

Preparing for the Next Pandemic: COVID-19's Lessons for Courts

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The pandemic we face today poses unique challenges for courts. If a disaster of the future brings similar challenges, we may be better equipped to face them based on the COVID-19 experience. At the United States District Court for the Northern District of Illinois, our response has been halting but effective as we learn to issue rulings without the benefit of direct oral advocacy and to conduct hearings by videoconference. Changes underway before 2020 have been accelerated. Our newer practices have advantages in ease and safety for litigants but also generate risks that parties will become less engaged and that we will not succeed in creating an atmosphere of confidence and dignity. The practice of pretrial discovery has changed rapidly, and questions of jurisdiction and venue may become less salient. The decline in the number of jury trials implicates constitutional rights and undermines an important avenue for public education. As a result, courts will need to find new ways to enhance public understanding of, and confidence in, the legal process. Public health concerns dictate greater flexibility in the location and times when work is performed but will also require the courts to make allowances for sudden changes in the lives and capabilities of litigants and staff. New lawyers will likely be more able to make their way in the online world, but legal institutions will need to make particular efforts to connect and socialize them in the practice of law.

I. INTRODUCTION

It's often said that generals are always prepared to fight the last war. And so it may well be that the lessons we are learning from this pandemic are lessons that would have been very useful to us a year ago but will not be that helpful when we face the next crisis—one that may be markedly different from this one. I am no futurist. To the contrary, I am largely suspicious of confident predictions and instead am a firm believer in the Law of Unintended Consequences.

But with all of that said, if there is a pandemic that is at all similar to COVID-19, I think the experience of 2020 will be illuminating. I can't

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speak for all of the institutions that have responded to this virus, or even all of the legal institutions that have faced the challenge. But I can examine the impact COVID-19 has had on the large, urban trial court where I am chief judge. This Article discusses how the United States District Court for the Northern District of Illinois has responded to the virus, with a particular emphasis on jury trials. I close by offering some reflections on how the pandemic might change the ways that courts will operate in the future.

II. THE NORTHERN DISTRICT OF ILLINOIS'S RESPONSE TO COVID-19

The first lesson we have learned is humility. The court cannot seamlessly change the way it operates. Our court's culture assumes lots of "face time": we are accustomed to seeing lawyers in the courtroom every day. In addition to lawyers, we expect to see parties, witnesses, jurors, family members, curious spectators, and the press. We conduct ceremonies of all kinds, and we swear in new citizens in large groups.¹ Courts have a responsibility for civic education, so we see and speak to school groups and bar associations.

The pandemic brought a sharp halt to all of those activities. When COVID-19 forced the sudden closure of the Chicago Public Schools, we realized that everything had to change. In the immediate wake of the virus, some courts ceased operations completely.² We did not do that, and indeed, a guiding principle is that the federal courts never close. Our own court activated what is known as its COOP plan—"COOP"

¹ Beginning in August of 2020, the Northern District of Illinois resumed naturalization ceremonies with health and safety precautions, including outdoor ceremonies, capacity limits, and masks. Information Release, U.S. Dist. Ct. for the N. Dist. of Ill., Dist. Ct. Hosts First Naturalization Ceremony Since Mid-March (Aug. 4, 2020), https://www.ilnd.uscourts.gov/_assets/_news/naturalization%20aug%202020.pdf [<https://perma.cc/JN3G-6UVZ>].

² See, e.g., Madison Alder et al., *Marshal Has Virus in DC, Courts Across US Respond to Threat (1)*, BLOOMBERG L. (Mar. 18, 2020), https://www.bloomberglaw.com/product/blaw/document/XE053FGG000000?criteria_id=0b0ca6229d8b4fe96d6556bb21607b4d&searchGuid=2f01bf93-8a83-4010-ac72-eb2ea69d2a66&search32=mABXXPzKF1vbsp0zXZNFJg%3D%3DQE-6gdcxZr2t9idfTL2J8DAQnR3LfrAh7hmcdwdRqdQISRRGIDCCdNtYNCs4frkIHPW2Qam1_b1vrXDw9t_sECwCpXXjrRqH6c3SuaAqYsjSypySkOY9VxR4XQWrB3dq8X_XmgqUoJTPzKJkdSAqPquOTcexwv9vdJkIBqbWza9D8wqgClJ1_3k2Edm9ih5 [<https://perma.cc/C8BK-H5PZ>] (reporting that courthouses in the Fourth and Tenth Circuits closed in mid-March of 2020 and that other courthouses had restricted access). In the fall of 2020, Chief Judge Gina M. Groh of the Northern District of West Virginia announced that the Elkins Courthouse would remain closed until further notice. U.S. DIST. CT. FOR THE N. DIST. OF W. VA., ORDER CLOSING ELKINS COURTHOUSE (Nov. 13, 2020), <https://www.wvnd.uscourts.gov/sites/wvnd/files/Order%20Closing%20Elkins%20Courthouse%20Nov%2013%202020.pdf> [<https://perma.cc/567J-T4UP>]. More recently, Chief Judge Groh lifted those restrictions, but persons with COVID-19 or symptoms of COVID-19 may not enter any courthouse in the district. U.S. DIST. CT. FOR THE N. DIST. OF W. VA., SECOND AMENDED STANDING ORDER (Apr. 14, 2021), https://www.wvnd.uscourts.gov/sites/wvnd/files/second.amended.order_.pdf [<https://perma.cc/SH7C-D7P8>].

standing for “continuing operations”—an emergency plan that sends nearly everyone home but continues court activity to the extent possible and necessary. We reduced in-court staff to a handful of judges and a single clerk³ and began ruling on all of the motions presented only after telephonic or videoconference hearings.⁴ In the months that followed, we expanded activity, bringing other judges back on a semi-in-court and semi-remote working basis, but we have largely limited in-person hearings.⁵ We were able to conduct a few civil and criminal trials, but in mid-November 2020, with COVID-19 numbers in the state soaring, we returned to a more restricted program.⁶ In mid-March 2021, we began a cautious second round of reopening, followed by the resumption of jury trials in April 2021.⁷

Our efforts to move to a digital world have been halting and often unsatisfying. Our videoconferencing platforms don’t always work smoothly. We judges, who revel in the pomp and pageantry of the courtroom, find ourselves instead peering into small screens, feeling more like bureaucrats than judicial officers, often uneasy and awkward about our own limited skills or inadequate technical support. Participants in the process—parties, lawyers, the public—have difficulty connecting and are themselves uncomfortable with the process. Those of us who operate in the court system are acutely aware of the importance of a

³ See U.S. DIST. CT. FOR THE N. DIST. OF ILL., GENERAL ORDER 20-0012 (Mar. 12, 2020), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/rules/admin/pdf-orders/General%20Order%2020-0012%20-%20In%20Re%20Coronavirus%20COVID%2019%20Public%20Emergency.pdf [<https://perma.cc/ZY4J-E55E>]; U.S. DIST. CT. FOR THE N. DIST. OF ILL., GENERAL ORDER 20-0014 (Mar. 20, 2020), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/rules/admin/pdf-orders/Coronavirus%2020-0014%20March%2020_ [<https://perma.cc/42YG-64G9>].

⁴ See U.S. DIST. CT. FOR THE N. DIST. OF ILL., THIRD AMENDED GENERAL ORDER 20-0012 (Apr. 24, 2020), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/rules/admin/pdf-orders/3rd%20Amended%20General%20Order%2020-0012.pdf [<https://perma.cc/8FC3-T4N8>] (“Any party may request, by motion to the assigned judge, that a telephonic hearing or settlement conference (by remote means) be conducted prior to May 29, 2020.”).

⁵ See U.S. DIST. CT. FOR THE N. DIST. OF ILL., FIFTH AMENDED GENERAL ORDER 20-0012 (July 10, 2020), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/rules/admin/pdf-orders/Fifth%20Amended%20General%20Order%2020-0012.Final.pdf [<https://perma.cc/65BW-C8AK>] (announcing that in-court hearings would be limited to urgent matters that could not be conducted remotely and that civil jury trials would not resume before August 3, 2020).

⁶ See U.S. DIST. CT. FOR THE N. DIST. OF ILL., EIGHTH AMENDED GENERAL ORDER 20-0012 (Nov. 13, 2020), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/rules/admin/pdf-orders/Eighth%20Amended%20General%20Order%2020-0012_FINAL.pdf [<https://perma.cc/SB66-CMGK>] (announcing that all civil and criminal jury trials are suspended until further notice and that all civil hearings shall be conducted remotely).

⁷ U.S. DIST. CT. FOR THE N. DIST. OF ILL., GENERAL ORDER 21-0006 (Feb. 17, 2021), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/rules/admin/pdf-orders/General%20Order%2021-0006%20Plan%20for%20the%20Safe%20Resumption%20of%20Jury%20Trials%20in%20the%20Northern%20District%20of%20Illinois%20-FINAL.pdf [<https://perma.cc/HWN2-2Y9W>].

vibrant and functioning legal world. The federal courts never truly close, and the public must have faith in the judiciary in challenging times. We need to be able to resolve disputes quickly and provide guidance that may not be perfect but enables societal functions. And as important as all of this is, we also recognize that what the world most needs now is something we cannot provide: a shot in every arm.⁸

What we can do is carry out the role of the courts—to bring repose and resolve disputes. This is what the courts have done for generations, and for generations we have done that work in much the same way. Courtrooms built in the twentieth century look structurally the way they did in earlier times: a bench in front, a witness box, seats for court staff, a podium for lawyers, a jury box, benches for spectators and witnesses. Today, courtrooms also feature screens and microphones, but the process remains very similar to what took place decades ago and continues to function reasonably well. The practice itself follows familiar traditions: Lawyers prepare and file briefs, at one time only in hard copy, and good writing has always been the central skill for attorneys. But there has always been a significant tradition of oral advocacy. The back-and-forth of argument with lawyers, face to expressive face, is stimulating and valuable. A trial, even one that addresses very dry or technical issues, is absorbing. Surely this was true when Clarence Darrow appeared in our federal court,⁹ and to this day, observing a great cross-examination or closing argument is compelling drama. My knees still shake when a jury walks back into the courtroom with a verdict.

But practice in the courts has seen significant changes as well, changes that began well before COVID-19. I have already mentioned the presence of screens in the courtrooms. Chambers look different, too: Walls of built-in bookshelves are now as likely to feature a judge's baseball hat collection as they do volumes of the Federal Supplement. We read case law on a screen, and most of us read briefs on a screen as well. Though not all state courts are quite there yet, federal courts have long since abandoned paper files. Until recently, many judges nevertheless relied on lawyers to give us what are called "courtesy copies"—printed

⁸ On December 14, 2020, the first Americans began receiving the Pfizer-BioNTech COVID-19 vaccine. See Campbell Robertson et al., *First Coronavirus Vaccines Bring Americans Hope in Small Doses*, N.Y. TIMES (Dec. 14, 2020), <https://nyti.ms/3p4WvIL> [<https://perma.cc/Z5G6-NGHS>]. As of October 1, 56 percent of Americans have been fully vaccinated. See *How Vaccinations are Going in Your County and State*, N.Y. TIMES (Oct. 1, 2021), <https://www.nytimes.com/interactive/2020/us/covid-19-vaccine-doses.html> [<https://perma.cc/FW5V-B6WX>] (last updated Oct. 4, 2021).

⁹ To take just one example, Darrow defended Eugene V. Debs against criminal charges resulting from Debs's role in the Pullman Strike of 1894. See generally *United States v. Debs*, 64 F. 724 (C.C.N.D. Ill. 1894). For context surrounding the trial, see JOHN A. FARRELL, CLARENCE DARROW: ATTORNEY FOR THE DAMNED 68–71 (2011); Daniel Novak, *The Pullman Strike Cases: Debs, Darrow, and the Labor Injunction*, in AMERICAN POLITICAL TRIALS 119–38 (Michal R. Belknap ed., 1994).

copies of their filings. That practice, which involved messengers or other staff entering the courthouse at all hours of the day to make deliveries, has come to an end, almost certainly a permanent end.¹⁰ It didn't make sense even before the pandemic, but today, the fewer people who set foot in the courthouse, the safer we are. Our large, imposing courthouses stand largely empty today, and this emptiness will be desirable in the event of any other contagious virus.

The courts are disposing of cases and motions in somewhat different ways than we did before the pandemic. We have dispensed with some of the formality. A year ago, I might have waited until lawyers appeared in court to present a motion, even one that is fairly routine. It was useful for me to see the lawyers in action, learn about and potentially resolve a discovery dispute on the spot, set the pretrial schedule, or encourage settlement. In an era when my priority is keeping people out of the courthouse, the practice is different.¹¹ When there is a rather obvious result of a particular motion, I may issue a ruling in a perfunctory way, counting on counsel to let me know if it should be revisited. The safety and economy of this approach compensates, at least to some degree, for the loss of direct interaction with lawyers. Things may well return to a bit more traditional practice when the pandemic is over, but our ability to move nimbly to rulings on a “paper” record will serve us well in the event of another such disaster. In fact, I can predict, with mixed feelings, that a remote practice will continue to a significant degree even after the courtroom doors are open and the courtrooms are deemed safe.

We are doing more than reading print and doing legal research on computer screens. Here, the pandemic has significantly accelerated the pace of change. Just as in law schools, in the academy generally, and in business, we in the courts have moved rapidly away from “live” hearings to remote arguments and hearings. There is a sterility about this, and a loneliness.¹² But the advantages are obvious and not limited to the fact that nobody risks contagion when communicating through a computer screen. Nobody needs to travel from home in order to participate in an online hearing. There is little need for “professional” clothing or

¹⁰ See, e.g., U.S. DIST. CT. FOR THE N. DIST. OF ILL., *supra* note 6.

¹¹ See *id.* (suspending Local Rule 5.3(b), which requires that all motions be noticed for in-person presentation).

¹² On the challenges of conducting work via videoconference, see, for example, Liz Fosslien & Mollie West Duffy, *How to Combat Zoom Fatigue*, HARV. BUS. REV. (Apr. 29, 2020), <https://hbr.org/2020/04/how-to-combat-zoom-fatigue> [<https://perma.cc/BR8B-U75B>].

even shoes.¹³ Some persons with disabilities find this new way of proceeding to be a great leveler.¹⁴ And there can be advantages for clients, even those who are incarcerated: the Clerk of our federal court came up with a plan to enable defense counsel to communicate with detained defendants using computer tablets in our local jails at a very large cost savings.¹⁵

The hearings themselves are different, and not always in a bad way. In some ways it is easier to observe facial expressions when we are all in closeups. Getting dressed for work or even a social event is easy, and commuting is a breeze. Gone is that awkward sensation of realizing we have been introduced to someone but can no longer remember that person's name—names are right there on the screen. A judge with hearing disabilities can turn up the volume or rely on the court reporter's "realtime" feed to catch nearly every word.

The courts have made a somewhat halting but also headlong dive into remote hearings. Thirteen federal district courts recently announced that they will begin livestreaming audio of hearings in major civil cases on the courts' YouTube channels.¹⁶ The Supreme Court has adapted to remote work as well by conducting oral arguments via telephone since May of 2020.¹⁷ Instead of the typical format, in which the justices jump in with questions for counsel at any time, the justices now ask questions in order of seniority, starting with the Chief Justice, for about two to three minutes each. Telephonic arguments obviously present some challenges, but for the first time, audio of the Court's arguments is being livestreamed online.¹⁸ This change, in turn, has facilitated the rise of a previously impossible pastime: live-tweeting Supreme

¹³ Indeed, some lawyers now need reminders to dress appropriately for virtual court appearances. Debra Cassens Weiss, *Lawyers Are Dressing Way Too Casual During Zoom Court Hearings, Judge Says*, ABA J. (Apr. 15, 2020), <https://www.abajournal.com/news/article/lawyers-are-dressing-way-too-casual-during-zoom-hearings-judge-says> [https://perma.cc/FH8U-T6U5].

¹⁴ See generally Lisa A. Schur et al., *Telework after COVID: A "Silver Lining" for Workers with Disabilities?*, 30 J. OCCUPATIONAL REHAB. 521 (2020).

¹⁵ See U.S. DIST. CT. FOR THE N. DIST. OF ILL., GENERAL ORDER 20-0017 (Apr. 13, 2020), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/rules/admin/pdf-orders/GO20-0017-FINAL.pdf [https://perma.cc/Z6KH-UF34].

¹⁶ Jacqueline Thomsen, *In Step Toward Transparency, Some Federal Courts Agree to Start Livestreaming High-Profile Hearings*, NAT'L L.J. (Dec. 15, 2020), <https://www.law.com/nationallawjournal/2020/12/15/in-step-toward-transparency-some-federal-courts-agree-to-start-livestreaming-high-profile-hearings/> [https://perma.cc/HG3B-KD5C]; *Federal Courts Participate in Audio Livestream Pilot*, U.S. CTS. (Dec. 15, 2020), https://www.uscourts.gov/news/2020/12/15/federal-courts-participate-audio-livestream-pilot?utm_medium=social&utm_source=twitter&utm_campaign=usc-news [https://perma.cc/9RQW-2FDY].

¹⁷ See Nina Totenberg, *Supreme Court Arguments Resume—But with a Twist*, NPR (May 4, 2020), <https://www.npr.org/2020/05/04/847785015/supreme-court-arguments-resume-but-with-a-twist> [https://perma.cc/HV4X-GQFQ].

¹⁸ *Id.*

Court arguments.¹⁹ Live-tweeting may never take off in the district courts, but our facility with new technology will certainly serve us in the next pandemic.

The process of pretrial discovery is another one that saw rapid change in recent times and even more significant change as a result of the pandemic. The production of documents called for by Rule 36 was once a largely paper process.²⁰ Today, of course, documents are produced and exchanged electronically, and the parties devote substantial effort to developing a protocol for production and review of electronically stored information. Until recently, however, most deposition discovery could be expected to take place “live,” even in situations where the witness was being videotaped. The COVID-19 pandemic appears to have completed the process of changing that expectation.²¹ In some instances, disagreement about the need for in-person deposition testimony reaches the courts.²² But in most cases the lawyers seem to work out a resolution and decide that, while a deponent on a screen may not be most desirable, it is good enough.

In fact, this method of conducting our business is likely to flourish with or without another pandemic. Again, the advantages are obvious. But there are real disadvantages to it as well. I have heard several times from litigants for whom the videoconference process is invasive. They feel uncomfortable that others can see their homes, their furniture, and their clutter; sometimes their children or even pets are visible as well. Some lawyers and litigants lack technical skills or bandwidth or are sharing an internet connection with other family members. As an institution, courts will need to address the intrusiveness of videoconferencing and the issue of access.

Another unappealing aspect of life on a screen is the ease of tuning out.²³ All of us have been there: things are slow or boring, and we check e-mail or do an online crossword puzzle or return to another project. We can mute ourselves, replace our image with an avatar, and wander into

¹⁹ See Angela Morris, *Live-Tweeting Lawyers Give Blow-by-Blow of Obamacare Argument in US Supreme Court*, TEX. LAW. (Nov. 10, 2020), <https://www.law.com/texaslawyer/2020/11/10/live-tweeting-lawyers-give-blow-by-blow-of-obamacare-argument-in-us-supreme-court/?slreturn=20201115151153> [<https://perma.cc/8WHW-V4H3>].

²⁰ See FED. R. CIV. P. 36.

²¹ See, e.g., Edward M. Sprio & Christopher B. Harwood, *Remote Depositions: The New Normal*, N.Y. L.J. (Oct. 19, 2020), <https://www.law.com/newyorklawjournal/2020/10/19/remote-depositions-the-new-normal/?slreturn=20201115164909> [<https://perma.cc/43XH-S376>]; Patricia Manson, *Judge: Demanding In-Person Deposition is Now ‘Unsound’*, CHI. L. BULL. (Oct. 21, 2020), <https://www.chicagolawbulletin.com/video-deposition-gets-ok-20201021> [<https://perma.cc/A4SK-N4HT>].

²² See, e.g., *Smid v. Molex, LLC*, No. 19 C 5631, 2020 WL 6132221 (N.D. Ill. Oct. 19, 2020).

²³ See, e.g., Manyu Jiang, *The Reason Zoom Calls Drain Your Energy*, BBC (Apr. 22, 2020), <https://www.bbc.com/worklife/article/20200421-why-zoom-video-chats-are-so-exhausting> [<https://perma.cc/S7GY-FALM>].

the kitchen for a cup of coffee. A speaker on a videoconference call is deprived of the body language and physical cues that enable the speaker to adjust the presentation or try a different tack.

Most significant, for me, is the videoconference “environment.” When visitors step into a church, temple, or mosque, they have a sense of the sacred feeling that is intended and, without being coached, lower their voices. Walk into Wrigley Field, or a coffee shop, or a classroom, and the behavioral norms there are obvious as well. A courtroom has that same effect. Our courtrooms are large and imposing and somber and serious. We judges wear robes and are seated at an elevated remove from the litigants. We are the quiet and commanding presence in a setting of dignity. Much of that feeling evaporates on a video screen. Lawyers generally understand the process and play by the rules.²⁴ But our participants are not all lawyers, and persons who are not familiar with the system and are not socialized to it lack access to the cues that the courtroom communicates. I confess to rampant ego here. Walking into a courtroom in a black robe and taking a seat at the bench is a rush. It is also a sobering and centering experience, and it is one I miss. Another pandemic might make the experience even more rare. To the extent that experience influences and improves the performance of judges and heightens respect among litigants, its loss is a sad one. The courts will need to find ways to create a sense of decorum for people who may never set foot inside the courthouse.

III. JURY TRIALS

We conducted a handful of jury trials late last summer but called a halt in November.²⁵ This spring, when the COVID-19 metrics began to improve, we resumed the process, with extensive precautions in place. We screen jurors via a lengthy questionnaire when they are summoned and excuse those for whom participation would create a particular hardship. We initiated a process of testing all potential jurors, lawyers, and other trial participants for COVID-19 using a highly sensitive saliva test developed at the University of Illinois.²⁶ To minimize the number

²⁴ In fact, in response to the reality that many attorneys are working from home, the American Bar Association now says that attorneys may work remotely in jurisdictions where they are not licensed, subject to a few caveats. Justin Wise, *ABA Open to Attys Working Remote Outside Home States*, LAW360 (Dec. 16, 2020), <https://www.law360.com/articles/1338525/aba-open-to-attys-working-remote-outside-home-states> [<https://perma.cc/N9M5-MF2T>]. The ethics committee’s opinion represents a softening of Model Rule 5.5, which governs the unauthorized practice of law. See ABA STANDING COMM. ON ETHICS & PRO. RESP., FORMAL OPINION 495 (Dec. 16, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf [<https://perma.cc/3ET2-WBH4>].

²⁵ See U.S. DIST. CT. FOR THE N. DIST. OF ILL., *supra* note 6 (announcing that all civil and criminal jury trials are suspended until further notice).

²⁶ U.S. DIST. CT. FOR THE N. DIST. OF ILL., *supra* note 7; see also SHIELD Illinois Saliva Test

of people who need to enter the building, we allow jury selection for just one trial on any given day. Once selected, jurors are spread out across a large courtroom during trial and have access to a separate, full-size courtroom where they can socially distance during breaks and while deliberating. “Sidebars,” which typically involve attorneys approaching the bench to discuss matters out of the jury’s hearing, have been reimagined with the use of white noise and headphones.²⁷

It’s no secret that the number of jury trials has declined over time, and COVID-19 has accelerated that decline as well.²⁸ Yet there has been no corresponding decline in the numbers of civil or criminal cases filed. Most civil cases are resolved without trial, either by way of a dismissal or summary judgment ruling, or by settlement.²⁹ And we can conduct bench trials with little difficulty.³⁰ Another pandemic, one involving easy transmission of a virus, could make jury trials even rarer.

The absence of jurors from our courthouses for lengthy periods of time can have profound effects. The Constitution guarantees the right to a jury trial in felony cases and in many civil cases.³¹ The Sixth Amendment also provides criminal defendants with the right to a “speedy and public trial.”³² But many governments, including the State

(Univ. of Ill. 2021), www.uillinois.edu/shield [<https://perma.cc/3ZJN-NW5K>] (last accessed Oct. 4, 2021).

²⁷ U.S. DIST. CT. FOR THE N. DIST. OF ILL., SUMMARY OF NORTHERN DISTRICT OF ILLINOIS JURY TRIAL PLAN (July 29, 2020), https://www.ilnd.uscourts.gov/_assets/_news/Jurytrial_summary_FINAL.pdf [<https://perma.cc/58R3-RWKP>]; see also COVID-19 Judicial Task Force, *Report of the Jury Subgroup: Conducting Jury Trials and Convening Grand Juries During the Pandemic*, U.S. CTS. (June 4, 2020), https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf [<https://perma.cc/3W5Q-AA9S>] (offering recommendations for federal courts to consider before resuming jury trials); Alanna Durkin Richer, *Courts Get Creative to Restart Jury Trials Amid Pandemic*, WASH. POST (July 15, 2020), https://www.washingtonpost.com/health/courts-get-creative-to-restart-jury-trials-amid-pandemic/2020/07/15/b0c97e10-c6ad-11ea-a825-8722004e4150_story.html [<https://perma.cc/M7CN-XGA2>].

²⁸ See, e.g., Benjamin Weiser, *Trial By Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html> [<https://perma.cc/U2RG-SMF>]; see generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

²⁹ See Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 145–46 (2009) (concluding that the settlement rate in two federal district courts was approximately 67 percent between 2001 and 2002).

³⁰ See, e.g., *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm’n*, 470 F. Supp. 3d 735, 741 (E.D. Mich. 2020) (finding that the pandemic amounted to “compelling circumstances” justifying conducting an entire bench trial via videoconference under Fed. R. Civ. P. 43(a)).

³¹ U.S. CONST. amends. VI, VII.

³² U.S. CONST. amend. VI. Nonetheless, courts have generally rejected speedy trial challenges. See *Barker v. Wingo*, 407 U.S. 514, 533–34 (1972) (holding that a defendant’s right to a speedy trial was not violated where a five-year delay caused “minimal” prejudice and the defendant “did not want a speedy trial”).

of Illinois, have suspended so-called speedy trial acts during the pandemic.³³ In Cook County, Illinois, there were no jury trials at all from March of 2020 until the spring of 2021. As a result, some nine thousand people were in jail or on electronic monitoring while awaiting trial—almost one thousand more people than at the same time the previous year.³⁴ Such delays raise significant constitutional concerns for the rights of the accused.³⁵

Most defendants facing criminal charges do want a jury trial. They believe that their odds are improved when the prosecution is required to convince twelve persons, not just one, of guilt beyond a reasonable doubt.³⁶ Civil litigants are equally passionate. Most individual plaintiffs who believe they have been wronged also believe their story will be persuasive to a group of their fellow citizens.³⁷

We trial judges love jury trials as well. Picking a jury can be a challenge. In a case involving ugly facts or technical complications, or one that will consume several days, potential jurors can be reluctant or apprehensive or resentful. But things nearly always change during the course of jury selection. Jurors quickly recognize the importance of their own role in a jury trial. They recognize that they are capable of that important work, and the idea that somebody might think otherwise becomes vaguely insulting. Jurors who are chosen and seated in the box seem to respond physically, sitting up straighter, paying more attention. As lawyers who have conducted trials learn, often to their chagrin, the jurors see and hear everything. Particularly for an experienced judge, the opportunity to simply preside, knowing the hard decision will be made by jurors, is very satisfying.

For me, the jury deliberation process is genuinely inspiring. I can think of no process like it in American society. The twelve jurors nearly

³³ SUP. CT. ILL., IN RE: ILLINOIS COURTS RESPONSE TO COVID-19 EMERGENCY/IMPACT ON TRIALS (Apr. 3, 2020), <https://courts.illinois.gov/SupremeCourt/Announce/2020/040320.pdf> [<https://perma.cc/EH8A-ALBZ>].

³⁴ Patrick Smith, *A Year with No Jury Trials Has 'Exposed Every Weakness That Exists' in the Cook County Court System*, WBEZ CHI. (Dec. 29, 2020), https://www.wbez.org/stories/a-year-with-no-jury-trials-has-exposed-every-weakness-that-exists-in-the-cook-county-court-system/52942d72-857b-4833-ae0f-aac1ad89759c?utm_source=email&utm_medium=referral&utm_campaign=WebShare [<https://perma.cc/2Y6Q-R2Z8>].

³⁵ See, e.g., Jessica A. Roth, *The Constitution Is On Pause in America's Courtrooms*, ATLANTIC (Oct. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/constitution-pause-americas-courtrooms/616633/> [<https://perma.cc/UEG8-2HBM>].

³⁶ In fiscal year 2018, 88 percent of criminal defendants who went to trial had a jury trial. See John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> [<https://perma.cc/KV4V-B5RG>]. The data suggests, ironically, that defendants fare better in bench trials, where they are acquitted at a much higher rate (38 percent) than jury trials (14 percent). *Id.*

³⁷ Galanter, *supra* note 28, at 517–18.

always have little in common. They come from across the political spectrum. They are evangelical Christians and atheists, gun-rights advocates and the reverse, persons with PhDs and high school dropouts, business executives and struggling artists. Yet they spend hours or days listening to evidence and then sit by themselves in a small room to talk about what they have heard. Despite their differences, jurors nearly always reach a decision they can all live with. They walk back into the courtroom as a team, led by the foreperson who has the verdict. Jurors do not always enjoy the process. But so very often, they develop a respect for it. They come away from it with an understanding of the procedures and some of the reasons for them. Some appear even to have learned the rules of evidence. Having invested their own time in the trial process, jurors come to believe that, if not perfect, the process is a fair one.

The importance of this cannot be overstated. Our nation suffers from a remarkable absence of civic education and understanding. Lawyers are the target of suspicion and cynicism, and judges can be as well.³⁸ The third branch of government functions well only on the strength of the nation's respect for it. The involvement of jurors in reaching decisions is a key component in promoting that respect. If this pandemic, or the next one, makes jury trials an even more rare feature of our jurisprudence, the courts as an institution will need to fill the gap in public education in a way that requires them to abandon the convenient detachment that many judges treasure.

IV. "FLEXIBILITY" AND REMOTE WORK

Courthouses without juries are much quieter places. When hearings take place only on video screens, we can be flexible about where and how those hearings take place. As this pandemic, or the next one, pushes us further in that direction, it will also push us further in the direction of flexibility with work locations and working hours for our staffs. The change is notable in my own chambers. We are physically in the courthouse only about half of the time, and even then, I see my own law clerks and assistant for just a few moments each day. I don't go to lunch or out for coffee with my colleagues or my staff. I have always been flexible about work hours, but now it matters even less when people are doing their work so long as the work gets done.

³⁸ Tragically, a disgruntled lawyer attacked Judge Esther Salas's family earlier this year. William K. Rashbaum, *Misogynistic Lawyer Who Killed Judge's Son Had List of Possible Targets*, N.Y. TIMES (July 25, 2020), <https://www.nytimes.com/2020/07/25/nyregion/roy-den-hollander-esther-salas-list.html> [https://perma.cc/R742-XSVR].

Flexibility about work hours should be a positive thing for lawyers. First, flexibility could mean doing less. For too long, the practice of billing clients on an hourly basis for legal work has created perverse incentives. Lawyers are rewarded for devoting hours and days of time to projects for which they can then invoice the very people to whom they owe fiduciary duties. If the pandemic pushes the law in a different direction, with respect to billing patterns or work expectations, this will be welcome fallout. Young lawyers in high-end firms nearly always tell me they would gratefully trade more time for a portion of their large salaries. In any event, in a COVID-19 era, we will have to look unfavorably on people who refuse to take time off for illness.

Flexibility may also mean that there are no limits to when or where the work is done. This, too, could be a positive change, and certainly one the judiciary would embrace in the event of another pandemic. Lawyers and staff need not commute to the office every day, or even any day. With a reliable Wi-Fi connection, effective work and instant communication is possible regardless of where we are living. Some evidence suggests an effect on living patterns already—that is, people moving from city locations to suburbs or even out of state.³⁹ If commuting is not a daily occurrence, then living close to the office, or close to public transportation, may be less necessary or even desirable. The courts, like other legal institutions, will need to be able to function nimbly, relying on staff who are always available to work online but not at all available to be physically present in the workplace.

There are downsides, as well. The result of flexibility may also be that work hours are twenty-four seven, and there is no freedom from the phone and e-mail. School systems across the nation have developed remote or at least partially remote class schedules. I understand children in Minnesota are aggrieved by this; they recognize that if the school district can direct, on any given day, that classes take place remotely, there may never again be another “snow day.” So, too, in the legal practice, it may be that, because nobody needs to come to the office to work, everyone will be expected to be working all the time when they are away from the office. That kind of “flexibility” serves no employee well and will have particularly harsh operation on parents who serve primary caregiving roles—very often, women.⁴⁰ The courts do not control what happens in private law practice. But the courts, and all legal

³⁹ See, e.g., Milan Polk, *Young People Across the Country May Be Moving Due to COVID-19, but It's Less Clear Whether Chicago Millennials Are Following Suit*, CHI. TRIB. (Aug. 13, 2020), <https://www.chicagotribune.com/real-estate/ct-re-millennials-moving-from-chicago-covid19-20200813-4wy7s3oma5ampovgorjrdsfrd4-story.html> [https://perma.cc/HXQ3-WG2Q].

⁴⁰ See, e.g., Nicole Bateman & Martha Ross, *Why Has COVID-19 Been Especially Harmful for Working Women?*, BROOKINGS INST. (Oct. 2020), <https://www.brookings.edu/essay/why-has-covid-19-been-especially-harmful-for-working-women/> [https://perma.cc/UX8M-QP9R].

employers, must recognize and make room for circumstances that interfere with standard expectations. When schools close suddenly, parents may not be able to work as quickly or as effectively.

This pandemic has had significant effects on the operations of the judiciary. Our large courthouses stand largely empty, but that does not mean they are no longer necessary. We will continue to find ways to conduct trials in the future. For now, the need for social distancing confirms the requirement of the additional space. Working remotely changes the dynamic in the courthouse.

V. FUTURE TRENDS

Before closing, let me spend a few pages on a potpourri of effects that the challenges we are facing will have on litigation and law practice.

For young lawyers, a very significant one relates to the social world. There is a process of socialization in any profession, and of course that is true in the law. Young lawyers make friends with one another, observe patterns of behavior on the part of more experienced colleagues, and have the opportunity to recognize and choose the types of lives they want to lead. They chat over coffee in law office corridors or grab a drink together after work. Practicing law from a kitchen table or a bedroom works, but it carves out aspects of professional life in large and subtle ways. Bar associations and inns of court are struggling to attract members, even though in some ways these organizations are needed now more than ever. New lawyers are more imaginative than we are, and they will need to make an effort to learn the norms of this profession in very different ways.

A pandemic will change other procedures. We have seen a sea change in the way people vote in the United States. In 2020, there were record numbers of mail-in ballots,⁴¹ and I myself voted early for the first time in my life. An election-related issue that came before me personally involved the practice in Illinois of requiring candidates for many offices to collect signatures on nominating petitions.⁴² Suddenly, in March, when the activity traditionally gets under way, nobody was going anywhere, and the idea of standing outside a grocery store, thrust-

⁴¹ Barbara Sprunt, *93 Million and Counting: Americans Are Shattering Early Voting Records*, NPR (Nov. 1, 2020), <https://www.npr.org/2020/10/26/927803214/62-million-and-counting-americans-are-breaking-early-voting-records> [<https://perma.cc/33BK-U7VC>].

⁴² See Rebecca Anzel, *No More Changes to Ballot Access: Federal Court Denies ISBE Request on Third-Party Candidates*, STATE J.-REG. (June 22, 2020), <https://www.sj-r.com/story/news/politics/elections/state/2020/06/22/no-more-changes-to-ballot-access-federal-court-denies-isbe-request-on-third-party-candidates/114309732/> [<https://perma.cc/9UXQ-HBAA>].

ing a petition into the hands of a would-be shopper, became unthinkable. What power does the court have, if any, to change the petition requirement?

The pandemic has challenged me to brush up on things I learned about in law school but haven't thought about once since. For example, *force majeure*—the ancient doctrine that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, or act of God, renders performance impossible. Does a pandemic count? We are finding out.⁴³

I expect that there will be some changes in the law itself. Consider the doctrine of *forum non conveniens*. Essentially, under that doctrine, we consider motions to transfer a case from one district court to another “[f]or the convenience of parties and witnesses.”⁴⁴ For at least ten years, that doctrine has made very little sense. Parties and witnesses aren't coming to court at all. They're all on screens. With the minor issue of time zones, a party can participate effectively in court proceedings and in discovery from pretty much anywhere in the world. Absent a forum selection clause, I would expect that transfers from one district to another will become rarer than they already are.

Let's consider jurisdictional questions, as well. We still get motions to dismiss cases for lack of personal jurisdiction.⁴⁵ Plenty of money and time are thrown at the question of whether a person or business has “availed themselves of the state's protections” or “purposefully directed his or her activity towards the state's residents.”⁴⁶ In a world where so much happens in the cloud, what does this mean? What internet activity counts?

⁴³ See, e.g., Travis S. Hunter & Renée Mosley Delcollo, *Is the Force Majeure with You?*, ABA (July 6, 2020), <https://www.americanbar.org/groups/litigation/committees/commercial-business/articles/2020/is-the-force-majeure-with-you-coronavirus-contracts/> [https://perma.cc/9VRP-HVGU].

⁴⁴ 28 U.S.C. § 1404(a).

⁴⁵ See FED. R. CIV. P. 12(b)(2).

⁴⁶ I paraphrase here from the Supreme Court's articulation of the standard for specific personal jurisdiction. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (“Where a defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws, it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State. In other words, submission through contact with and activity directed at a sovereign may justify specific jurisdiction in a suit arising out of or related to the defendant's contacts with the forum.”) (internal citations and quotation marks omitted); see also *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026–30 (2021) (rejecting automobile manufacturer's attempt to impose a causation requirement for specific personal jurisdiction, such that a state would lack specific jurisdiction over a defendant unless the defendant's conduct in the forum gave rise to the plaintiff's claims).

The Confrontation Clause of the Sixth Amendment is bedrock constitutional doctrine.⁴⁷ In an era when so much evidence is gathered via video and phone “pings,” what does it mean to truly be confronted by a witness? With respect to witness testimony, are there circumstances in which the right of confrontation is satisfied even when a witness is heard via remote platform?

The pandemic has generated issues we have never addressed before: free speech issues; religious discrimination issues; balancing the health and safety of detainees against safety of the community; and balancing legitimate expressive activity against the need for order. These challenges will be with us for months and years to come. If we think of these challenges as part of the war on COVID-19, and that another pandemic may lie in the future—well, generals are always prepared to fight the last war, but preparing to fight the last war is not necessarily a foolish thing to do. If military technology is stable, the lessons of the last war probably retain their authority. And so, too, the legal system.

Let me end my remarks with words from Mayor Harold Washington. This is what he said in an inaugural address in 1983—and I believe it’s still true today: “Most of our problems can be solved. Some of them will take brains, some of them will take patience, and all of them will have to be wrestled with like an alligator in the swamp.”⁴⁸ Like those of you reading this, I have brains, and I try to have patience. I am looking forward to having many future lawyers fighting the alligators in the swamp with me.

⁴⁷ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

⁴⁸ Harold Washington, Mayor, Chi., Inaugural Address (Apr. 29, 1983), in *Mayor Harold Washington Inaugural Address, 1983*, CHI. PUB. LIBR., <https://www.chipublib.org/mayor-harold-washington-inaugural-address-1983/> [<https://perma.cc/3PRB-GMP3>] (last visited Oct. 4, 2021).