explain.³⁰ In total, there were thirty-six questions with the possibility to write-in answers.

A. Methodology

The survey was an online survey using Qualtrics.³¹ I began to distribute it in early May 2020.³² All responses were anonymous, and anonymity was explained in the emails I sent.³³ I used snowball sampling,³⁴ sending the survey to everyone I knew who might have some connection to the criminal legal system including defense lawyers, prosecutors, judges, law professors, alumni, and students. I asked each person to send it to anyone they might know who is a prosecutor, judge, or lawyer working in the criminal legal system in the United States. I also sent it to various organizations asking them to post the survey on their websites or distribute it to their mailing lists. Some organizations quickly distributed the survey.³⁵ Others refused.³⁶ This was an extended process. Survey responses started arriving on May 12, 2020, and ended on August 31, 2020, with one straggler’s response arriving on Oct. 28,

³⁰ See *infra* app. question 16.

³¹ See, for example, Ross Rubin, *Qualtrics Review*, PC MAG., <https://www.pcmag.com/reviews/qualtrics> (last visited Aug. 8, 2021), for an explanation and review of Qualtrics as a survey platform.

³² I sent the early draft to several colleagues for feedback and made changes based on their suggestions. By mid-April I had a completed draft that I sent out as a pilot. After reviewing the twenty pilot responses, I made further changes to the survey and started distributing the survey in early May 2020.

³³ Included in the general email that I sent with survey was the statement that “[t]he survey responses are entirely anonymous. I will not know if you have answered and your name will not be attached, in any way, to your answers. Because it is anonymous, you can forward the link to anyone and everyone who you know who is a professional in our criminal legal system and ask them to fill it out. It is not tied to any email addresses or other personal identifying information.”

³⁴ See, e.g., *Snowball Sampling: Definition, Advantages and Disadvantages*, STATS. HOW TO, <https://www.statisticshowto.com/probability-and-statistics/statistics-definitions/snowball-sampling/> (last visited Aug. 6, 2021).

³⁵ E.g., E-mail from the National Association of Criminal Defense Lawyers (June 6, 2021) (on file with author).

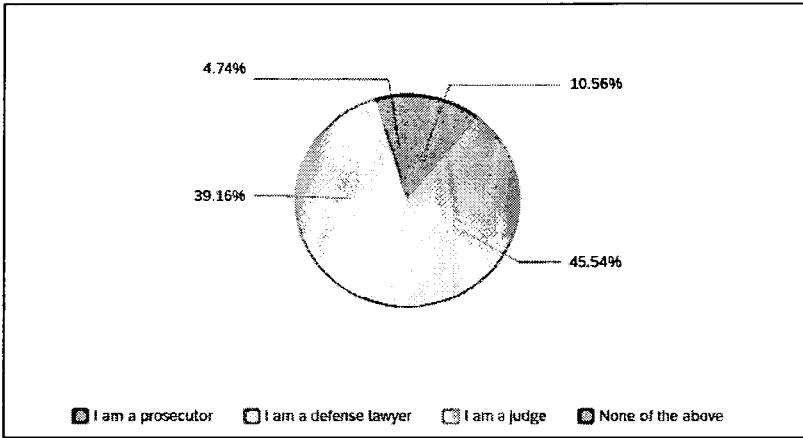
³⁶ E.g., E-mail from the Administrative Office for the Courts for the Maryland Judiciary (June 16, 2020) (on file with author) (responding that the “Maryland Judiciary is unable to participate in this survey” without giving any additional explanation).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

2020.³⁷ The bulk of the responses were during the first four months of the pandemic, during a ten-week period from mid-May to the end of the July, 2020.

B. Respondent Profile

A total of 549 people responded to the survey. The largest percentage of responses were from judges (39% of all respondents) and defense lawyers (46% of all respondents).³⁸ Just over ten percent of the respondents were prosecutors.



A total of 3% of the prosecutors were federal prosecutors, and 2% of the defense lawyers reported being federal public defenders. Of the 244 defense lawyer respondents, 33% reported being local public defenders and 41% reported that they were publicly appointed private lawyers. A total of 34 lawyers (14%) were private lawyers who do not take any public appointments. Most of the respondents work at the state level, so while there is some data

³⁷ Some of the larger organizations of criminal justice professionals distributed the survey later in the process. For example, The National District Attorney's Association distributed the survey on Aug. 10, 2020 in their newsletter, and the National Association of Criminal Defense Lawyers distributed the survey during the week of August 3, 2020. The California Judges Association distributed the survey on July 20, 2020 and sent a reminder about the survey during the week of August 3, 2020. However, only forty-two responses came in during August, 2020 (and one in October, 2020).

³⁸ See *infra* app. question 1 (answers on file with author) (Please note: When reporting the data throughout this article, the percentages will be rounded up or down. Any answer that is .00-.50 (such as 10.49%) will be reported rounding down (10%). Any answer that is .60-.99 (such as 10.79%) will be reported rounding up (11%).)

about federal practices, the survey, for the most part, gives a picture of how state courts adjusted, or failed to adjust, to the pandemic.³⁹

Just over half of all of the respondents (281) were from two states: Texas and California. The remaining respondents were from twenty-five other states. Respondents came from a total of one hundred and sixty-two counties around the country.⁴⁰ Of those, thirty-three were counties with populations of over one million. There were fifty-one medium size counties (250,000 to one million in population). Respondents reported working in a total of seventy-eight small counties (population under 250,000). Respondents from Texas and California were spread across a large number of counties including the largest counties in each state and smaller rural counties. Respondents from Texas included those in sixty small counties, twenty-one medium, and seven large counties.⁴¹ Respondents from California, in contrast, were more from medium and large counties (twenty-five medium counties and eleven large counties). One judicial respondent from California simply wrote “rural Northern”⁴² which may have been due to the county being smaller and concerns about certain answers (such as the types of cases handled in the court) destroying anonymity.

The prosecutor data are reported in this article, recognizing that the relatively smaller number of prosecutor respondents means that the numbers may be too disproportionately small to draw reliable conclusions, particularly with some questions. It is unclear why there were fewer prosecutor responses compared to the other groups. It was more challenging to get prosecutor

³⁹ Over 97% of the defense lawyer respondents and over 96% of the prosecutor respondents worked at the state level (on file with author).

⁴⁰ See, e.g., *How Many Counties are in the United States*, WORLDATLAS, <https://www.worldatlas.com/articles/how-many-counties-are-in-the-united-states.html> (last visited Aug. 8, 2021) (the United States has 3007 counties).

⁴¹ See, e.g., *id.* (Texas has a total of 254 counties).

⁴² Judicial Response 123, app. question 64 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

organizations to distribute the survey to their membership.⁴³ Overall, the prosecutor responses to the survey reflected less frustration compared to defense attorneys, and their responses indicated that prosecutors did not seem to feel as powerless in how the courts were responding.

The prosecutor respondents were less experienced than the defense lawyers. Over 50% of the prosecutors had six or fewer years in criminal practice, compared to 20% of defense lawyers. In terms of overall practice experience, of those that responded to this question, just over 50% of the defense lawyers reported fifteen years or more of practice, compared to over 29% of the prosecutors. In terms of gender, 62% of the judges were men, while prosecutors and defense lawyers were more evenly divided along gender lines, with 56% of prosecutors being women, and 48% of defense lawyers being women.⁴⁴ Over 70% of the prosecutor and defense lawyer respondents and just over 67% of judges identified as white or Caucasian.⁴⁵

There were differences in terms of who identified themselves as being in a higher risk category for COVID-19. Sixty-eight percent of prosecutors said they were not in a higher risk category for COVID-19, compared to 56% of defense lawyers and 48% of judges. These differences may reflect that prosecutor respondents to this survey had less experience which may mean they were younger and therefore less likely to be in a higher risk group for COVID-19.

⁴³ For example, one state-wide prosecutor organization (who I will not name to protect their anonymity) responded that their board had “asked us not to send out them any more surveys” as they “are averaging about 2 a week on a myriad of topics” and that mine was the “fourth survey request related to the pandemic.” The overall unsettled conditions also seemed to influence the willingness to answer any questions as a representative of the same organization said, “[t]his is going to be a great study of how things have changed for sure, but now is not the time to answer that question—it is also fluid . . . heck we still get one new supreme court order a week . . .” (on file with the author); A national prosecutor’s organization commented on “a bit of survey fatigue” as there had been surveys specifically directed at prosecutor’s offices, although they did agree to distribute the survey (on file with the author).

⁴⁴ *ABA Profile of the Legal Profession 2021*, A.B.A. 12 (2021), <https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf> [hereinafter *ABA Profile*] (showing overall, 63% of lawyers in the United States are men and 37% are women); see *Demographic Data Provided by Justices and Judges*, CAL. CTS. (Dec. 31, 2020), <https://www.courts.ca.gov/documents/2021-JO-Demographic-Data.pdf> (It is harder to find country-wide data on state level judges. In California, 62% of judges are men, and 38% are women).

⁴⁵ *ABA Profile*, *supra* note 44, at 13 (85% of all lawyers in the United States are white); *Demographic Data Provided by Justices and Judges*, *supra* note 44 (65% of California judges reported as white).

III. DISPUTE SYSTEM DESIGN

Dispute System Design (DSD) is “the applied art and science of designing the means to prevent, manage, and resolve streams of disputes or conflict.”⁴⁶ DSD began as a way to address conflict in labor relations.⁴⁷ It has since expanded and been applied in a wide variety of areas including court annexed and connected dispute resolution, mediation and arbitration programs, and ombuds programs.⁴⁸ DSD focuses on the interests and needs of the parties and stakeholders instead of power-based decision making.⁴⁹

Lisa Blomgren Amsler, Stephanie Smith, and Janet Martinez developed an analytic framework for DSD.⁵⁰ This framework is a helpful starting point to guide “the analysis and design of dispute systems.”⁵¹ They suggest six elements that should guide any DSD process: identify the goals; identify the stakeholders and their interests, examine the processes and structures; know the financial and human; and evaluation which includes looking at the successes, accountability and learning.⁵²

Justice is part of the analysis for DSD. There are five categories of justice in the DSD analysis. These are “justice as to outcomes,” “justice as to processes,” “justice within organizations,” “justice for people living in a community,” and “injustice in various settings and processes.”⁵³ Procedural justice is the “dominant theoretical frame” for evaluation of different systems.⁵⁴

A DSD design approach to making decisions is by definition one that is inclusive, interest-based (not power based) and uses the analytic framework

⁴⁶ LISA BLOMGREN AMSLER ET AL., *DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT* 7 (2020).

⁴⁷ See, e.g., Lisa Bloomgren Amsler, *The Dispute Resolver's Role Within a Dispute System Design: Justice, Accountability, and Impact*, 13 U. ST. THOMAS L.J. 168, 170 (2017) [hereinafter *Dispute Resolver's Role*].

⁴⁸ Lisa Bloomgren Amsler, *Dispute System Design and the Global Pound Conference*, 18 CARDOZO J. CONFLICT RESOL. 621 (2017).

⁴⁹ See e.g., Amsler, *Dispute Resolver's Role*, *supra* note 47, at 170–171.

⁵⁰ AMSLER ET AL., *supra* note 46, at 22–38. See also Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009) (describing five key elements for the Dispute Systems Analytical Framework).

⁵¹ Smith & Martinez, *supra* note 50, at 129.

⁵² See e.g., AMSLER, *supra* note 46, at 22–38 (describing each element in more detail).

⁵³ *Id.*

⁵⁴ Lisa Bloomgren Amsler et al., *Dispute System Design and Bias in Dispute Resolution*, 70 SMU L. REV. 913, 924 (2017).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

as a starting point, with a focus on how these changes might impact the different kinds of justice. The survey results reflect a more power-based, rather than interest-based and inclusive form of decision making. For example, during the ten-day period in March of 2020 when courts around the country shut down, the basic DSD approach was not used. Decisions to close the courts were top-down, either by a governor's order, the statewide court administration, or local presiding judges. The shut-down decisions were not open for discussion or debate. Given the scope of the public health crisis, these initial decisions did need to be made quickly. However, after the initial shut down decisions were made, there were a number of other decisions that needed to be made about how to manage essential court processes, such as arraignments and bail hearings. There were also decisions about what kind of health and safety measures to put in place, such as limiting the number of people coming into a courtroom, moving proceedings online, and whether to require masks for in-person hearings. Although the survey results indicate that some jurisdictions were more collaborative, there were widespread failures to look more broadly at the impact of these decisions. Goals were not set, stakeholders were not consulted, and often decisions were made to move processes online without the resources to do so, much less with any consideration on the impact that moving these processes online might have for issues of justice, or plans to evaluate the impact.

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

Overall, only a small number of survey responses reported ongoing processes where the three main stakeholders (judges, prosecutors, and defense lawyers) jointly discussed how to manage court processes, including case resolution, in the early months of the pandemic. COVID-19 brought far reaching changes to court practice and the survey responses suggest that these changes were often a product of power-based and top-down decision making and not a collaborative process. As the survey results illustrate, the failure to talk to defense lawyers, at least some of the time and in some places, meant

that key issues were not identified in advance and in ways that could have prevented some of the problems or helped to manage the problems as they emerged.

IV. COVID-19 “CHANGED EVERYTHING”⁵⁵: TRANSITION FROM IN-PERSON TO PANDEMIC COURTROOMS

Unsurprisingly, judges, prosecutors and defense lawyers universally agree that there have been widespread changes to court practices due to COVID-19. Health and safety were clearly important issues from the beginning of the pandemic.⁵⁶ There were serious concerns about how to protect court staff and how to prevent the spread of COVID-19 both from those in custody and to those out of custody.⁵⁷ Prisons and jails are crowded and were recognized early on as potential COVID-19 hot spots.⁵⁸ Both courts and jails remained open and functioning, although jury trials were cancelled around the country. Other proceedings, however, continued to be held, such as

⁵⁵ Defense Attorney Response 25, app. question 56 (on file with author).

⁵⁶ See e.g., Frank G. Runyeon, *COVID-19 Sickens 17 Judges, Over 150 Court Staffers in NY*, LAW 360 (April 27, 2020, 9:09 PM), <https://www.law360.com/articles/1267819/covid-19-sickens-17-judges-over-150-court-staffers-in-ny> (reporting that two judges had died); see also *Criminal Court Reopening and Public Health in the COVID-19 Era: NACDL Statement of Principles and Report*, NAT’L ASS’N OF CRIM. DEF. LAWS. (June 2020), <https://nacdl.org/getattachment/56802001-1bb9-4edd-814d-c8d5c41346f3/criminal-court-reopening-and-public-health-in-the-covid-19-era.pdf> (recommendations on how to reopen courts while protecting defendants’ rights).

⁵⁷ See e.g., Lance Benzel, *Colorado Public Defender Tests Positive for COVID-19, Others Wait for Tests*, THE GAZETTE (March 18, 2020), https://gazette.com/news/colorado-public-defender-tests-positive-for-covid-19-others-wait-for-tests/article_5765b756-6944-11ea-a4c2-3f3b867b805d.html; see also Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, PRISON POL’Y INST. (December 2020), <https://www.prisonpolicy.org/reports/covidspread.html> (reporting on the increased cases of COVID-19 both within jail and correctional facilities and community spread from those institutions due to policies that failed to reduce risk of COVID-19 infections in jails and prisons).

⁵⁸ See e.g., Timothy Williams & Danielle Ivory, *Chicago’s Jail is Top U.S. Hot Spot as Virus Spreads Behind Bars*, N.Y. TIMES (April 8, 2020), <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html#:~:text=jail%2Dchicago.html,Chicago%27s%20Jail%20Is%20Top%20U.S.%20Hot%20Spot%20as%20Virus%20Spreads,incluing%20at%20least%2032%20deaths.>

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

arraignments and bail hearings.⁵⁹ Defendants, both in and out of custody, continued to appear in-person in court and, depending on the court, some of these processes shifted to online platforms.

The survey recognized the concerns about possible exposure to COVID-19 in court and had questions specifically about health and safety measures being taken to protect those coming to court. The survey asked if adequate physical protection was given to court personnel, including judges, defendants, defense lawyers, prosecutors, and victims and witnesses. The survey then had a series of questions, depending on responses to the general question, about whether or not adequate physical protections were given to each group.⁶⁰ They were asked either to explain what was done,⁶¹ or explain what should have been done for each group.⁶²

Overall, judges were the group that was most satisfied, that all groups were adequately physically protected, while defense lawyers were far less convinced.⁶³ Judge respondents explained in detail the measures that had been taken in their courtrooms to provide physical protection.⁶⁴ The responses listed the variety of measures that were taken ranging from plexi-glass barriers, to reducing the number of people in individual courtrooms, to increasing remote processes, to health screenings before people could enter the courthouse.⁶⁵ As a group, defense lawyers were the most skeptical about whether these measures provided adequate protections. For example, 61% of defense lawyers strongly or somewhat agreed that prosecutors were adequately physically protected compared to 73% of the prosecutors and 79% of the judges.⁶⁶ Defense lawyers, as a group, also seemed more concerned about victims and witnesses, with just 45% strongly or somewhat agreeing that they

⁵⁹ See e.g., Stephanie Francis Ward, *Where and How Are Criminal Defense Lawyers Making Headway on COVID-19 Bail Motions?*, ABA J. (April 6, 2020), <https://www.abajournal.com/web/article/where-and-how-are-criminal-defense-lawyers-making-headway-on-covid-19-bail-motions>.

⁶⁰ See *infra* app. questions 45, 46, 48, 49, 51, 52, 54, 55, 84, 85.

⁶¹ See *infra* app. questions 45, 49, 52, 54, 84.

⁶² See *infra* app. questions 46, 48, 51, 55, 85 (answers to these questions were not always different and included responses such as “the same for each” or “the same for defense” when asking about the prosecution).

⁶³ Judicial Responses, app., question 83 (on file with author); Defense Attorney Responses, app. question 83 (on file with author).

⁶⁴ Judicial Responses, app., questions 45, 49, 52, 54, 84 (on file with author);

⁶⁵ *Id.*

⁶⁶ Defense Attorney Responses, app. question 83 (on file with author).

were adequately protected,⁶⁷ compared to 69% of prosecutors⁶⁸ and 79% of judges.⁶⁹

A. *“All input is valuable and necessary to make these changes . . . successful.”*⁷⁰: *Consultative Process for Change*

In March of 2020, as the pandemic hit, criminal courts around the country were faced with immediate decisions about what processes to bring online, what to have in person, how to handle in person proceedings, what restrictions to place on having people in the courtroom, and what rules to implement in terms of masking, sanitizing, and social distancing in the courtroom. Many of these decisions, as will be discussed later, have serious implications in terms of protecting rights. The process of making these decisions often reflected how individual courts are managed. Is there an existing culture of collaborative decision-making? Are prosecutors and defense attorneys consulted equally in deciding how to manage caseloads and court processes? Or is the decision-making top-down with judges deciding without discussion with the other professional players in the system? In addition to who was making the decisions, it is also important to understand if there were constraints on the decision-making. Did judges perceive that they had the ability to institute all the changes they wanted? Or were there budgetary or bureaucratic constraints?

1. *WHO MADE DECISIONS?*

Judges and prosecutors perceived that there was more consultation as changes were being made than defense lawyers did. Seventy-five percent of defense lawyers responded that there were changes to court practices that should have been made with defense lawyers' input, but weren't. In contrast, 29% of prosecutors and 17% of judges thought there were changes to court practice that should have been made with defense input, but weren't.

⁶⁷ Defense Attorney Responses, app. question 83 (on file with author).

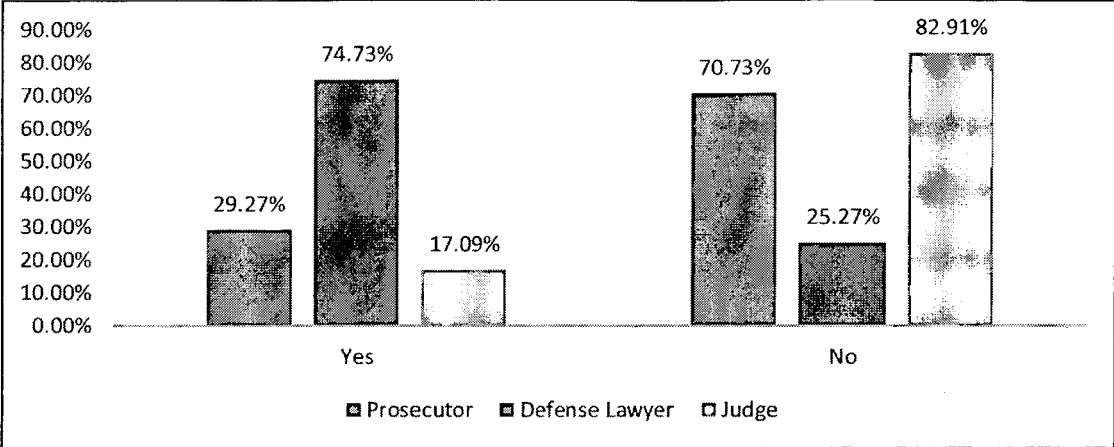
⁶⁸ Prosecutor Responses, app. question 83 (on file with author).

⁶⁹ Judge Responses, app. question 83 (on file with author).

⁷⁰ Judge Response 5, app. question 40 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

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



A number of defense responses to this question reported a version of what this respondent said, “[n]o input was considered at all from the criminal defense bar (to my knowledge).”⁷¹ Another observed that the lack of consultation was not a new phenomenon, “I have been practicing in the same jurisdiction for over 10 years and am not aware of any efforts to request input from defense counsel.”⁷² Another said, “literally all of them [failed to seek defense input]. No court in the dozen plus counties I practice in reached out in any way for defense input.”⁷³ In addition, there were comments such as: “There had been zero consideration of the impact of these changes on the constitutional rights of criminal defendants.”⁷⁴ Numerous defense lawyer responses to this question referred to how they should have been consulted to set up better ways to communicate with their clients, such as: “If I could have input I would like a means of speaking with my clients without staff listening in.”⁷⁵

Judges were singled out for criticism by defense lawyers in response to this question. One respondent said, “the judges ignore all of our input and

⁷¹ Defense Attorney Response 19, app. question 40 (on file with author).
⁷² Defense Attorney Response 13, app. question 40 (on file with author).
⁷³ Defense Attorney Response 102, app. question 40 (on file with author).
⁷⁴ Defense Attorney Response 21, app. question 40 (on file with author).
⁷⁵ Defense Attorney Response 66, app. question 40 (on file with author).

in fact strive to do the exact opposite.”⁷⁶ Another said, “One judge continued on in court like nothing happened until her bailiff tested positive. This judge disregarded administrative judge’s orders and state office of court’s orders.”⁷⁷

Some judges commented on the importance of talking to defense lawyers. As one commented, “I think all input is valuable and necessary to make these changes . . . successful.”⁷⁸ Judges did comment on a lack of communication with defense offices, although they did not report leaving out the defense bar in the decisionmaking process. For example, one judge said, “The admin at the public defender’s office did not adequately meet and discuss the procedures with their staff. Decisions made by the court’s executive team and the admin of other offices were later objected to by the line attorneys.”⁷⁹ Of the twenty seven written answers by judges, seven acknowledged that they did not know if there were changes that should have been made with defense input, but were not, which could be due, in part, to those respondents not being directly involved in planning.⁸⁰ The judicial responses to this question, in large part, lacked an indication that judges were aware of defense lawyers being left out of the decisionmaking or that defense lawyers had concerns about being left out of the decisionmaking. In contrast, all three groups were in close agreement about whether there were changes that should have been made with prosecutor input, but were not.

Defense lawyers acknowledged that they did not always know what should have been done. One simply replied to the question with, “you need an ‘I don’t know’ button here.”⁸¹ Another called for more input, while recognizing there were no easy answers:

There should have been input about how to handle preliminary hearings and misdemeanor trials where we must sit next to our clients and do not allow for social distancing. I don’t know how they should be handled, but I am uncomfortable proceeding as if everything were normal, especially because I have risk factors.⁸²

⁷⁶ Defense Attorney Response 82, app. question 40 (on file with author).

⁷⁷ Defense Attorney Response 127, app. question 40 (on file with author).

⁷⁸ Judge Response 5, app. question 40 (on file with author).

⁷⁹ Judge Response 20, app. question 40 (on file with author).

⁸⁰ Judge Responses, app. question 40 (on file with author).

⁸¹ Defense Attorney Response 18, app. question 40 (on file with author).

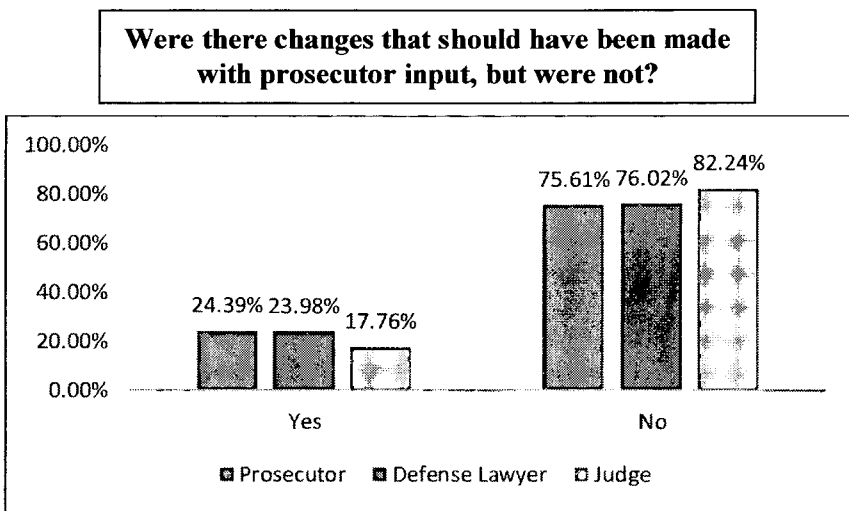
⁸² Defense Attorney Response 8, app. question 40 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Another defense lawyer gave this example,

Recently our district held a jury trial and did not obtain any defense input on safety measures or how the procedures of trial would go. The defense filed a lengthy motion objecting to holding a trial during the peak of a pandemic. The motion included expert statements and citations to scientific studies and statistics showing that it would be risky. The defense motion was denied.⁸³

In contrast, all three groups were in close agreement that prosecutors had been adequately consulted.



2. WAS THERE FLEXIBILITY TO MAKE CHANGES?

Judges were asked if they had “full flexibility to make changes in how cases were handled” in their courtrooms⁸⁴ and 61% responded that they strongly agreed or somewhat agreed that they had full flexibility. This indicates that they would have had the flexibility to use a more consultative, inclusive, Dispute System Design process in making changes. Judges were then asked what limited their flexibility.⁸⁵ This answer had options to choose from and an “other, please specify” category. Respondents could choose more

⁸³ Defense Attorney Response 35, app. question 40 (on file with author).

⁸⁴ See *infra* app. question 35.

⁸⁵ See *infra* app. question 81.

than one option. Of the 337 responses, 20% stated that rules prevented flexibility, while 28% said that either courtroom or courthouse design was an issue. Over 16% of the judge-respondents replied that there was inadequate technology to make the changes. Over 10% of the responses said a problem was that court administration was too centralized. In the “other, please specify” category, judges pointed to problems with access to technology by the parties. For example, one judge responded, “Due to being a rural court, there are several areas in the county where inadequate internet service is available. The Court has adequate technology, but not all potential parties.”⁸⁶ Some respondents criticized decisions made at a higher level without consultation, such as, “Higher courts did not communicate with Justice Courts”⁸⁷ and the “Local Administrative Judge made all decisions without consulting other courts.”⁸⁸ Indicating that the lack of a more consultative process was beyond the control of these judges. Others identified particular players in the system as problems such as, “lack of cooperation from the sheriff”⁸⁹ or “Clerks, DA’s, [public defender], Sheriff and other partners operate autonomously and are not managed or controlled by the judiciary.”⁹⁰

Over 75% of judges responded that they strongly or somewhat agreed that they “had the necessary resources to make changes to better protect myself and others in the courtroom during the coronavirus pandemic.”⁹¹

B. *Protection for Professionals*

1. *“IT’S A FOUR-ALARM FIRE OF ARROGANCE, ENTITLEMENT AND STUPIDITY”⁹²: PROTECTION FOR DEFENSE LAWYERS*

More judges agreed that defense lawyers were less well protected compared to other groups, but 72% strongly or somewhat agreed that defense lawyers were well protected. This contrasts with 46% of defense lawyers responding in the same way. Nearly a quarter of the defense lawyers strongly disagreed that they were provided adequate physical protection, compared to 2% of the judges and 5% of prosecutors.

The measures that respondents thought were adequate to protect defense lawyers included remote appearances, health screening on entry to the

⁸⁶ Judge Response 3, app. question 81 (on file with the author).

⁸⁷ Judge Response 10, app. question 81 (on file with author).

⁸⁸ Judge Response 11, app. question 81 (on file with author).

⁸⁹ Judge Response 20, app. question 81 (on file with author).

⁹⁰ Judge Response 30, app. question 81 (on file with author).

⁹¹ See *infra* app. question 37 (responses on file with author).

⁹² Defense Attorney Response 10, app. question 46 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

courthouse, physical barriers, and personal protective equipment.⁹³ Remote court appearances was the category that defense lawyers and prosecutors identified as providing adequate protection more than any other single category. An equal number of judges identified remote court appearances and personal protective gear, indicating that judges thought personal protective equipment provided adequate protection allowing for in-person appearances. When the numbers are consolidated, remote court appearance was the largest single category with ninety-three of the responses referencing remote appearances in some way. For example, one defense lawyer reported, “there was an extensive effort to make as much of court virtual as possible. We were about 85% successful in getting that done.”⁹⁴ A prosecutor from a county in North Texas said that proceedings are “100% virtual or get reset if [the defense lawyer] feel[s] unsafe.”⁹⁵ Another defense lawyer commented that “[t]he best measure was a switch to virtual video court for most matters.”⁹⁶ Judges referenced partitions installed in the courtrooms, mask requirements, physical distancing, and also remote appearances. As one judge explained:

I do not have many defense attorneys come into my Court. When the pandemic started, we quickly implemented safety procedure. All my staff is behind glass except for a 3 to 8 inch opening in front of the counter to receive documents, payments, etc. The few attorneys who came into my office were asked to sanitize their hands and once they finished their business with the Court, the area was sanitized. I had some defense attorneys come in an emergency situations, we required the above, but also that they wear masks. My office had extra masks and if they did not have one, one was given to them⁹⁷

However, even in response to a question asking about what was done right, a number of defense lawyers tempered their responses with concerns, for example, one defense lawyer wrote positively about being allowed to do video hearings and then said,

[H]owever, some judges have forced defense counsel to appear in person—even when defense counsel expressed concerns about their physical safety related to their suppressed immune systems. [It

⁹³ See *infra* app. question 45 (responses on file with the author).

⁹⁴ Defense Attorney Response 3, app. question 45 (on file with the author).

⁹⁵ Prosecutor Response 10, app. questions 45 (on file with the author).

⁹⁶ Defense Attorney Response 23, app. question 45 (on file with the author).

⁹⁷ Judge Response 17, app. question 45 (on file with the author).

was] clearly vindictive on the judge's part, as it was clear they didn't like defense counsel and counsel's zealous advocacy for their client."⁹⁸

Some of the defense attorney comments focused on how they were treated differently,

... Counsel still appeared in court sitting with clients but judges appeared via zoom or refused to all to approach the bench. Counsel and clients were expected to pass paper and review probation paperwork but judges wouldn't pass paper back and forth with attorneys. It was clear the judges were concerned about their protection but expect us to solve our own issues without disrupting the proceedings.⁹⁹

Some defense lawyers wanted to make clear who was responsible for the positive measure protecting defense lawyers, for example,

Courts only took these measures at the insistence of defense lawyers (the Public Defender's Office). We were the ones who insisted that we need not appear personally in court and that if we did, masks would be worn and social distances enforced.¹⁰⁰

At least one prosecutor agreed that some of the changes were due to defense lawyers themselves, writing that, "[a]ll courtroom activities are held remotely or postponed when defense lawyers refused to cooperate."¹⁰¹

Defense lawyers had numerous, and relatively lengthy, responses to the question of what should have been done to protect them. The largest category of responses involved personal protective equipment, including masks. These answers were often about who in the courtroom was, or wasn't wearing a mask, and mask requirements.¹⁰² For example, one defense lawyer commented,

⁹⁸ Defense Attorney Response 11, app. question 45 (on file with the author).

⁹⁹ Defense Attorney Response 25, app. question 45 (on file with the author).

¹⁰⁰ Defense Attorney Response 50, app. question 45 (on file with the author).

¹⁰¹ Prosecutor Response 6, app. question 45 (on file with the author).

¹⁰² See *infra* app. questions 45–46 (responses on file with the author); see also Debra Cassens Weiss, *Judge Refuses to Wear Face Mask and Has Ordered Lawyer to Remove Theirs*, *Public Defender Group Says*, ABA J., (Aug. 12, 2020, 1:57 PM), <https://www.abajournal.com/news/article/judge-refuses-to-wear-mask-and-has-ordered-lawyers-to-remove-theirs-defender-group-says>.

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Some judges still refuse to wear masks despite orders from the Chief Judge and governor, and they refuse to enforce mask usage in their courtrooms. However, defense lawyer and prosecutors are part of the problem as they often choose not to wear a mask, or they do not wear them properly. It's a four-alarm fire of arrogance, entitlement and stupidity.¹⁰³

Many defense lawyers commented on the lack of protection for defendants in custody and how this put them and others in danger:

When COVID first occurred they were still bringing inmates to court with no safety measures. Inmates did not wear masks and were not socially distanced. . . We have heard of non-positive inmates being housed with COVID positive inmates. We still have to interact with our clients and cannot effectively represent our clients and maintain 6 feet of social distance in court.¹⁰⁴

Many defense attorney respondents expressed frustration about the lack of consistent enforcement of mask mandates,¹⁰⁵ as one defense lawyer wrote, the “lack of enforcement puts everyone at risk, it is unacceptable.”¹⁰⁶ Another commented on the need for one set of rules, “[n]ot 32 different sets of rules.”¹⁰⁷ A number of defense respondents commented on how defense lawyers were not asked about what to do to provide better protection. As one lawyer wrote, “[t]hey should have consulted with us.”¹⁰⁸ Judges had far fewer written responses to this question, seventeen as compared to eighty from the defense lawyers, in contrast to over eighty written responses when asked about how court personnel were protected in a different question.¹⁰⁹ Of those 17 answers, two said they did not know or “had no answer to this, but they remain at risk.”¹¹⁰ Those answers suggest that better consultation with defense lawyers might have been needed. However, one judge said that “[w]e are constantly receiving input and making changes when physically and/or logistically possible.”¹¹¹

¹⁰³ Defense Attorney Response 10, app. question 46 (on file with author).

¹⁰⁴ Defense Attorney Response 11, app. question 46 (on file with author).

¹⁰⁵ *Id.*; see also Weiss, *supra* note 102.

¹⁰⁶ Defense Attorney Response 12, app. question 46 (on file with author).

¹⁰⁷ Defense Attorney Response 77, app. question 46 (on file with author).

¹⁰⁸ Defense Attorney Response 68, app. question 46 (on file with author).

¹⁰⁹ See *infra* app. question 52 (responses on file with author).

¹¹⁰ Judge Response 4, app. question 46 (on file with author).

¹¹¹ Judge Response 6, app. question 46 (on file with author).

Defense lawyers also were concerned that they were required to go to the jails to get plea forms and other documents signed and a number suggested the need to move to paperless processes. Defense attorney respondents were concerned that they were put at risk due to the need to get physical signatures and that no one else in the court system shared this risk, as one defense lawyer observed, “[t]hey shouldn’t have made us go to the jail to get plea paperwork signed while judges and prosecutors get to handle the plea via Zoom.”¹¹² One respondent detailed the challenge of getting documents signed when not going to the jail:

If I want to get a waiver of appearance signed (a very simple document) I have to mail the document to the client. Schedule a phone call with him. Explain the document. Have him mail it back to me. Wait for staff to sanitize and scan the document. Then I can file it. This is taking up to 3 weeks.¹¹³

Prosecutors also mentioned the need for better ways for defense lawyers to communicate with their clients as “there should be ways for them to visit their clients in jail without exposure” to the virus.¹¹⁴ Both prosecutors and defense lawyers noted the problem of needing to sign paperwork, and not having electronic options. Interestingly, not a single judge commented on the need to change practices regarding paperwork or signed documents although one judge did report that “pre-COVID, written waiver forms were the norm, now they are the exception.”¹¹⁵

2. *“WE ARE ALL AT RISK WHEN WE COME TO COURT”*¹¹⁶:
PROTECTION FOR PROSECUTORS

The option that prosecutors, defense lawyers, and judges agreed gave better protection to all involved was remote court appearances. Prosecutors and defense lawyers also responded about working remotely (beyond simply remote court appearances). More judges responded that personal protective equipment, sanitizing and cleaning, and enforcing social distancing were adequate methods of protecting prosecutors. In contrast, no prosecutor or defense lawyer responded that sanitizing and cleaning were methods that provided adequate physical protection to prosecutors. One prosecutor detailed

¹¹² Defense Attorney Response 26, app. question 46 (on file with author).

¹¹³ Defense Attorney Response 28, app. question 46 (on file with author).

¹¹⁴ Prosecutor Response 2, app. question 46 (on file with author).

¹¹⁵ Judge Response 41, app. question 39 (on file with author).

¹¹⁶ Judge Response 5, app. question 55 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

a variety of approaches:

For over four months there were no in-person court appearances, once courts reopened for in-person appearances they were limited to a maximum of ten cases calendared per day, each with a designated 15 minute window, and in the ceremonial courtroom—an extra large courtroom—with plexiglass dividers, social distancing maintained, and obligatory masks.¹¹⁷

Prosecutors identified remote court appearances as the best protection and when asked what should have been done, one prosecutor said, “[t]hey should not require prosecutors to appear in person if virtual appearances are an option.” Agreeing with this, one judge respondent noted that “we are all at risk when we come to court.”¹¹⁸ One prosecutor expressed concern about the failure to follow rules as, “some judges are flippant and don’t care.”¹¹⁹ Defense lawyers cited to working from home and working remotely as adequate protection for prosecutors, but some contrasted it with others in the court system. As one defense lawyer said about working entirely remotely, “[d]efense attorneys do not have that luxury. Nor does the court personnel.”¹²⁰ Another defense lawyer wrote, “[h]eck, I’m not sure they [prosecutors] even go to the office. Have not seen [a prosecutor] in person for weeks.”¹²¹ One defense lawyer criticized the shift to working from home as “email was [the] only form of communication. This led to slow decision making and poor decision making.”¹²² In terms of what should have been done but wasn’t, many defense lawyers suggested that prosecutors should have been provided masks and/or should have been required to wear masks. One commented on their perception that prosecutors, “. . . seem to not be worried about COVID at all.”¹²³ One defense lawyer wrote that:

The Dallas DA’s office does very little to protect their employees with most of them in the trenches in offices tinier than a 1 man solitary confinement cell. They are also filthy. Carpet probably hasn’t been cleaned since it was put in. Some prosecutors I found placing scotch tape across their door entrances with hand

¹¹⁷ Prosecutor Response 1, app. question 54 (on file with author).

¹¹⁸ Judge Response 5, app. question 55 (on file with author).

¹¹⁹ Prosecutor Response 2, app. question 55 (on file with author).

¹²⁰ Defense Attorney Response 23, app. question 54 (on file with author).

¹²¹ Defense Attorney Response 8, app. question 54 (on file with author).

¹²² Defense Attorney Response 59, app. question 54 (on file with author).

¹²³ Defense Attorney Response 21, app. question 55 (on file with author).

made signs to social distance. Scotch tape wouldn't even stick to the dirty walls. It was pointless.¹²⁴

3. *"WE DON'T HAVE THE CAPACITY AND EQUIPMENT."*¹²⁵:
PROTECTION FOR COURT PERSONNEL

Judges, prosecutors, and defense lawyers all agreed on the need for remote options as a way to better protect everyone, including court personnel. Judges gave extensive answers detailing what was done in their courts to protect court personnel, including installing plexiglass barriers; marking and maintaining social distancing; disinfecting and sanitizing; and using masks. Some judges said that one measure was to prevent "direct contact with defendants"¹²⁶ and generally limiting who was allowed in the court. Masks were mentioned frequently as a way that adequate physical protection was provided. One judge observed that "[a]s the county and state learned more about the virus, the rules evolved."¹²⁷ Defense lawyers, unlike judges, commented on the need to enforce mask-wearing to protect court personnel, such as "[t]he court should require all people to wear a mask, including courtroom reporters."¹²⁸ There were also comments about the need for transparency when someone tests positive in the courthouse.¹²⁹ Some judges commented on the different treatment depending on the court. For example, one observed that Justice of the Peace Courts "had to buy all supplies for ourselves and our staff."¹³⁰ One judge observed that the same level of care "has not been taken for judges in less desirable/lower prestige courts."¹³¹ Judges complained that they were unable to do more remote appearances because they did not have the technology to do so, because they did not have the resources, due to unequal distribution of the resources, or due to backorders on the equipment.¹³² Some judges and defense attorneys were clearly frustrated about not being able to do more remote appearances. As one judge said, "[t]he pandemic has been going on for almost 5 months and we still do not have the ability to have people appear by video . . . we don't have the capacity and

¹²⁴ Defense Attorney Response 34, app. question 55 (on file with author).

¹²⁵ Judge Response 9, app. question 51 (on file with author).

¹²⁶ Judge Response 11, app. question 52 (on file with author); Judge Response 35, app. question 52 (on file with author) ("Defendants do not enter our office").

¹²⁷ Judge Response 74, app. question 52 (on file with author).

¹²⁸ Defense Attorney Response 4, app. question 51 (on file with author).

¹²⁹ Defense Attorney Response 11, app. question 51 (on file with author).

¹³⁰ Judge Response 14, app. question 52 (on file with author).

¹³¹ Judge Response 6, app. question 51 (on file with author).

¹³² Judge Response 12, app. question 51 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

equipment.”¹³³

C. *Protection for Civilians*

Criminal courtrooms, in pre-pandemic times, were usually crowded places. Defendants, both those in and out of custody, witnesses, victims, and family and friends of all of the above were regularly in courtrooms.¹³⁴ When the pandemic hit, courthouse doors were shut and getting into court was limited and restricted. Yet, non-professionals such as defendants, victims, and witnesses were still coming to court for court dates. The survey asked respondents about how well these groups were being protected.

1. *“THE JAILS ARE A NIGHTMARE”¹³⁵: PROTECTION FOR DEFENDANTS*

How well defendants were protected is another area of difference between the groups of respondents.¹³⁶ Over 77% of judges responded that they strongly agreed or somewhat agreed that defendants were adequately physically protected. Prosecutors were more skeptical and a lower overall percentage (68%) strongly or somewhat agreed that defendants were well protected. Defense attorneys, again, had a stunningly different perception, with just 27% of defense lawyers strongly or somewhat agreeing that defendants were adequately physically protected. Over 62% of the defense lawyers strongly or somewhat disagreed that defendants were adequately physically protected (compared to 9% of judges and 25% of prosecutors).

Defense lawyers were concerned about failures to protect their clients in the jails and during the process of transporting them to and from court. A number of respondents commented that COVID-positive defendants had been transported to court without notifying anyone that they were COVID-

¹³³ Judge Response 9, app. question 51 (on file with author).

¹³⁴ See also, Melanie D. Wilson, *The Pandemic Juror*, 77 WASH & LEE L. REV. ONLINE 65, 66 (2020) (commenting on how jurors have been treated during the pandemic and recommending that if “we are going to require jurors to serve during this dangerous time, we must protect them to protect the criminal justice system itself.”).

¹³⁵ Defense Attorney Response 66, app. question 48 (on file with author).

¹³⁶ See also Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. L. REV. ONLINE 59 (2020) (pretrial detention models “fail to account for the risks defendants face while incarcerated.”).

positive.¹³⁷ One defense lawyer said, “Dallas jails won’t release who is quarantined and who is not due to HIPPA so there’s no way for the courts to know who has COVID or if they have been exposed.”¹³⁸ Both judges and defense lawyers criticized the jails for quarantining defendants after court appearances, due to concerns that it was acting as a punishment for going to court and that it would discourage defendants from future court appearances.

Some commented that the best protection would be to release more defendants so fewer would be in custody. As one defense lawyer wrote, “low risk defendants should have received PR bonds.”¹³⁹ Another said, “[r]elease the children!”¹⁴⁰ While another simply wrote, “the jails are a nightmare.”¹⁴¹ Some counties made efforts to lower jail populations.¹⁴² However, in Texas, Governor Abbott acted quickly to make that more difficult for some defendants by issuing, on March 29, 2020, Executive Order GA-13 which prohibited the release of anyone “previously convicted of a crime that involved physical violence or the threat of physical violence or any person currently arrested for such a crime that is supported by probable cause.”¹⁴³ Numerous defense attorney respondents from Texas referred to this Executive Order or directly to Governor Abbott for the failure to better protect for defendants. As one respondent put it, “Give more PR bonds and tell Abbott to go fuck himself.”¹⁴⁴ One defense attorney respondent explained,

The Governor’s executive order has had a profound impact on the indigent community. Ex: It affects people who may have had a previous violent misdemeanor but are in jail on a drug charge—they aren’t allowed [out on] a PR bond, but can’t afford to bond out.¹⁴⁵

¹³⁷ See also Jolie McCullough, *A Texas Man Was Sent to Trial with the Coronavirus. Jurors Weren’t Told They Were Exposed Until After Deliberations Ended*, TEX. TRIB. (Jan. 12, 2021, 12:51 PM), <https://www.texasstandard.org/stories/a-texas-man-was-sent-to-trial-with-the-coronavirus-jurors-werent-told-they-were-exposed-until-after-deliberations-ended/>.

¹³⁸ Defense Attorney Response 29, app. question 48 (on file with author).

¹³⁹ Defense Attorney Response 72, app. question 48 (on file with author).

¹⁴⁰ Defense Attorney Response 37, app. question 48 (on file with author).

¹⁴¹ Defense Attorney Response 66, app. question 48 (on file with author).

¹⁴² See e.g., Christopher Connelly, *Texas Counties Cut Jail Population by 10,000 in March*, KERA (Apr. 23, 2020, 7:23 PM), <https://www.keranews.org/texas-news/2020-04-23/texas-counties-cut-jail-population-by-10-000-in-march> (this is approximately 15% of the state jail population in Texas).

¹⁴³ GOVERNOR OF THE STATE OF TEXAS, EXEC. ORD. GA 13 (Mar. 29, 2020).

¹⁴⁴ Defense Attorney Response 60, app. question 48 (on file with author).

¹⁴⁵ Defense Attorney Response 64, app. question 48 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Some of the judges agreed with the need to release more people. But, releasing more people was not necessarily only dependent on judicial decisions, as a judge from California explained,

On a statewide level California courts instituted emergency bail schedules requiring release on OR [own recognizance] of low-level offenders to reduce jail populations, but the court should have moved more quickly to release prisoners sentenced for low-level crimes early. In particular, felony probationers and parolees who were incarcerated for offenses like failure to report to probation or failure to comply with ankle monitor requirements should not have continued in custody, but local prosecutor's office continued to prioritize pursuing those cases and mandatory sentencing rules made release from custody impossible.¹⁴⁶

Another judge commented on the short-term nature of the changes saying that the emergency bail schedule adjustments reduced the jail population by half, but "that ended too early"¹⁴⁷

Judges, prosecutors, and defense lawyers agreed that more remote appearances, allowing defendants to waive their right to appear, decreasing court hearings or requirements to appear would have provided better protection. Related to these suggestions was the concern that coming to court posed dangers to both defendants and to those in the courtroom. Numerous defense responses criticized the failure to provide masks to defendants and the failure to socially distance defendants, as "they cannot maintain social distance in the jail, nor in court where they are shackled right next to one another for hours at a time."¹⁴⁸ Another defense lawyer commented that, "[t]he jury box is filled with inmates and inmates are chained together which makes it impossible to social distance."¹⁴⁹ In contrast, the judges wrote more about what was done to protect defendants, what was required (including masks, sanitizing, and remote appearances), and only a few noted the problem of the lack of face masks in response to the question of what should have been done.¹⁵⁰ Defense lawyers expressed frustration with the failure of courts to do more oversight of the jails to better protect defendants. As one defense lawyer

¹⁴⁶ Judge Response 13, app. question 48 (on file with author).

¹⁴⁷ Judge Response 45, app. question 48 (on file with author).

¹⁴⁸ Defense Attorney Response 6, app. question 48 (on file with author).

¹⁴⁹ Defense Attorney Response 5, app. question 48 (on file with author).

¹⁵⁰ See Judge Response 9, app. question 48 (on file with author); Judge Response 14, app. question 48 (on file with author).

wrote:

Despite multiple release motions begging the court to oversee the jail's handling of Covid precautions in custody, there is no will (much less action). . . . The courts defer entirely to the jail with no oversight or accountability, and it is complete bullshit.¹⁵¹

Masks were an issue both for defendants in custody, who depended on jails supplying them with masks, and for defendants out of custody. As one defense lawyer wrote:

Warrants were issued to [defendants] who didn't appear [because]they were turned away for not having a mask. We were continually trying to find masks for our clients so they could get into the courthouse while in custody clients were brought [to court] from the jail without masks.¹⁵²

Defense lawyers also complained about delayed processes at the jails and that defendants were detained longer and singled out judges for failing to prevent these delays. As one said:

. . . the judges should also have put their foot down and required clerks and the jail to do their job and get people out in a timely manner. I had a client who posted bond and then waited an additional two weeks for release so he could get a leg monitor.¹⁵³

2. "I WAS TOLD NO FACE-TO-FACE MEETINGS"¹⁵⁴: PROTECTION FOR VICTIMS AND WITNESSES

As with the other categories, a large percentage of judges (79%) strongly or somewhat agreed that witnesses were adequately protected. And, 69% of prosecutors strongly agreed or somewhat agreed that witnesses were adequately protected. In contrast, 45% of defense attorneys strongly agreed or somewhat agreed that witnesses were provided adequate protection.

The responses about what provided protection to witnesses was comparable to the answers for other groups coming into the courthouse. More respondents thought that limiting or stopping in-person hearings was the way

¹⁵¹ Defense Attorney Response 12, app. question 48 (on file with author).

¹⁵² Defense Attorney Response 17, app. question 48 (on file with author).

¹⁵³ Defense Attorney Response 57, app. question 48 (on file with author).

¹⁵⁴ Judge Response 10, app. question 84 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

to provide adequate protection. One judge wrote, “I was told no face-to-face meetings with victims or complainants.”¹⁵⁵ Another judge wrote,

. . . we are holding court virtually. However if someone has to come in for whatever reason we are doing temperature checks, masks, hand sanitizer, social distancing and disinfecting when they leave so it is safe for the next person. We are also working by appointment only on Wednesdays.¹⁵⁶

One defense attorney wrote “[t]oday (June 8, 2020) is the first time I’ve seen a witness testify live in court (or at all) since the emergency began.”¹⁵⁷

In contrast to descriptions of the crowded conditions for in-custody defendants brought into court, judges gave descriptions of measures to insure better social distancing. For example, “[j]ury assembly rooms were repurposed as waiting areas for witnesses so that they could be seated far apart.”¹⁵⁸ Another wrote that, “. . . the courtrooms are marked up with seats that cannot be used”¹⁵⁹ One prosecutor suggested that witnesses and/or victims “needed more space so they had room to wait.”¹⁶⁰ A defense attorney wrote:

Courts are protecting victims and witnesses to the detriment of in-custody criminal defendants by being more lenient and accommodating with continuances sought by the prosecution. DAs are taking strategic advantage of this, and it’s disgusting.¹⁶¹

Social distancing and limiting people in courtrooms was not consistent. One defense lawyer reported, “I have a sentencing with many witnesses and was told [to] bring all 20 people [to court].”¹⁶² Another defense lawyer suggested that courts should require remote, not in-person, appearances for victims as, “[t]hey’re the reason I’ve had to appear in court. They insist that the defendant be physically present and apparently, crime victim rights trump the public health crisis.”¹⁶³ As with other groups, judges referred to

¹⁵⁵ *Id.*

¹⁵⁶ Judge Response 27, app. question 84 (on file with author).

¹⁵⁷ Defense Attorney Response 30, app. question 84 (on file with author).

¹⁵⁸ Judge Response 65, app. question 84 (on file with author).

¹⁵⁹ Judge Response 63, app. question 84 (on file with author).

¹⁶⁰ Prosecutor Response 1, app. question 85 (on file with author).

¹⁶¹ Defense Attorney Responses, app. question 9 (on file with author).

¹⁶² Defense Attorney Responses, app. questions 23, 85 (on file with author).

¹⁶³ Defense Attorney Responses, app. questions 20, 85 (on file with author).

mask wearing and requiring masks, although, as one noted, “masks [are] required, but [not] provided.”¹⁶⁴ Another judge wrote, “I have noticed a large number of law enforcement NOT wearing face masks in court or in hallways.”¹⁶⁵

V. “I HAVE NO IDEA WHO IS IN CHARGE OF DECIDING TO IGNORE THE CONSTITUTION”¹⁶⁶: PROTECTING DEFENDANTS’ RIGHTS

The survey responses raise questions about how defendants’ rights were protected as changes swept over the criminal courts. The question about whether defendants’ rights were as well protected during the COVID-19 pandemic as before was one of the questions that yielded the most written defense responses (170 in total).¹⁶⁷ As one defense lawyer said, COVID-19 “changed everything and we just cannot provide the level of assistance and counsel that will ensure our client’s rights are fully protected at every stage.”¹⁶⁸ There were concerns about communications between lawyers and their clients, speedy trial rights as jury trials were suspended nationwide, the right to be free from cruel and inhuman treatment, and the right to be physically present in court.¹⁶⁹ In terms of broad categories, over two hundred respondents expressed concerns about the violation of due process or constitutional rights and/or speedy trial rights. Defense lawyers also raised concerns about the limitations of electronic communications in responding to this question, both in terms of how defendants participate in court proceedings and in terms of the challenges presented to building the attorney-client relationships. A number of the written defense responses commented on the constitution being suspended in full, such as “the Constitution was suspended in Cook County, [Illinois],”¹⁷⁰ and “the state and federal constitutions have essentially been suspended in [Nevada].”¹⁷¹

The question of whether defendants’ rights have been protected as well during the pandemic was another area of marked disagreement between defense lawyers and the other two groups. Over 88% of defense lawyers reported that defendants’ rights are *not* as well protected during the pandemic as before. In contrast, over 62% of prosecutors and 71% of judges replied that

¹⁶⁴ Judge Response 71, app. question 84 (on file with author).

¹⁶⁵ Judge Response 9, app. question 85 (on file with author) (emphasis in original).

¹⁶⁶ Defense Attorney Response 50, app. question 40 (on file with author).

¹⁶⁷ Defense Attorney Responses, app. question 56 (on file with author).

¹⁶⁸ Defense Attorney Response 25, app. question 56 (on file with author).

¹⁶⁹ Defense Attorney Response 118, app. question 56 (on file with author).

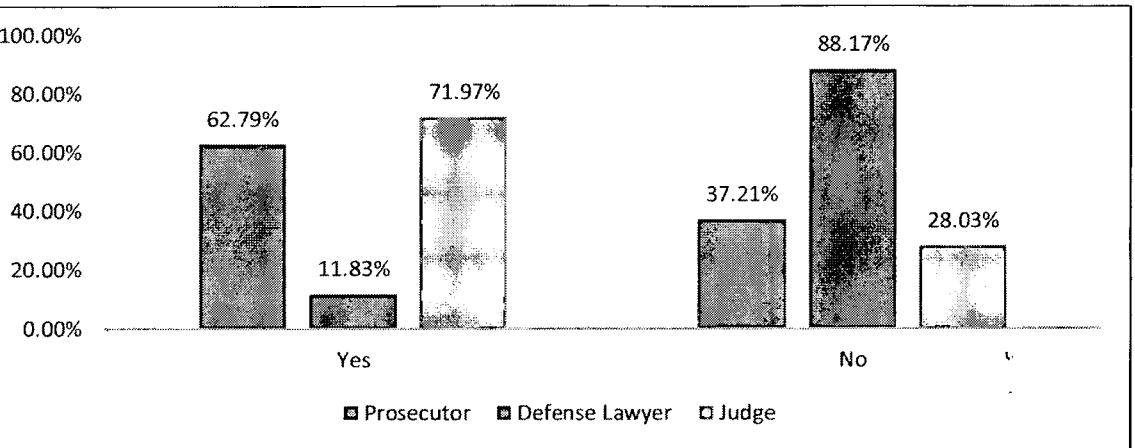
¹⁷⁰ Defense Attorney Response 34, app. question 56 (on file with author).

¹⁷¹ Defense Attorney Response 25, app. question 56 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

defendants' rights *are* as well protected during the pandemic.

Are Defendants' rights protected during the COVID-19 pandemic as well as they were before the pandemic?



Some respondents reported that respect for defendants' rights have improved in some areas. As one defense lawyer said, "they are better protected. Outrageous bails and unnecessary pretrial incarcerations are down, as are outlandish probation terms."¹⁷²

Not all judges recognized the possible problems. In response to a general question about any other concerns not addressed in the survey, one judge questioned asking about whether defendants' rights had been as well protected, requesting, "can you give a scenario as to how COVID would cause" a defendant's rights to be "jeopardized?"¹⁷³ Another judge commented on defendants being released with a citation as "I believe it gives them a false impression they can do whatever they want without consequences."¹⁷⁴ In contrast, one judge wrote,

I have concerns that less serious crimes prosecuted with the same, or close to the same, regularity in the face of the public health crisis will result in outsized consequences to those accused of those crimes. Certain criminal offenses ought not be prosecuted because

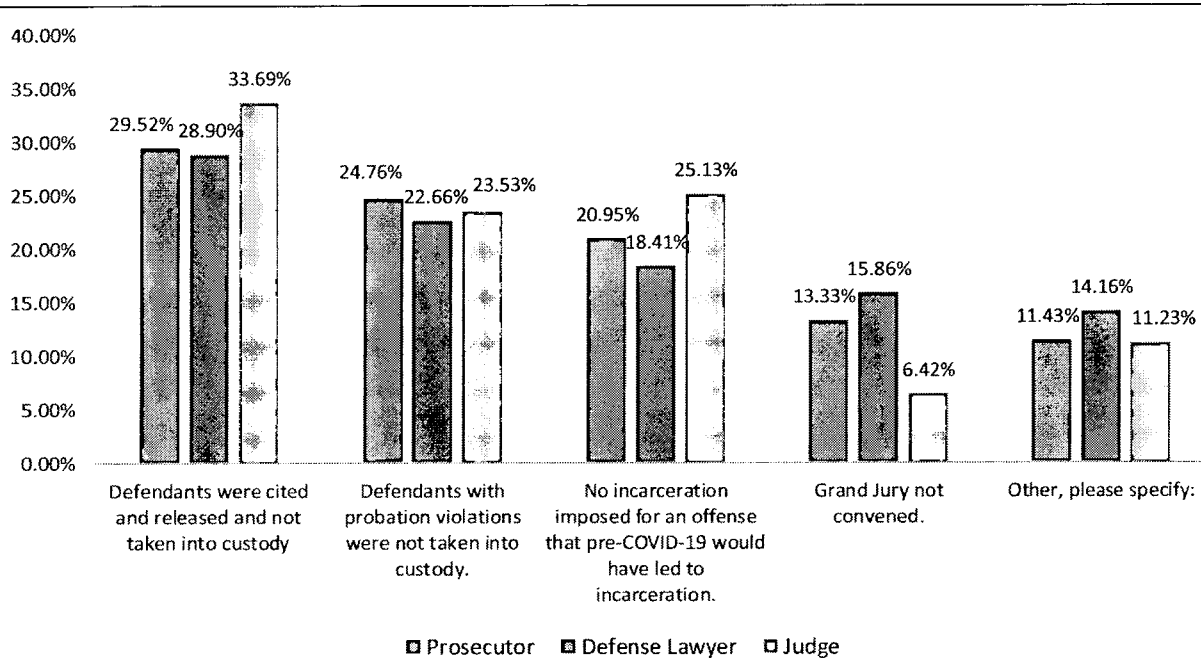
¹⁷² Defense Attorney Response 21, app. question 56 (on file with author).

¹⁷³ Judge Response 6, app. question 67 (on file with author).

¹⁷⁴ Judge Response 8, app. question 67 (on file with author).

the potential consequences of an individual defendant’s participation in the criminal justice system are so vastly disproportionate to the acts committed.¹⁷⁵

As the table below illustrates, prosecutors, defense lawyers, and judges generally agreed about several categories of what was working in favor of defendants since the beginning of COVID, including that defendants with probation violations were not taken into custody and that defendants were more generally cited and released and not taken in custody on cases after COVID-19 started.



¹⁷⁵ Judge Response 39, app. question 67 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

A. *“I’m being asked to choose between either attorney-client privilege or my personal health”*¹⁷⁶: *Communication Concerns*

Among the most serious findings of this survey is the high percentage of defense lawyers who are concerned about confidentiality of their electronic communications with their clients, the inability to adequately communicate with their clients, and inadequate access to remote forms of communication.¹⁷⁷ The shut-down of courts, the shut-down of jails, and concerns about jails and prisons being COVID-19 hot spots all worked to disrupt defense lawyers’ meetings and communication with their clients. In-person meetings (in jails and in court) went from being the norm for attorney client communication to being difficult, if not impossible. Not surprisingly, an overwhelming 94.87% of defense lawyers reported that they changed how they meet with their clients due to COVID-19. No defense lawyer respondent reported an inclusive dispute system design process, or any communication between judges, prosecutors, and defense lawyers, to determine how to protect the defendant’s right to communicate with counsel during the pandemic. The survey results make it clear that this forced change in process for meeting with clients left defense lawyers with the option of electronic forms of communication, mailing letters to the jail, or, where it was possible, taking the personal health risk to visit a client in custody.

Defense lawyers reported serious problems with inadequate remote forms of communication with their clients, including a lack of privacy and confidentiality in their communication. Over 56% of the defense lawyer respondents reported that their jurisdictions did not have adequate forms of electronic communication beyond phone calls. And, 52% reported that electronic forms of communication, beyond the phone, were not available in their jurisdiction before the pandemic. Many jurisdictions were not prepared for immediate transfer to online communication with the jails. In one county, judges asked defense lawyers to donate iPads to send to the jail to facilitate communication between defendants in jail and the courts until they could set up a more permanent system.¹⁷⁸ Of the survey respondents who reported an improvement in electronic communications, just over 30%, reported that it took four or more weeks after COVID-19 hit their jurisdiction before

¹⁷⁶ Defense Attorney Response 99, app. question 16 (on file with author).

¹⁷⁷ See also Tarika Daftary-Kapur et al., *COVID-19 Exacerbates Existing System Factors that Disadvantage Defendants: Finding from a National Survey of Defense Lawyers*, 45 LAW & HUM. BEHAV. 81 (2021) (reporting survey results of 93 defense lawyers also reporting problems with client communication during the pandemic).

¹⁷⁸ Tarrant County, Texas (on file with author).

electronic communications were more widely available. For those that responded that the electronic communications were inadequate, 52% reported that electronic communications had not improved. This seems to suggest that in many jurisdictions electronic communications were inadequate and this problem was not being addressed. This also meant that clients were in jails around this country without being able to effectively communicate with their lawyers.

1. CONFIDENTIAL COMMUNICATION

Defense lawyers have had problems with confidential communications before the start of the pandemic.¹⁷⁹ Defense lawyer respondents referred to existing concerns about confidentiality with electronic communications that pre-dated the pandemic, and wrote about specific problems due to the changes in how they were able to communicate with their clients due to the pandemic and changes in rules in both courthouses and jails. Over 74% of the defense lawyer respondents reported that they were “concerned about confidentiality” of their “current electronic communications with . . . clients who are in custody.”¹⁸⁰ The survey instrument asked those who responded “yes” to describe their concern. There were 164 responses to this question, which means over 67% of all defense lawyer respondents wrote additional information to explain their “yes” answer to this question. In addition, there were eighty-eight written responses to the question of whether the respondent had “other concerns regarding client communications that have not yet been addressed.”¹⁸¹

These written responses were striking in terms of how many defense lawyers appear to not trust any form of electronic communication with their clients who are in custody. Many respondents made it clear that this distrust was based on previous bad experiences. One respondent wrote, “[a]buses are common across the state.”¹⁸² Another respondent said, “too many examples of [guards] and the prosecutors listening.”¹⁸³ One respondent wrote:

Our jail has a history of lying to us about whether phone calls are being recorded. They say the video calls are not recorded, but I would be a fool to completely trust anything they say given their

¹⁷⁹ See, e.g., Daftary-Kapur et al., *supra* note 177, at 92.

¹⁸⁰ See *infra* app. questions 16.

¹⁸¹ See *infra* app. question 18.

¹⁸² Defense Attorney Response 130, app. question 16 (on file with author).

¹⁸³ Defense Attorney Response 131, app. question 16 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

history.¹⁸⁴

Another respondent wrote, “[w]e have confirmed cases of the deputies recording video meetings and turning over those recordings to police and prosecutors.”¹⁸⁵ One respondent said, “Local jail provider has been sued multiple times for recording attorney/client calls and disclosing to State.”¹⁸⁶ For one defense lawyer, their distrust was based on personal experience reporting that “[w]e have received jail calls from us from the DA in discovery packets before.”¹⁸⁷ For others, the distrust was more general, such as, “I have never trusted the jail call systems. Special sections of DAs office listen to jail calls on a regular basis.”¹⁸⁸ One respondent wrote, “I have zero confidence that jails or sheriff’s offices are not recording and listening to attorney jail calls.”¹⁸⁹ Some respondents just gave a blunt assessment such as, “Hell yes I am concerned.”¹⁹⁰ Or, “[t]hey say they aren’t recording calls, but?”¹⁹¹

Some defense attorneys replied that the only way to have confidential communications with their clients is through the US Mail as “nothing is private except snail mail.”¹⁹² Relying on regular mail for client communication has obvious concerns including the longer time to convey messages and that it may be more difficult for defendants with limited literacy skills or who do not have English as a first language.

Defense lawyers also expressed skepticism about the confidentiality of phone systems that are managed by private companies. For example, “Securus is notorious for recording confidential attorney client communications. There is little to no competition so they operate with impunity.”¹⁹³ And, “Securus is not the most secure, always fear they may turn calls over to the DA.”¹⁹⁴ Another respondent wrote:

¹⁸⁴ Defense Attorney Response 18, app. question 16 (on file with author).

¹⁸⁵ Defense Attorney Response 90, app. question 16 (on file with author).

¹⁸⁶ Defense Attorney Response 158, app. question 16 (on file with author).

¹⁸⁷ Defense Attorney Response 157, app. question 16 (on file with author).

¹⁸⁸ Defense Attorney Response 83, app. question 18 (on file with author).

¹⁸⁹ Defense Attorney Response 129, app. question 16 (on file with author).

¹⁹⁰ Defense Attorney Response 123, app. question 16 (on file with author).

¹⁹¹ Defense Attorney Response 107, app. question 16 (on file with author).

¹⁹² Defense Attorney Response 125, app. question 16 (on file with author).

¹⁹³ Defense Attorney Response 58, app. question 16 (on file with author).

¹⁹⁴ Defense Attorney Response 56, app. question 16 (on file with author).

The company that runs the Tarrant County Jail phone systems (Securus) has specifically informed defense attorneys that our phone calls are not guaranteed to not be recorded by their systems . . . Basically, both the Sheriff and Securus are passing the ball back and for the on whose job it is to guarantee our phone calls are confidential. Nobody can give us a straight answer or guarantee. Meanwhile, there in no other way to communicate with our clients in Tarrant County outside of an in-person jail visit . . . So I'm being asked to choose between either attorney-client privilege or my personal health"¹⁹⁵

Some respondents expressed general skepticism, such as, the "corporation (Telmate) assures us it is not being recorded but we have no way of knowing that."¹⁹⁶ Or, "[i]t says we are not recorded but it is a private system so there are no guarantees."¹⁹⁷

Defense lawyers were also concerned that their clients did not have private spaces in the jails to have video or phone calls and that jail guards and other inmates may be in the same room, or easily able to hear the conversation. One defense attorney observed that "inmates [are] walking around in the background" during video calls.¹⁹⁸ Another commented that "[g]uards do not understand confidentiality, do not respect it, when on video calls."¹⁹⁹ There were also comments about how the physical location of the phones or video devices were not private, such as:

Video booths are on the unit and everything a client says is within earshot of an officer or other inmates. The conversations are never truly confidential, which is why I rarely used them pre-Covid. The lack of confidentiality is a huge problem.²⁰⁰

2. ATTORNEY-CLIENT COUNSELING

Defense lawyer respondents also discussed their concern that the exclusive use of electronic communication is preventing them from building a good attorney-client relationship. As one respondent said, "[I]t's very impersonal when some of these conversations involve incredibly private,

¹⁹⁵ Defense Attorney Response 99, app. question 16 (on file with author).

¹⁹⁶ Defense Attorney Response 76, app. question 16 (on file with author).

¹⁹⁷ Defense Attorney Response 77, app. question 16 (on file with author).

¹⁹⁸ Defense Attorney Response 121, app. question 16 (on file with author).

¹⁹⁹ Defense Attorney Response 52, app. question 16 (on file with author).

²⁰⁰ Defense Attorney Response 21, app. question 16 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

sensitive information, like prior abuse or health issues.”²⁰¹ Another said, “I find it extremely difficult to forge a trusting relationship with someone I can’t speak with face to face.”²⁰² One constraint to building better attorney client relations when relying on electronic communications can also be artificial time limits, as one defense attorney reported, their calls are limited to “25 min[.] max and have to be scheduled a day ahead.”²⁰³ A number of defense lawyers also commented on the difficulty of sharing and reviewing discovery electronically with their clients, including videos or photographs. This problem is compounded when the only form of communication is the telephone, as physical discovery cannot be seen by the client on the other end of the phone.

Defense lawyers expressed concern about not being able to contact their clients in jail due to quarantines, COVID-19 positive test results, and transfer to parts of the jail where there were not video or other electronic means of communication. They were also concerned that jail personnel did not prioritize attorney-client communications.

Communication problems were not limited to clients who were in custody. Another commonly expressed concern was that it is harder to get in touch with clients who, in previous times, would have shown up to court on the appropriate day/time, but do not have cell phones or other electronic devices. Lawyers have no way to contact these clients without in-person court appearances. In addition, in courts that have gone to all virtual appearances, these clients have no way to appear in court. Some clients are more challenged than others in using electronic communications. As one defense lawyer wrote: “This eworld does not accommodate elderly or challenged people who do not get technology, who do not have computers, whose phones are limited and often out of service.”²⁰⁴

Defense lawyers also expressed frustration at time and space limits that impacted the quality of the counseling they could do with their clients. One defense lawyer working with juvenile clients explained,

I used to sit in conference with my clients as long as it took to explain whatever they did not understand, now we are at the mercy of counseling staff who want their office back after 30 minutes, in explaining plea options to a sixteen year old facing up to five years or the possibility of being tried as an adult, 30 minutes [is] not

²⁰¹ Defense Attorney Response 14, app. question 18 (on file with author).

²⁰² Defense Attorney Response 49, app. question 18 (on file with author).

²⁰³ Defense Attorney Response 161, app. question 16 (on file with author).

²⁰⁴ Defense Attorney Response 34, app. question 18 (on file with author).

sufficient.²⁰⁵

3. “ELECTRONIC JUSTICE IS INJUSTICE.”²⁰⁶: THE RIGHT TO BE PHYSICALLY PRESENT IN COURT

The survey also revealed concerns about moving to more online proceedings.²⁰⁷ One concern was that as courts have moved to electronic appearances for defendants, there is no way for lawyers to have confidential conversations with their clients during these appearances. If, for example, a defendant has a question during a remote arraignment or while entering a remote change in plea and accepting a plea deal, there is no way for the defense lawyer to do the electronic equivalent of bending over and whispering into their client’s ear.²⁰⁸

Judges commented on defendants not being physically present when facing witnesses against them, and comments such as defendants “do not have sufficient access to the courthouse and to their attorneys.”²⁰⁹ One defense attorney simply said, “electronic justice is injustice.”²¹⁰ In writing about possible jury trials, one judge commented, “one cannot have a fair jury under these conditions. Witnesses wearing face masks prevents adequate judging of credibility.”²¹¹ One judge commented:

There is a growing tension between speedy trial rights and confrontation rights. There is an understandable willingness to delay trials in the current public health crisis, but an unwillingness at this point to conduct trials via live remote technology that allows a defendant to see witnesses, allows the trier of fact to see the witnesses and defendant, and allows the attorneys to see the witnesses and jurors. With each additional delay, more and more cases pile up in advance for trial.²¹²

²⁰⁵ Defense Attorney Response 47, app. question 18 (on file with author).

²⁰⁶ Defense Attorney Response 81, app. question 56 (on file with author).

²⁰⁷ *But see* Matthew Bender, *Unmuted: Solutions to Safeguard Constitutional Rights in Virtual Courtrooms and How Technology Can Expand Access to Quality Counsel and Transparency in the Criminal Justice System*, 66 VILL. L. REV. 1 (2021) (proposing how virtual litigation could protect defendants’ rights and increase access to counsel).

²⁰⁸ *See* Turner, *supra* note 23, at 22.

²⁰⁹ Judge Response 20, app. question 56 (on file with author).

²¹⁰ Defense Attorney Response 81, app. question 56 (on file with author).

²¹¹ Judge Response 31, app. question 56 (on file with author).

²¹² Judge Response 35, app. question 56 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Judges also recognized that there has been confusion about how and when courts are meeting and that the system for transporting defendants from the jails has had serious problems. As one judge commented:

Court communications about where and how to appear in court have not been clear, causing defendants to be confused about how to make court appearances and subjecting them to potential issuance of arrest warrants for failure to appear. In-custody defendants who are transported to court for in person appearances are quarantined on return to the jail, which creates a disincentive for them to exercise their right to be personally present for court.²¹³

In addition to the right to be present in court, respondents also raised questions about why defendants had to be in court for all appearances. Long before the pandemic, it has been well recognized that the criminal process, with multiple appearances, creates a serious burden on defendants.²¹⁴ For example, one defense lawyer commented:

The courts should not be requiring defendants to show up for unnecessary settings. The Harris county courthouse is full of people that are less than 6 feet apart and not wearing masks. Their appearance should not have been required in the first place.²¹⁵

B. *Incarceration*

1. *CLIENTS ARE "IN JAIL WAITING FOR TRIALS INDEFINITELY."*²¹⁶:
THE RIGHT TO A SPEEDY TRIAL

Trial dates were suspended and postponed across the country.²¹⁷ The

²¹³ Judge Response 36, app. question 56 (on file with author).

²¹⁴ See e.g., MALCOM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 10 (1992) (describing the burden of multiple court appearances for criminal defendants on low level offenses).

²¹⁵ Defense Attorney Response 74, app. question 67 (on file with author).

²¹⁶ Defense Attorney Response 88, app. question 56 (on file with author).

²¹⁷ See e.g., Sarah Jarvis, *Coronavirus: The Latest Court Closures and Restrictions*, March 12, 2020, updated July 1, 2021, Law 360, available at: <https://www.law360.com/articles/1252836/coronavirus-the-latest-court-closures-and-restrictions> (a listing of courts from around the country); Jolie McCullough & Emma Platoff, *Coronavirus Pauses Many Texas Court Proceedings. For Some, That Means More Time in Jail*, TEX. TRIB. (Mar. 19, 2020, 11:00 AM), <https://www.texastribune.org/2020/03/19/texas-courts-coronavirus-jury-trials-defense-attorneys/>; see also, See also State Courts and COVID Document archive (civil court data base) available at: <https://www.alyxmark.com/document-archive>

uncertainties of the pandemic created widespread uncertainties about when trials would start again.²¹⁸ This often meant that defendants were left to sit in jail for indefinite periods of time as court dates and trial dates were postponed again and again. As one defense lawyer commented, clients are “in jail waiting for trials indefinitely.”²¹⁹ When the courts shut down in March of 2020, jury trials were postponed for different periods of time, but universally, these orders were extended as it became clear that COVID-19 was not going to disappear in a matter of weeks (or even months).²²⁰ Defense lawyers and judges both commented on delays, suspension of speedy trial rights, and the suspension of trial rights in general. The almost universal suspension of jury trials didn’t just prevent defendants from going to court. As was discussed earlier in this article, jury trials are important points of pressure to encourage prosecutors to make plea offers and without that point of pressure, defense attorneys reported that more cases were languishing in the system and backlogs were growing.²²¹

Other hearings were also suspended. As one defense lawyer observed, “I have a client that is sitting in jail and I cannot get [him] in front of the judge” for a probation revocation hearing as there are no in-person hearings.²²² Another commented that “[s]peedy trial rights are being trampled on.”²²³

2. “*THE COURTS DEFER ENTIRELY TO THE JAIL*”²²⁴: *THE RIGHT TO BE FREE FROM CRUEL AND INHUMAN TREATMENT*

One broad area of concern was health and safety in the jails and the violation of defendants’ rights to be free of cruel and unusual punishment. As one defense lawyer wrote:

²¹⁸ See e.g., Stephen E. Smith, *The Right to a Public Trial in the Time of COVID-19*, 77 WASH. & LEE L. REV. ONLINE 1 (2020) (recommending attention to constitutional rights as trials are delayed due to COVID-19); see also Sarah Jarvis, *NY, Los Angeles Join Piecemeal Jury Trial Restart Across US*, LAW360 (Aug. 25, 2020), <https://www.law360.com/articles/1303948/ny-los-angeles-join-piecemeal-jury-trial-restart-across-us>.

²¹⁹ Defense Attorney Response 88, app. question 56 (on file with author).

²²⁰ See e.g., Eighteenth Emergency Order Regarding the COVID-19 State of Disaster, Docket No. 20-9080, Supreme Court of Texas, available at: <https://www.txcourts.gov/media/1448109/209080.pdf>; Twenty-Second Emergency Order Regarding the COVID-19 State of Disaster, Docket No. 20-9095, Supreme Court of Texas, August 6, 2020, available at: <https://www.txcourts.gov/media/1449564/209095.pdf>.

²²¹ See *supra* Section IV.C.

²²² Defense Attorney Response 151, app. question 56 (on file with author).

²²³ Defense Attorney Response 78, app. question 56 (on file with author).

²²⁴ Defense Attorney Response 12, app. question 48 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

The right to be free from cruel and unusual punishment is being infringed. In the jail, inmates are not socially distanced and they are only providing them a bar of soap—no sanitizer, etc.²²⁵

Another defense lawyer commented:

Overall poor and dangerous living conditions at the jail. I have a client that had a bullet wound that they did not clean or cover or provide medicine for. I also hear some lady inmates [aren't] being provided any sanitary napkins whatsoever and they [aren't] available to buy at commissary. Jail has also run out of other meds.²²⁶

In commenting about their risk of exposure one defense lawyer respondent said, “One [client] even contracted COVID-19 during bookin(g).”²²⁷ One defense lawyer drew the comparison to before COVID-19, writing,

They are operating within a system that is jumbled and confused . . . and that's WITHOUT the coronavirus shutdown measures. The system has become less flexible and less communicative; there are disruptions in care and defendants are placed in danger daily.²²⁸

Defense lawyers were highly critical of the jails and their failures to move more quickly to implement basic safety protocols to protect their clients. As one said, about clients in custody, they “were not provided face masks until very recently and are not encouraged to wear them properly.”²²⁹

As was reported above, defense lawyers also criticized courts for not being more proactive when it came to protecting the health and safety of their clients, as one said:

The courts should have made sure the defendants had face masks much sooner than they did. They also should have been more willing to release people from jail when COVID release motions were made. The Court often seemed to take as truth the prosecutors argument that the jail was just as safe as being out on the streets re:

²²⁵ Defense Attorney Response 24, app. question 56 (on file with author).

²²⁶ Defense Attorney Response 116, app. question 56 (on file with author).

²²⁷ Defense Attorney Response 118, app. question 56 (on file with author).

²²⁸ Defense Attorney Response 149, app. question 56 (on file with author).

²²⁹ Defense Attorney Response 5, app. question 48 (on file with author).

risk to contract COVID.²³⁰

Defense lawyers questioned why defendants were kept in jail, particularly considering the high risk to contract COVID in jail. Just as remote appearances were widely recognized to be the best protection for defense lawyers, prosecutors, and judges, defense lawyers commented that release from jail was the best physical protection for their clients. These responses make it clear that while there were some defendants released in the early months of the pandemic and some efforts to lower jail populations, those efforts were not universal. One defense lawyer recommended: “More cite and release, immediate appearances so defendants eligible for pretrial release never get to the jail. . . .”²³¹

These answers call into question why courts and prosecutors largely continued with business as usual and why the pandemic was not used as a reason to rethink how we use jail and incarceration in this country. As one defense lawyer observed, “[d]efendants who are locked up are not being protected, they are being exposed in custody.”²³² And, lawyers from Texas criticized Governor Abbot’s order limiting bond to defendants with no prior violent cases on their record, regardless of the current case or number of years since the prior.²³³

VI. PLEA BARGAINING

Plea bargaining is the dominant process for resolving criminal cases in the United States.²³⁴ Plea bargaining is the negotiation of criminal cases, either through charge bargaining, sentence bargaining, or both.²³⁵ The process of plea negotiation can be short and quick, or extended over multiple conversations and meetings with offers and counter-offers.²³⁶ Plea bargaining

²³⁰ Defense Attorney Response 11, app. question 48 (on file with author).

²³¹ Defense Attorney Response 65, app. question 48 (on file with author).

²³² Defense Attorney Response 21, app. question 48 (on file with author).

²³³ GOVERNOR OF THE STATE OF TEXAS, EXEC. ORD. GA 13 (Mar. 29, 2020).

²³⁴ See e.g., ALKON & SCHNEIDER, *supra* note 14, at 25–26.

²³⁵ See e.g., Cynthia Alkon, *The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CON. L. Q. 561, 567 (2014) [hereinafter *U.S. Supreme Court’s Failure*].

²³⁶ See generally CYNTHIA ALKON, *Plea Bargaining: An Example of Negotiating with Constraints*, in 1 NEGOTIATOR’S DESK REFERENCE 683 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017) (describing the general process of plea negotiation).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

is heavily criticized and this criticism predates the pandemic by decades.²³⁷ Trial, and the pressure of trials, influences plea bargaining in a number of ways. It is well documented that defendants may face a significant trial tax, or trial penalty, if they go to trial and lose.²³⁸ Scholars have also written about the impact that trials (and the trial penalty) have on plea negotiations and plea outcomes.²³⁹ The pandemic changed the standard plea negotiation atmosphere as trials around the country were immediately suspended. Trials regularly act as a point of pressure to settle cases. Setting trial dates, or empaneling a jury, can act as immediate leverage in the plea negotiation which can work to the advantage of the defense or the prosecution, depending on the circumstances. Prosecutors have three basic choices with every case: dismiss it, try it, or plead it out. Every criminal case before the pandemic would at some point have to go to trial, plead out, or be dismissed. The pandemic changed this fundamental fact. When jury trials were suspended, and speedy trial rights suspended, the more immediate pressure to dispose of cases through plea bargaining ceased to exist. As reported below, defense attorney respondents complained that not having trial dates meant that prosecutors were not making offers and many cases were languishing, creating backlogs that courts are still trying to manage, over two years after the pandemic began.²⁴⁰

A. “Human Interaction leads to better cooperation”²⁴¹: Plea Bargaining Process

As is no surprise, both prosecutors and defense lawyers reported using more electronic forms of communication for plea bargaining than before

²³⁷ See generally ALKON & SCHNEIDER, *supra* note 14, at 129–62 (detailing concerns about plea bargaining).

²³⁸ See e.g., *U.S. Supreme Court's Failure*, *supra* note 235, at 603–05.

²³⁹ See generally ALKON & SCHNEIDER, *supra* note 14, at 133–35. *But see* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466–68 (2004) (criticizing the idea that the shadow of trial model was “far too simplistic”); *see also* Cynthia Alkon, *What's Law Got to Do With It? Plea Bargaining Reform After Lafler and Frye*, 7 Y.B. ARB. & MEDIATION 1, 20–22 (2015).

²⁴⁰ See e.g., Lyle Moran, *Court Backlogs Have Increased by an Average of One-Third during the pandemic, new report finds*, ABA J. (Aug. 31, 2021), <https://www.abajournal.com/news/article/many-state-and-local-courts-have-seen-case-backlogs-rise-during-the-pandemic-new-report-finds>; *King County's Courts are 'Barely Keeping Up' with a Massive Backlog of Cases Due to the COVID-19 Pandemic*, SEATTLE TIMES (July 11, 2021, 6:00 AM), <https://www.seattletimes.com/seattle-news/law-justice/King-Countys-Courts-Are-Barely-Keeping-up-With-a-Massive-Backlog-of-Cases-Due-to-the-Covid-19-Pandemic/>.

²⁴¹ Defense Attorney Response 13, app. question 67 (on file with author).

COVID-19.²⁴² Just 13% of defense lawyers and 14% of prosecutors reported that plea offers were initially made in the same way (which could mean electronically) as they were pre-COVID-19. 9% of both prosecutors and defense lawyers report discussing (or negotiating) plea offers the same way as before COVID-19 (which could mean electronically). Plea discussions via telephone and email are the two largest categories for increase. Over 20% of prosecutors reported using email more, while over 18% of defense lawyers reported using email more. One defense lawyer explained their concern about not having in-person conversations:

My biggest concern is the lack of face to face communication with prosecutors. There is no alternative to being able to sit down and discuss a client's case and possible options in person. I feel it's a lot easier to just dismiss mitigating evidence or alternative plea ideas if it's just an email or phone call. Human interaction leads to better cooperation . . . The lack of interaction . . . hurts our ability as defense attorneys to adequately represent our clients . . .²⁴³

Both defense lawyers (100 total out of 250), and prosecutors (25 out of 58) reported that more plea offers have been made electronically since the pandemic began.²⁴⁴ These electronic offers, especially if they are first offers, may act to anchor the plea negotiation and, in the absence of face-to-face meetings, may make it harder to negotiate different deals.

Defense lawyers and prosecutors disagreed over whether they felt pressure to plead out more of their cases since COVID-19. Just over 10% of prosecutors report feeling more pressure to plead out cases, compared to 5% of defense lawyers. Under 1% of prosecutors report feeling less pressure to plead out cases, compared to 3% of defense lawyers. But, as with other answers, the raw numbers here are so small it is hard to draw larger conclusions about how common or frequently this might be happening, beyond the fact that some lawyers reported it was happening. Defense lawyer

²⁴² See *infra* app. questions (results on file with author); see also Thea Johnson, *Crisis and Coercive Pleas*, 111 J. OF CRIML. & CRIMINOLOGY 1 (2020) (analyzing problems with plea bargaining during COVID-19 and possible lessons learned for improving plea bargaining practice).

²⁴³ Defense Attorney Response 13, app. question 67 (on file with author). In late 2021, early 2022, some prosecutors have privately told the author that defense lawyers are not accepting plea offers understanding, or in the hopes that, case backlogs may force better deals in the future. This concern was not expressed in the survey.

²⁴⁴ Defense Attorney Responses, app. question 26 (on file with author); Prosecution Responses, app. question 26 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

respondents noted in this question, and others, that due to court closures it is more difficult to get guilty pleas heard—which may account for a relatively small number of both prosecutors and defense lawyers feeling pressured to plead out more cases. Some defense lawyers reported a decrease in plea offers: “The state is refusing to tender discovery or engage in plea negotiations, except for custody clients and even very reluctantly and unevenly then.”²⁴⁵ Some of the defense lawyer respondents expressed frustration about the lack of offers saying, for example, “Prosecutors have not caught on to the fact that every delayed case is going to have to be dealt with later, and are frankly being short-sighted and lazy about dealing with stuff now rather than later.”²⁴⁶ Prosecutors, in contrast, did not single out defense lawyers for criticism in responding to this question. COVID-19 protocols in jails also led to delays in plea bargaining, as one defense lawyer reported:

We’re not given access to clients when they are quarantined for Covid reasons at the jail, so some clients are made to stay in longer than the plea offer would’ve required because the jail won’t let them appear even remotely to accept the offer and enter the plea.²⁴⁷

The survey did not ask specifically whether defendants faced more pressure to plead guilty due to concerns about COVID-19 and wanting to get out of custody. It is well understood that being in custody is a point of pressure that can make the overall plea negotiation atmosphere coercive, as defendants are often faced with the choice of pleading not guilty and staying in custody, or pleading guilty and being immediately released due to the plea agreement.²⁴⁸ A survey that did ask defense lawyers this question found that 65% reported that “my clients are feeling pressured to plea guilty because of COVID-19.”²⁴⁹ However, some respondents did report concerns about the coercive atmosphere due to delays in court processing. For example, one defense lawyer respondent reported that:

Many are held in county jail awaiting hearings or trial far longer than they should. It has made at least two of our clients take plea offers when they had previously wanted to go to the jury for

²⁴⁵ Defense Attorney Response 25, app. question 31 (on file with author).

²⁴⁶ Defense Attorney Response 57, app. question 40 (on file with author).

²⁴⁷ Defense Attorney Response 140, app. question 56 (on file with author).

²⁴⁸ See e.g. CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 61–84 (2021).

²⁴⁹ Daftary-Kapur et al., *supra* note 177, at 90.

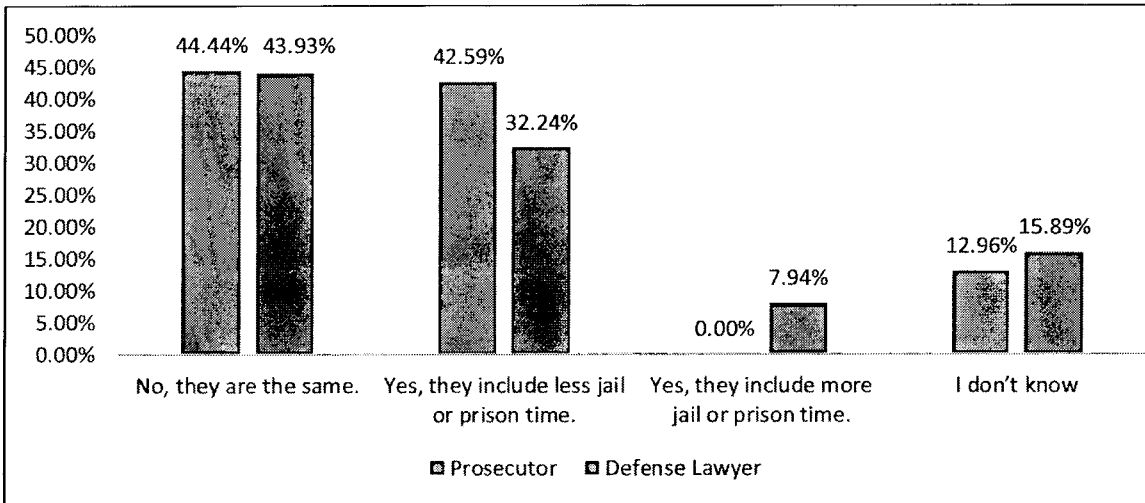
punishment.²⁵⁰

In addition to not making offers, defense lawyers reported problems with being unable to plead out some defendants. For example, one defense attorney reported that two courts cancelled “all plea bargain hearings” because “the local DA refused to do the plea hearings by Zoom.”²⁵¹

B. Plea Bargaining Outcomes

In terms of substantive outcomes, both prosecutors and defense lawyers agree that plea offers improved (less jail or prison) in some cases.²⁵² However, defense lawyers also reported that some plea deals are worse than before the pandemic began. Prosecutors disagree that this is happening.

Since COVID-19 became an issue in your community, have plea offers changed?²⁵³



²⁵⁰ Defense Attorney Response 43, app. question 56 (on file with author).

²⁵¹ Defense Attorney Response 5, app. question 31 (on file with author).

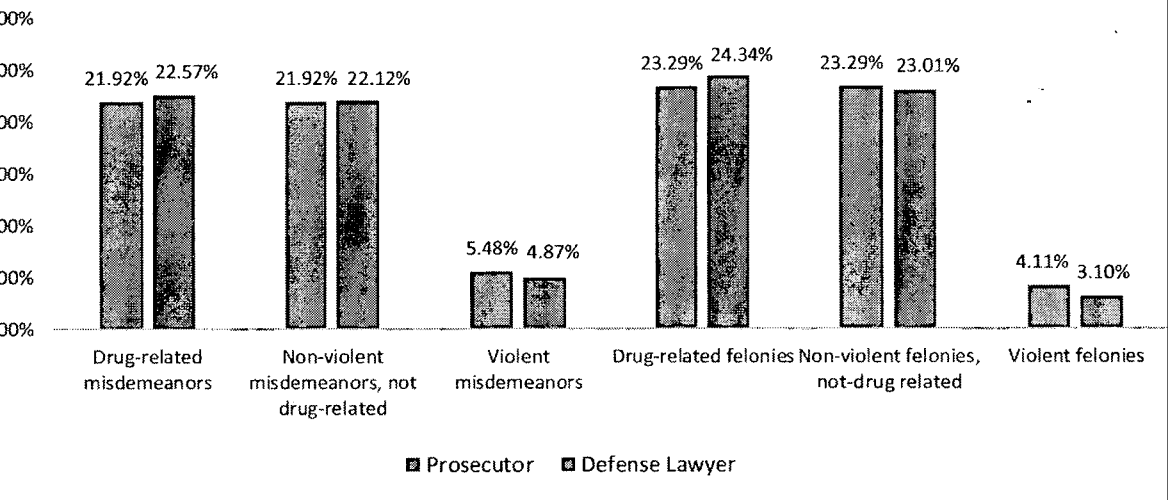
²⁵² See generally Terry Skolnik, *Criminal Law During (and After) COVID-19*, 43 MAN. L.J. 145 (2020) (cautioning against decreasing jail and increasing financial in Canada during COVID-19).

²⁵³ See *infra* app. question 27.

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

A total of seventeen defense lawyers reported that they had gotten worse deals. This low number makes it hard to draw any reliable conclusions from this survey about how frequently defendants were getting worse plea offers than they would have gotten pre-COVID-19. But, the results of this survey make it clear it was happening, at least in some places and with some defendants. Prosecutors and defense lawyers agree that defendants charged with non-violent misdemeanors and felonies, including drug related misdemeanors and felonies, were getting better plea offers. Prosecutors and defense lawyers were in fairly close agreement about how often these types of cases were getting reduced jail or prison time.²⁵⁴

Approximately what percentage of your cases have had plea offers for reduced jail/prison time?



However, prosecutors and defense lawyers did not agree regarding how frequently their cases were getting reduced jail or prison time. 13% of prosecutors report that 76-100% of their cases are getting reduced jail or prison time, compared to 6% of defense lawyers reporting the same.²⁵⁵ While 16% of defense lawyers, and only 9% of prosecutors report that between 51-75% of

²⁵⁴ Defense Attorney Responses, app. question 28 (on file with author); Prosecution Responses, app. question 28 (on file with author).

²⁵⁵ Defense Attorney Responses, app. question 29 (on file with author); Prosecution Responses, app. question 29 (on file with author).

their cases were getting deals involving less jail or prison time.²⁵⁶

For the 8% of defense lawyers who reported their cases had plea deals for more jail time, 35 % reported it was happening in 0-25% of their cases.²⁵⁷ Perhaps most surprisingly, 12% of the respondents who reported that they were getting worse deals reported it was happening with 76-100% of their cases.²⁵⁸ However, in raw numbers, only 17 defense lawyer respondents reported that they were getting worse deals, and only two reported it was in 76-100% of their cases, so it is hard to draw larger conclusions based only on this data.²⁵⁹

VII. CONCLUSION

This survey gives a national snapshot of how the criminal legal system responded to COVID-19 in the first five chaotic months. Overall, the criminal legal system depends on regular in-person communication between defense lawyers and prosecutors; lawyers, prosecutors, and judges; lawyers and their clients; and a variety of other players. This was disrupted during the early months of the pandemic and the survey respondents commented on this disruption in a variety of contexts including how court processes were conducted and how plea bargaining happened (or didn't), and the impact on defendants' rights.

One key conclusion is that the criminal legal system failed to guarantee confidential attorney-client communications when in-person meetings become impossible or ill-advised. Electronic communication that existed in jails was not put in place to be the primary form of communication between clients and lawyers. Many jurisdictions had specific bad examples of jails failing to respect the confidentiality of attorney-client communications that pre-dated the pandemic. The defense bar's widespread and general distrust of electronic forms of communication got substantially worse during the pandemic and no respondent to this survey reported any jurisdiction that did anything to address these serious concerns.

The survey results also illustrate that criminal courts were not prepared to shift to online platforms. Some courts did not have the necessary equipment and technology. Both court personnel and parties, such as defendants and victims, did not always have the skills to shift online. Online

²⁵⁶ Defense Attorney Responses, app. question 29 (on file with author); Prosecution Responses, app. question 29 (on file with author).

²⁵⁷ See *infra* app. question 30 (responses on file with author).

²⁵⁸ Defense Attorney Responses, app. question 29 (on file with author).

²⁵⁹ Defense Attorney Responses, app. question 29 (on file with author).

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

processes were not set up to substitute for in-person communications, such as attorney-client communication. There were also wide-spread differences in practices from courtroom to courtroom, with some courts requiring in-person appearance by attorneys and some mandating online appearances.

Another key conclusion is that there were widespread concerns about physical safety in the courthouses and jails in the early months of the pandemic. Both defense lawyers and prosecutors raised concerns that they were put in harm's way by being required to be in court in-person and by courts failing to require masks and adequate social distancing. Judges and defense lawyers expressed serious concerns about the failure of the local jails to protect those in custody including failing to protect them as they were transported to court.

Plea bargaining was also seriously impacted during the early months of the pandemic. Plea bargaining is often conducted in person and shifted to remote and electronic forms of communication. This survey highlights how important trials are in that they act as a point of leverage to force negotiations. Even though only a small percentage of cases go to trial, the fact that every case could go to trial is a point of pressure in the system for case resolution. Without that pressure, case backlogs built up and many courts may spend years digging out from under these backlogs.

Finally, the survey results highlight the failure of criminal courts to use dispute system design to manage and plan for the changes demanded by the pandemic. Decision-making was often top-down and key stakeholders, such as defense attorneys, reported being left out of the decision making in ways that negatively impacted their safety, their relationships with their clients, and protection of basic rights.

The responses to the survey paint a picture of chaotic and unpredictable state criminal courts during the first many months of pandemic. As with many other parts of our society, the criminal courts were unprepared to deal with the pandemic and struggled with how to adapt. Unfortunately, survey respondents reported wide-spread problems with courts failing to include key stakeholders in discussions about how to manage a situation that was new to everyone and full of uncertainty. As the survey responses indicated, top down, non-inclusive decision-making by many courts meant that they failed to address key problems. One truism of the pandemic has been that we may all be on the same rough seas, but we are not all in the same boat. This survey highlights that reality. Defense lawyers, prosecutors, and judges had some fundamentally different areas of concern and different levels of power over a situation that, in reality, was largely beyond everyone's control.

Appendix: Survey Questions

Q8 Thank you for your willingness to complete this survey. The research project is *COVID-19 Goes to Court: Survey Examining Changes in Processing Criminal Cases Due to the Pandemic*. The Principal Investigator for this survey is Cynthia Alkon, Professor of Law, Texas A&M University School of Law. You are invited to participate in this study because we are trying to learn more about what has changed in how criminal cases are processed in the court system due to the COVID-19 pandemic. You are a possible participant in this study if you are a judge or a practicing attorney, either a prosecutor or a defense lawyer. You must be 18 years of age or older to participate. The survey is designed to find out what, if anything, has changed in how criminal cases are processed due to the COVID-19 pandemic. The survey is expected to take you approximately 15-25 minutes to complete. If you decide to participate, please continue. If you do not want to participate, you can leave the survey at any time. If you leave the survey before completing it, none of your answers will be included in the survey results. Your participation in this study is voluntary. You can decide not to participate in this research and it will not be held against you. You can leave the study at any time. There are no sensitive questions in this survey that should cause discomfort. However, you can skip any question you do not wish to answer, or exit the survey at any point. The survey is on Qualtrics. To view Qualtrics' policy regarding privacy see: [Privacy Policy](#) No direct personal identifiers will be collected. The results of the survey may be published but no one will be able to identify you. Please feel free to ask questions regarding this study. You may contact Cynthia Alkon at calkon@law.tamu.edu if you have any questions. You may also contact the Human Research Protection Program at Texas A&M University (which is a group of people who review the research to protect your rights) by phone at 1-979-458-4067, toll free at 1-855-795-8636, or by email at irb@tamu.edu for additional help with any questions about the research voicing concerns or complaints about the research obtaining answers to questions about your rights as a research participant concerns in the event the research staff could not be reached the desire to talk to someone other than the research staff. If you want a copy of this consent for your records, you can print it from the screen. If you wish to participate, please click the “**I Agree**” button and you will be taken to the survey. If you do not wish to participate in this study, please select “**I Disagree**” or select **X** in the corner

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

of your browser.

- I Agree (5)
- I Disagree (4)

End of Block: Survey Introduction

Start of Block: Filtering Question

Q1 Select one that applies to you:

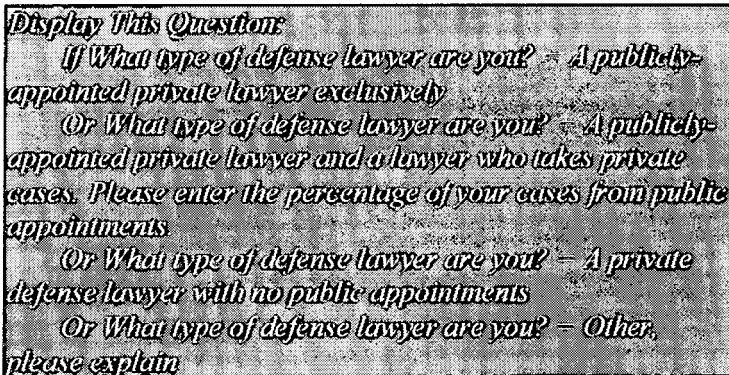
- I am a prosecutor (1)
- I am a defense lawyer (2)
- I am a judge (3)
- None of the above (4)

End of Block: Filtering Question

Start of Block: Defense Lawyer Questions

Q5 What type of defense lawyer are you?

- A Public Defender at the state or county level (1)
 - A Public Defender in the federal system (2)
 - A publicly-appointed private lawyer exclusively (3)
 - A publicly-appointed private lawyer and a lawyer who takes private cases. Please enter the percentage of your cases from public appointments. (4)
 - A private defense lawyer with no public appointments (5)
 - Other, please explain (6)
-



Q86 Please describe your caseload.

- Exclusively state cases (1)
- Predominantly state cases with some federal cases (3)
- About the same number of state and federal cases (5)
- Predominantly federal cases with some state cases (4)
- Exclusively federal cases (2)

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Q68 This first set of questions is about whether things have changed in terms of how you communicate with your clients since COVID-19.

Q9 Have there been changes in how you meet with your clients due to COVID-19?

Yes (1)

No (2)

Display This Question:
If there have been changes in how you meet with your clients due to COVID-19? = Yes

Q10 Who initiated the changes? Please check all that apply

I did (1)

It was due to changes in jail or prison policies (2)

It was due to changes in court policies (6)

It was due to changes in my law offices policies (3)

It was initiated by others, please specify (4)

Q11 Do the jails in your jurisdiction have adequate forms of electronic communication other than phone calls (for example, video calls, such as Zoom, Skype, or Facetime) to allow you to meet remotely with your clients who are in custody?

Yes (1)

No (2)

Display This Question:
If Do the jails in your jurisdiction have adequate forms of electronic communication other than phon... = Yes

Q12 Were these forms of communication available prior to COVID-19 becoming an issue in your jurisdiction?

- Yes (1)
- No (2)

Display This Question:
If Were these forms of communication available prior to COVID-19 becoming an issue in your jurisdicte... = No

Q13 How long did it take for electronic communications to become more widely available?

- Less than one week from the time COVID-19 became an issue in your jurisdiction (4)
- One to two weeks from the time COVID-19 became an issue in your jurisdiction (6)
- Two to three weeks from the time COVID-19 became an issue in your jurisdiction (7)
- Four or more weeks from the time COVID-19 became an issue in your jurisdiction (8)
- Still not available (9)

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Display This Question

If Do the jails in your jurisdiction have adequate forms of electronic communication other than phon... = No

Q14 Please describe what forms of communications were available when COVID-19 first prevented or caused concern about in-person meetings in your jurisdiction (Video calls? Telephone? Only in-person visits?).

Display This Question

If Do the jails in your jurisdiction have adequate forms of electronic communication other than phon... = No

Q15 Has the availability of electronic/remote communications improved between when COVID-19 first changed in-person access to your clients in your jurisdiction and as of the date you are completing this survey, even though the electronic communications are still inadequate?

Yes (1)

No (2)

Q16 Are you concerned about confidentiality in your current electronic communications with your clients who are in custody? If yes, please describe your concern.

Yes (1)

No (2)

Q17 Does it cost more for you to communicate with your clients since COVID-19? If yes, please explain.

Yes (1)

No (2)

Q18 Do you have other concerns regarding client communications that have not been addressed above? If yes, please explain.

Yes (1)

No (2)

Q75 To what extent do you agree with the following statement: I have access to COVID-19 related form motions and templates

Strongly agree (11)

Somewhat agree (12)

Neither agree nor disagree (13)

Somewhat disagree (14)

Strongly disagree (15)

End of Block: Defense Lawyer Questions

Start of Block: Defense Lawyer & Prosecutor Questions

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Display This Question:
If/Select one that applies to you: = I am a prosecutor

Q2 What type of prosecutor are you?

- I am a federal prosecutor (1)
- I am a full-time county/state level prosecutor (2)
- I am a part- time county/state level prosecutor (3)

Q70 This next group of questions is about plea discussions/negotiations and sentences post-COVID-19.

Q26 Please check all that apply:

Plea offers are initially conveyed the same way (for example, in the electronic file, in person, in a phone call...etc.) that they were before COVID-19. (1)

Prosecutors and defense lawyers discuss plea offers in the same way as they did before COVID-19 (for example, in person, over the phone...etc.). (2)

More plea offers are made electronically (for example in email, in electronic files...etc) since COVID-19. (3)

I discuss plea offers via video teleconferencing (including Facetime, Skype, Zoom, WhatsApp video...etc.) more since COVID-19. (5)

I discuss plea offers via telephone more since COVID-19. (6)

I discuss plea offers via email more since COVID-19. (7)

I discuss plea offers via text message more since COVID-19. (8)

Face-to-face meetings to discuss plea deals have been eliminated or drastically reduced since COVID-19. (9)

Q27 Since COVID-19 became an issue in your community, have plea offers changed? Please check all that apply:

- No, they are the same. (1)
- Yes, they include less jail or prison time. (2)
- Yes, they include more jail or prison time. (3)
- I don't know. (4)

Display This Question:
If Since COVID-19 became an issue in your community, have plea offers changed? Please check all that... - Yes, they include less jail or prison time.

Q28 What types of plea offers are for less jail or prison time? Please check all that apply:

- Drug-related misdemeanors (1)
- Non-violent misdemeanors, not drug-related (2)
- Violent misdemeanors (3)
- Drug-related felonies (4)
- Non-violent felonies, not drug-related (5)
- Violent felonies (6)

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Display This Question:
If Since COVID-19 became an issue in your community, have plea offers changed? Please check all that... = Yes, they include less jail or prison time.

Q29 Approximately what percentage of your cases have had plea offers for reduced jail/prison time?

- 0-25% (4)
- 26-50% (5)
- 51-75% (6)
- 76-100% (7)

Display This Question:
If Since COVID-19 became an issue in your community, have plea offers changed? Please check all that... = Yes, they include more jail or prison time.

Q30 Approximately what percentage of your cases had plea offers for more jail time?

- 0-25% (7)
- 26-50% (8)
- 51-75% (9)
- 76-100% (10)

Q31 Has there been a change in how you manage your cases due to COVID-19? Please check all that apply:

- All trials have been postponed. (1)
 - My cases have been delayed at every stage of the criminal process. (2)
 - I have felt more pressure to plead out more of my cases. (3)
 - I have felt less pressure to plead out more of my cases. (4)
 - More reduced jail/prison time plea offers are being made. (5)
 - Probation violation cases have been postponed. (6)
 - I appear in court by telephone or via video teleconferencing (including Facetime, Skype, Zoom, WhatsApp video...etc.) more often. (7)
 - I appear in court by telephone or via video teleconferencing (including Facetime, Skype, Zoom, WhatsApp video...etc.) almost exclusively. (8)
 - There has been no change. (9)
 - Other? Please specify: (10)
-

Q69 This next set of questions is about whether court practices, including criminal processes, have changed since COVID-19.

Q19 Have the court/s you work in changed how they manage cases due to COVID-19?

- Yes (1)
- No (2)

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Q20 On approximately what date did the changes happen?

Q22 Were speedy trial rules suspended due to COVID-19?

- Yes (3)
- No (4)
- Not applicable as there are no speedy trial rules in my jurisdiction (5)

Q23 Were appearances and hearings delayed due to COVID-19?

- Yes (1)
- No (2)
- I don't know (3)

Display This Question:
If Were appearances and hearings delayed due to COVID-19? = Yes

Q24 Which of the following were delayed due to COVID-19? Please check all that apply:

- Arraignments for defendants in custody (1)
 - Arraignments for defendants out of custody (2)
 - Bond hearings (3)
 - Preliminary hearings (4)
 - Search and Seizure Hearings (5)
 - Trials (6)
 - Probation violation hearings (7)
 - Others, please list: (8)
-

Q25 Have practices changed since the pandemic regarding how, or if, defendants are brought to court if they are in custody? If yes, how?

Yes (1)

No (2)

End of Block: Defense Lawyer & Prosecutor Questions

Start of Block: Judges Questions

Q6 As a judge, please check all that apply:

I handle adult misdemeanors (1)

I handle adult felonies (2)

I handle an integrated docket with both adult misdemeanors and adult felonies (3)

I handle a problem-solving court/specialty court, such as a drug court (6)

I handle juvenile cases (5)

Other, please explain: (4)

Display This Question:

If As a judge, please check all that apply: - I handle a problem-solving court/specialty court, such as a drug court

Q77 Has your specialty court/problem-solving court conducted in-person meetings/proceedings?

Yes (1)

No (2)

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Display This Question:
*If Has your specialty court/problem-solving court
conducted in-person meetings/proceedings? = No*

Q79 When was the last in-person meeting?

Q80 Have you had alternatives to in-person meetings with the participants/clients in your specialty court? Please check all that apply.

- Video conferencing with participants (including Zoom, Facetime, Skype...etc.) (1)
 - Phone calls with participants (4)
 - Email communications with participants (5)
 - Facebook messages (6)
 - Posting recordings on social media (7)
 - Text communications with participants (8)
 - Other, please specify: (9)
-

Q32 Were you involved in discussions in your court, or jurisdiction, about what changes to make in court practices in your jurisdiction during the COVID-19 pandemic? Please check all that apply.

- Yes (1)
- No (2)
- No changes were made (3)
- Other judges were directly involved (4)

Display This Question:
If Were you involved in discussions in your court, or jurisdiction, about what changes to make in co... = Yes

Q33 Were changes made due to your input? If yes, please describe what changes were made.

Yes (1)

No (2)

Display This Question:
If Were you involved in discussions in your court, or jurisdiction, about what changes to make in co... = No

Q34 Were there changes that should have been made with your input, but were not? If yes, please describe.

Yes (1)

No (2)

Q35 To what extent do you agree with the following statement: I had full flexibility to make changes in how cases were handled in my courtroom during COVID-19.

Strongly agree (1)

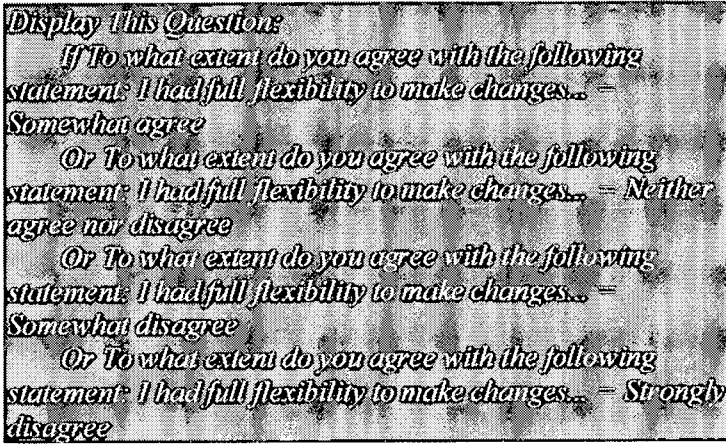
Somewhat agree (2)

Neither agree nor disagree (3)

Somewhat disagree (4)

Strongly disagree (5)

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19



Q81 What limited your flexibility? Please check all that apply:

- Rules (1)
 - Local practices (4)
 - Inadequate technology to make changes (5)
 - Court Administration too centralized (6)
 - Court Administration not centralized enough (7)
 - Courtroom design (8)
 - Courthouse design (9)
 - Other, please specify: (10)
-

Q37 To what extent do you agree with the following statement: I have had the necessary resources to make changes to better protect myself and others in the courtroom during the coronavirus pandemic.

- Strongly agree (1)
- Somewhat agree (2)
- Neither agree nor disagree (3)
- Somewhat disagree (4)
- Strongly disagree (5)

End of Block: Judges Questions

Start of Block: Questions to All Respondents

Q71 This next group of questions is about what was done, if anything, to protect the physical safety of court and legal professionals during the pandemic and who, in your experience, was part of the decision-making to set up these new policies or practices.

Q82 To your knowledge, who was involved in discussions about what changes to make in court practices in your jurisdiction during the COVID-19 pandemic? Please check all that apply:

- Defense bar (public defender and/or private counsel) (1)
- Prosecutors office (2)
- Judges (3)
- I don't know (4)

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Display This Question

If to your knowledge, who was involved in discussions about what changes to make in court practices... = Defense bar (public defender and/or private counsel)

Q39 What changes were made due to **defense** input? Please specify.

Q40 Were there changes that should have been made with **defense** input, but were not? Please specify.

Yes (1)

No (2)

Display This Question

If to your knowledge, who was involved in discussions about what changes to make in court practices... = Prosecutors office

Q42 What changes were made due to **prosecutor** input? Please specify.

Q43 Were there changes that should have been made with **prosecutor** input, but were not? Please specify.

Yes (1)

No (2)

Q83 Please indicate the extent to which you agree that the courts have provided adequate physical protection during the COVID-19 pandemic for the following groups:

	Strongly agree (11)	Somewhat agree (12)	Neither agree nor disagree (13)	Somewhat disagree (14)	Strongly disagree (15)
Defense lawyers (1)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Prosecutors (2)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Court personnel (including judges) (3)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Defendants (4)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Victims and/or Witnesses (5)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Display This Question:

If Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Defense lawyers [Strongly agree]

Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Defense lawyers [Somewhat agree]

Q45 If the courts took adequate measures to physically protect **defense lawyers**, what was done? If you have copies of court orders or communications that you are willing to share, please send to calkon@law.tamu.edu.

Display This Question:

If Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Defense lawyers [Somewhat disagree]

Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Defense lawyers [Strongly disagree]

Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Defense lawyers [Neither agree nor disagree]

Q46 If the courts did **not** take measures to physically protect **defense lawyers**, what should have been done?

Display This Question:
 If Please indicate the extent to which you agree that the courts have provided adequate physical pro... – Defendants
 [Strongly disagree]
 Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... – Defendants [Somewhat disagree]
 Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... – Defendants [Neither agree nor disagree]

Q48 If the courts have **not** provided adequate physical protection for **defendants**, what should have been done?

Display This Question:
 If Please indicate the extent to which you agree that the courts have provided adequate physical pro... – Defendants
 [Strongly agree]
 Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... – Defendants [Somewhat agree]

Q49 If the courts have provided adequate physical protection for **defendants**, what was done? If you have copies of court orders/communications that you are willing to share, please send to calkon@law.tamu.edu.

Display This Question:
 If Please indicate the extent to which you agree that the courts have provided adequate physical pro... – Court personnel (including judges) [Somewhat disagree]
 Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... – Court personnel (including judges) [Strongly disagree]
 Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... – Court personnel (including judges) [Neither agree nor disagree]

Q51 If the courts have **not** provided adequate physical protection for **court personnel (including judges)**, what should have been done?

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Display This Question:
If Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Court personnel (including judges) [Strongly agree]
Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Court personnel (including judges) [Somewhat agree]

Q52 If the courts have provided adequate physical protection for **court personnel (including judges)**, what was done? If you have copies of court orders or communications that you are willing to share, please send to calkon@law.tamu.edu.

Display This Question:
If Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Prosecutors [Strongly agree]
Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Prosecutors [Somewhat agree]

Q54 If the courts have provided adequate physical protection for **prosecutors**, what was done? If you have copies of court orders or communications that you are willing to share, please send to calkon@law.tamu.edu.

Display This Question:
If Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Prosecutors [Somewhat disagree]
Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Prosecutors [Strongly disagree]
Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Prosecutors [Neither agree nor disagree]

Q55 If the courts have **not** provided adequate physical protection for **prosecutors**, what should have been done?

Display This Question:
If Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Victims and/or Witnesses // Strongly agree //
Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Victims and/or Witnesses // Somewhat agree //

Q84 If the courts have provided adequate physical protection for **victims and/or witnesses**, what was done? If you have copies of court orders or communications that you are willing to share, please send to calkon@law.tamu.edu.

Display This Question:
If Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Victims and/or Witnesses // Somewhat disagree //
Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Victims and/or Witnesses // Strongly disagree //
Or Please indicate the extent to which you agree that the courts have provided adequate physical pro... = Victims and/or Witnesses // Neither agree nor disagree //

Q85 If the courts have **not** provided adequate physical protection for **victims and/or witnesses**, what should have been done?

Q56 Are defendants' rights protected during the COVID-19 pandemic as well as they were before the pandemic? If no, please explain.

Yes (1)

No (2)

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Q57 Please check all the situations, that arguably worked in favor of a defendant, that apply since the beginning of the COVID-19 pandemic in your jurisdiction:

Defendants were cited and released and not taken into custody when they would have been put into custody pre-COVID-19). (3)

Defendants with probation violations were not taken into custody (when they would have been pre-COVID-19).

(4)

No incarceration imposed for an offense that pre-COVID-19 would have led to incarceration. (5)

Grand jury not convened (6)

Other, please specify: (7)

End of Block: Questions to All Respondents

Start of Block: Optional Demographic Questions for Judges Only

Q73 The following section includes questions about optional demographic information.

Q62 How many years have you been a judge?

0 to 6 years (8)

7 to 14 years (9)

15 or more years (10)

End of Block: Optional Demographic Questions for Judges Only

Start of Block: Optional Demographic Questions for Prosecutors and Defense Lawyers

Q72 The following section includes questions about optional demographic information.

Q60 How many years have you practiced law?

- 0 to 6 years (5)
- 7 to 14 years (6)
- 15 or more years (7)

Q61 How many years have you practiced criminal law?

- 0 to 6 years (8)
- 7 to 14 years (9)
- 15 or more years (10)

**End of Block: Optional Demographic Questions for
Prosecutors and Defense Lawyers**

Start of Block: Optional Demographic Questions for All

Q63 What is your gender?

- Male (7)
 - Female (8)
 - A gender not listed, please specify: (9)
-

CRIMINAL COURT SYSTEM FAILURES DURING COVID-19

Q76 Which categories currently describe you? Please check all that apply.

- American Indian or Alaska Native (1)
- Asian (4)
- Black or African American (5)
- Hispanic, Latino or Spanish Origin (6)
- Middle Eastern or North African (7)
- Native Hawaiian or Other Pacific Islander (8)
- White or Caucasian (9)
- A race, ethnicity, or origin not listed, please specify:
(10)

I prefer not to respond (11)

Q66 Do you identify as being in a higher-risk category for being more vulnerable to COVID-19 (e.g., age, pre-existing condition, viral exposure, immune compromised)?

- Yes (1)
- No (2)
- I don't know (3)

Q64 What county or jurisdiction are your cases in? Please list both the city or county and the state. If you practice in multiple counties, please list the county where you have a higher percentage of your case load.

County/City or Jurisdiction (55)

State (56)

Q59 Are you concerned about your pay or salary due to COVID-19? If yes, what are your concerns and have the courts addressed these concerns?

No (1)

Yes (2)

Q87 Are you concerned about the pay or salary of others you work with due to COVID-19? Please check all that apply:

Court staff (1)

Non-lawyer employees in defense lawyer offices (2)

Staff in public defender offices (3)

Staff in prosecutor offices (4)

Experts (5)

Other, please specify (6)

End of Block: Optional Demographic Questions for All

Start of Block: Final Question Block

Q67 Thank you for taking time to fill out this survey. This is the last question. Once you are finished, you can click the SUBMIT button below to submit your responses.

Do you have any concerns not been raised in this survey about how the criminal legal system is working in your jurisdiction(s) since COVID-19? If yes, please describe those concerns:

No (1)

Yes (2)

End of Block: Final Question Block