

# Criminal Court Reopening and Public Health in the COVID-19 Era

## NACDL Statement of Principles and Report

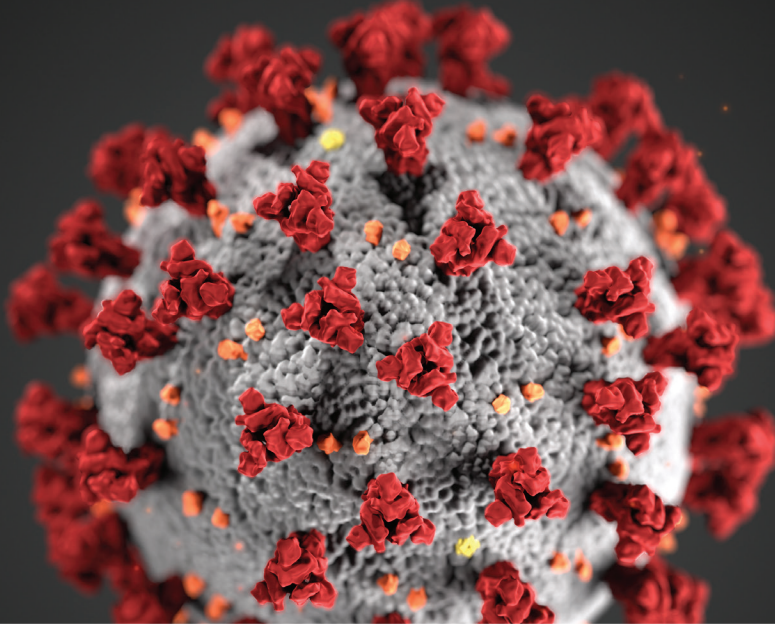


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NATIONAL  
ASSOCIATION  
OF CRIMINAL  
DEFENSE LAWYERS



NACDL  
FOUNDATION FOR  
CRIMINAL  
JUSTICE

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## NACDL Statement of Principles and Report

Adopted by the NACDL Executive Committee

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## **Summary of Core Principles for Reopening Courts**

- I. In-Person Proceedings Must Be Certified by Independent Medical Experts to Present Minimal Risk of COVID-19 Transmission**
- II. High-Risk Individuals Should Not be Required to Participate in In-Court Proceedings in Which There is a Risk of Infection in the Courthouse, Nor Should That Person or the Accused Suffer Any Penalty or Loss of Rights for Declining to Participate**
- III. Any Measures Implemented to Address the Pandemic Must Be Limited to the Duration of the Pandemic and Tailored to Meet an Articulated Public Health Need**
- IV. Criminal Proceedings Require That Conditions Are Restored That Ensure Defense Counsel Can Meet Their Sixth Amendment Obligations, Including the Conditions Necessary for Robust, Ethical Attorney-Client Relationships**
- V. Criminal Proceedings Require That Conditions Are Restored That Ensure Effective Representation by Conflict-Free Defense Counsel**
- VI. Constitutional Rights Must Not Be Abridged**
- VII. Use of Virtual Mechanisms Must Be Temporary, Limited, and Consistent with Constitutional Rights**
- VIII. Use of Virtual Mechanisms Requires the Informed and Voluntary Consent of the Accused Based on a Robust Attorney-Client Relationship**
- IX. Any Measures Implemented to Address the Pandemic Must Not Exacerbate the Well-Recognized Historic Failures of the Criminal Legal System**
- X. Courts Should Use Pre-Trial Release and Other Mechanisms to Minimize the Pressures on the Accused During the Pandemic, Including Affording an Accused the Unilateral Right to Elect a Bench Trial Where that Right Does Not Already Exist**

# Introduction

NACDL recognizes that the unprecedented public health risks caused by the COVID-19 pandemic present enormous challenges for court operations especially in criminal matters where liberty, and in some venues, life are at stake.<sup>1</sup> There is an inherent conflict between core constitutional rights and public safety. A highly infectious and potentially deadly disease, which experts in the medical profession have concluded spreads most virulently when people are in close proximity in enclosed spaces for extended periods, makes business as usual in the nation's courthouses impossible.<sup>2</sup>

From a legal perspective, there can be no justice when fundamental constitutional rights are suspended or curtailed.<sup>3</sup> NACDL members have reacted with care and courage by seeking release for incarcerated individuals who face increased risk of COVID-19 infection by virtue of age, race, pre-existing medical conditions, conditions of confinement, or other factors. Despite personal risk of exposure and adverse economic circumstances, NACDL members have remained steadfastly committed to their clients and to the Constitution to ensure that the fear and panic caused by this pandemic does not undermine our shared values of liberty and fairness.<sup>4</sup>

While the medical profession is reporting evidence of a resurgence of the virus and warning that a second wave of deadly infection is expected for autumn 2020, the nation's courts press forward with tentative reopening. It is imperative that leadership of the judiciary and other stakeholders understand the implications for the criminal legal system and adhere to core principles going forward.

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<sup>1</sup> NACDL has issued several statements to address the impact of the COVID-19 pandemic on the criminal justice system. See March 4, 2020, NACDL Statement: [Nation's Criminal Defense Bar Calls for Prompt Implementation of Comprehensive, Concrete, and Transparent COVID-19 Coronavirus Readiness Plans for Nation's Prisons, Jails, and Other Detention Facilities](#); March 19, 2020, NACDL Statement of Principles and Further Call to Action Concerning COVID-19 and America's Criminal Justice System; May 9, 2020, NACDL Supplemental Statement of Principles and Further Call to Action Concerning COVID-19 and America's Criminal Justice System: Avoiding Criminalization in Confronting COVID-19 (via May 11, 2020, NACDL News Release); May 27, 2020, Joint Statement: [Proposed Public Health and Public Safety Pathways for Criminal Justice System Responses to COVID-19 \(May 27, 2020\)](#) ("The principles below represent pathways for institutionalizing approaches that maintain high levels of health and safety during this unprecedented public health crisis and beyond.") (Read the joint news release [here](#).)

<sup>2</sup> <https://nypost.com/2020/04/28/coronavirus-in-ny-3-judges-die-almost-170-court-workers-infected/>;  
<https://www.nydailynews.com/coronavirus/ny-coronavirus-pandemic-unprepared-nyc-courts-20200526-fe2zknj7cbgutpjd3vtfruiiq-story.html>;  
<https://www.latimes.com/california/story/2020-05-28/los-angeles-county-public-defender-dies-from-covid-19>

<sup>3</sup> <https://eji.org/news/covid-19s-impact-on-people-in-prison/>

<sup>4</sup> As Attorney General William Barr stated in his memorandum of April 27, 2020, "[T]he Constitution is not suspended in times of crisis. We must therefore be vigilant to ensure its protections are preserved, at the same time that the public is protected."

# The Inherent Tension

The COVID-19 pandemic presents unprecedented health risks in every aspect of public life. These unprecedented public health risks pose enormous challenges for court operations especially in criminal matters where the accused, presumed innocent, are often subjected to pre-trial detention in crowded and unsanitary conditions. According to infectious disease experts, these deadly risks are maximized when human beings are in close proximity, not only in pre-trial detention, but in the conditions and activities common to courthouses across the country – enclosed spaces requiring close proximity for extended periods. In-person court proceedings pose serious risks to every human being involved directly in the proceedings and to their families and communities – risks which public health experts recognize to be greater for specific communities including people of color.

Compromising accused persons’ constitutional and fundamental rights -- like the right to counsel, the right to confront witnesses, the right to due process, and the right to a speedy and public trial by a jury culled from a fair cross section of the community<sup>5</sup> -- for the sake of public safety results in grave injustice. NACDL recognizes that there is no way to fully reconcile these core constitutional rights with the public safety considerations arising from this pandemic. There are, however, fundamental principles that can minimize the constitutional burden while protecting the public and all the stakeholders who must come together for our courts to function.<sup>6</sup>

## Explication of Core Principles for Reopening Courts

1. **In-Person Proceedings Must Be Certified by Independent Medical Experts to Present Minimal Risk of COVID-19 Transmission.** In-person court proceedings should not be conducted unless independent medical experts certify that the conditions of the courthouse and in the community present a minimal risk of COVID-19 transmission. The determination of public health needs and remedial action to facilitate in-person proceedings must be implemented only under independent medical supervision certifying that the measures ensure the safety of all participants.

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<sup>5</sup> Dubin, Josh, *COVID-19’s Next Victim? The Rights to the Accused* (to be published in *The Champion Magazine*, June 2020).

<sup>6</sup> In developing these principles, NACDL relied on the expertise provided by leading experts including Dr. Laura J. Rasmussen-Torvik (PhD, MPH, FAHA, Associate Professor Chief, Division of Epidemiology Department of Preventive Medicine Center for Genetic Medicine Northwestern University Feinberg School of Medicine); Michele Barry, MD, FACP, Drs. Ben and A. Jess Shenson Professor, Senior Associate Dean, Global Health, Director Stanford University Center for Innovation in Global Health, Professor of Medicine and Senior Fellow at the Woods Institute and The Freeman Spogli Institute; Dr. Beth Redbird, PhD Stanford University, Assistant Professor of Sociology, Northwestern University Department of Sociology; Joshua Dubin, Esq., Dubin Research Consulting, *COVID-19’s Next Victim? The Rights to the Accused* (to be published in *The Champion Magazine*, June 2020).

2. **High-Risk Individuals Should Not be Required to Participate in In-Court Proceedings in Which There is a Risk of Infection in the Courthouse, Nor Should That Person or the Accused Suffer Any Penalty or Loss of Rights for Declining to Participate.** Persons deemed high risk for severe illness from COVID-19 should not be required to participate in in-person court proceedings. This includes, judges, lawyers, defendants, necessary staff, and witnesses. This group also includes persons who live with or have primary caretaker duties to at-risk individuals. No person excluded from participation for the foregoing reasons shall suffer any penalty or loss of rights.
3. **Any Measures Implemented to Address the Pandemic Must Be Limited to the Duration of the Pandemic and Tailored to Meet an Articulated Public Health Need.** Any limitation or accommodation implemented to realize court operations must be limited to the duration of the COVID-19 pandemic and must be narrowly tailored to meet an articulable public health need.
4. **Criminal Proceedings Require That Conditions Are Restored That Ensure Defense Counsel Can Meet Their Sixth Amendment Obligations, Including the Conditions Necessary for Robust, Ethical Attorney-Client Relationships.** Criminal proceedings require a robust attorney-client relationship which, in turn, requires sufficient opportunities for client and counsel to confer (for example, to review evidence or to discuss charges and potential defense investigation or defenses). Any limitation or accommodation implemented to continue court operations during the COVID-19 pandemic must not impede defense counsel's compliance with lawyer's ethical obligations under relevant Rules of Professional Conduct (RPC) including RPC 1.1, competence of counsel, RPC 1.6 confidentiality, RPC 1.4 lawyer-client communication, RPC 1.3 diligence, and RPC 1.7 conflict of interest and must be consistent with ABA, state, and local bar association's ethics opinions.<sup>7</sup> Conflict-free representation is not possible where defense counsel are placed at risk of infection and fear contagion. Fear of transmission on the part of client or counsel fatally undermines the trust and communication necessary to establish and maintain an attorney-client relationship. The accused cannot make intelligent and informed choices, including the decision to plead guilty, absent such a relationship.
5. **Criminal Proceedings Require That Conditions Are Restored That Ensure Effective Representation by Conflict-Free Defense Counsel.** Criminal proceedings require that defense counsel are able to meet their Sixth Amendment obligations including defense investigation and representation free of conflicts including balancing personal health concerns against the needs of representation. Such representation is not possible where defense counsel and others, such as the families and staff of defense counsel, are placed at

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<sup>7</sup> Conflict-free representation is not possible where defense counsel is placed at risk of infection and fear contagion.

risk of infection. Fear of contagion during counsel/client meetings or court, on the part of defense counsel, creates a conflict with the duty of zealous advocacy.<sup>8</sup>

6. **Constitutional Rights Must Not Be Abridged.** Any limitation or accommodation implemented to continue court operations during the COVID-19 pandemic must not abridge the constitutional, statutory, or customary rights of an accused person absent a voluntary and informed waiver by such person with the assistance of counsel. As suggested above, any such waiver cannot be made absent a robust attorney-client relationship. For example, and perhaps most obviously, any hearing in which a witness wears a mask for health-related reasons, does not allow the factfinder to evaluate the credibility of the witness and thus undermines due process and right to confrontation. Similarly, if the risk of community transmission impedes the capacity of the defense team to conduct investigation including witness interviews, effective assistance of counsel is foreclosed.
7. **Use of Virtual Mechanisms Must Be Temporary, Limited, and Consistent with Constitutional Rights.** The use of virtual mechanisms and other remedial processes in lieu of traditional in-person hearings in criminal cases must be temporary, narrowly tailored to specific needs, and consistent with constitutional, statutory, and customary rights.
8. **Use of Virtual Mechanisms Requires the Informed and Voluntary Consent of the Accused Based on a Robust Attorney-Client Relationship.** The use of virtual mechanisms in lieu of in-person hearings in criminal cases may only be employed with the informed and voluntary consent of the accused and with the assistance of counsel and adequate other safeguards.
9. **Any Measures Implemented to Address the Pandemic Must Not Exacerbate the Well-Recognized Historic Failures of the Criminal Legal System.** Any limitation or accommodation implemented to continue court operations during the COVID-19 pandemic must not exacerbate the historic failures of the criminal legal system including the erosion of the right to trial (through coercive plea bargaining), structural discrimination based on race and socio-economic status, excessive use of pre-trial detention, and institutional inequalities including underfunded public defender services.
10. **Courts Should Use Pre-Trial Release and Other Mechanisms to Minimize the Pressures on the Accused During the Pandemic, Including Affording an Accused the Unilateral Right to Elect a Bench Trial Where that Right Does Not Already Exist.** Recognizing that many accused persons will be forced to choose between various fundamental rights and the right to a speedy trial, prosecutors and courts should support to the maximum extent possible mechanisms minimizing extended pretrial detention during the COVID-19 pandemic, including liberal pretrial release and allowing for accused

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<sup>8</sup> The defense function requires face-to-face visits, significant client contact, and investigation including witness interviews into a population so gripped in panic that the airline industry has shut down. The risk of passing along the virus to clients and others currently makes this work – the bedrock of effective defense – impossible.



persons to knowingly and unilaterally waive their right to trial by jury (in jurisdictions where no such right exists) and proceed to trial by judge.

## Discussion

### **I. Reopening Must Be Based on Science, Must Be Made Under Independent Medical Supervision, and Must Be Limited to the Duration of the Pandemic (Principles 1, 2, and 3).**

COVID-19 is characterized by four documented characteristics. First, it is a highly infectious respiratory disease. Second, the manner of transmission is primarily in droplets emitted by individuals through breathing, talking, coughing, and sneezing.<sup>9</sup> Third, experts agree that the only effective way to minimize transmission is for people to remain distant, keep their mouths and noses covered, and avoid congregating in confined spaces. Fourth, while the disease can be serious and potentially fatal for people of any age, including those in previously excellent health, irrefutable evidence demonstrates that there is an extremely high morbidity rate for older people and people with a wide range of underlying conditions such as hypertension, diabetes, moderate to severe asthma, serious heart conditions, and persons who are immunocompromised.<sup>10</sup> It also appears to affect people of color more severely.<sup>11</sup> These characteristics require expert analysis to minimize the potential for exposure.<sup>12</sup>

Given the nature of the disease and the manner of transmission, court proceedings, especially jury trials, present a grave risk to all participants, including the public which has a fundamental right to attend. Courthouses and courtrooms in this country are remarkably similar in style and structure and, especially in populations centers, hundreds of individuals enter and remain in the courthouse daily. By design, many criminal courtrooms are cramped and windowless spaces or adorned with windows that do not open. Criminal jury trials for even a single accused routinely includes 25 or more participants confined to a single room for several hours each day.<sup>13</sup> Thus, courthouses and

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<sup>9</sup> See <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2765641> (High transmissibility of COVID-19 before and immediately after symptom onset suggests that finding and isolating symptomatic patients alone may not suffice to interrupt transmission, and that more generalized measures might be required, such as social distancing.); Appendix A (Dr. Michele Barry, M.D., FACP).

<sup>10</sup> <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

<sup>11</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> (The effects of COVID-19 on the health of racial and ethnic minority groups is still emerging; however, current data suggest a disproportionate burden of illness and death among racial and ethnic minority groups.).

<sup>12</sup> See, e.g., guidance provided by the Centers for Disease Control available at <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> and <https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>.

<sup>13</sup> Participants in a criminal jury trial include *at a bare minimum* the accused, a defense lawyer, a prosecutor, a case agent, a judge, judicial clerk, a court reporter, two court security officers, numerous witnesses, family members in

courtrooms typify settings in which the virus spreads most efficiently.<sup>14</sup> According to infectious disease experts, these deadly risks are maximized when human beings are in close proximity, not only in pre-trial detention, but in the conditions and activities common to courthouses across the country – enclosed spaces requiring close proximity for extended periods.<sup>15</sup>

Any temporary mechanisms for reopening in-person hearings and trials must be based solely on and consistent with scientific evidence and independent medical judgment and certified by appropriate local, state, or federal medical expert. Best practices in this regard need to prioritize evidence-based health and safety measures and the preservation of fundamental rights over the ministerial needs of docket management. Courts must recognize the criminal accused’s right to speedy trial might be subjugated based on the current state of affairs including lack of a vaccine, substantial rates of infection and mortality, and economic hardship. In the event that present scientific and medical concerns make in-person jury trials impossible, courts should explore mechanisms, including pre-trial release, that do not shift the burden of delay onto the accused who is presumed innocent. Scientific and medical opinion on transmission of the coronavirus evolves daily but case studies support a strong consensus that social interaction can be safe in outdoor settings allowing for unrestricted airflow as well as social distancing and the use facial coverings. American criminal jury trials, of course, represent just the opposite: indoor, contained settings in which multiple individuals congregate for many hours while some of these individuals engage in projected, high-volume speech – conditions ideal for transmission and panic.<sup>16</sup> For these reasons, NACDL does not believe that it is possible to protect health and safety in the courtroom while protecting constitutional rights of accused.

NACDL has consulted with preeminent infectious disease and epidemiological experts who have opined that the risk of person-to-person transmission in the trial courtroom setting remains high and that, apart from the risk of exposure, many of our friends and neighbors suffer from varying degrees of “COVID panic.” Prophylactic measures such as six-foot social distancing and plexiglass dividers are considered “helpful” but do not and cannot overcome normal atmospheric transmission of the virus in settings, typical of trials, of 20 or more persons sharing indoor space

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attendance, and at least fourteen jurors. Most trials also include paralegals and numerous accused which translates into more lawyers and paralegals.

<sup>14</sup> See Appendix C (Laura Rasmussen-Torvik, PhD, MPH).

<sup>15</sup> Court processes require speaking at high volume which is a substantial and documented mechanism of transmission. Flushing toilets, moreover, aerosolizes the virus. Other mechanisms of transmission in courthouses include passing documents or sharing elevators. As discussed below, transportation to and from courthouses is also an issue as is the need for clients to discuss their cases with defense counsel, which requires face-to-face extended meetings to discuss charges, evidence, defenses, and other issues. The attorney-client relationship is the foundation for the functioning of a constitutionally adequate criminal process.

<sup>16</sup> The above description is, of course, incomplete. Potential jurors, witnesses, lawyers and others will have to navigate security lines, elevators, waiting rooms, and hallways – each situation posing additional risks and making interactions more tense and unpredictable than non-pandemic situations.

for hours at a time.<sup>17</sup> Even high-volume recycling of air does not eliminate risk given that air currents will expose individuals based on their location relative to intake and distribution points. Consensus exists that cloth face covering is recommended in public settings like a courtroom but that N95 masks are preferable.<sup>18</sup> Because of these concerns along with lack of a vaccine, rapid testing, and asymptomatic transmission,<sup>19</sup> NACDL submits that resuming criminal jury trials – particularly in areas of significant community-based transmission – would not only be reckless and irresponsible, but would also undermine the truth-seeking purpose of trials given the well-documented and understandable fear, panic, and uncertainty on the part of jurors, witnesses, court staff, deputies, judges, prosecutors, and defense counsel. Based on scientific studies regarding the potential for transmission as well as human reactions to that potential, NACDL submits that courts cannot ensure that juries reflect a fair cross section of the community given varying rates of infection, mortality, and fear in subsets of our society defined by race, socio-economic status, and perhaps even political affiliation.

## **II. Measures Designed to Facilitate Reopening Cannot Be Implemented Unless Conditions Are Restored for Defense Counsel to Fulfill Their Sixth Amendment Functions (Principles 4 and 5).**

During the COVID-19 pandemic, most courts have found ways to operate safely while attempting to allow limited essential proceedings to continue. Virtual hearings have been the preferred mechanism. NACDL submits that this period of social isolation has compromised attorney-client relationships particularly with in-custody clients. Attorney-client relationships are a condition for productive and constitutional court proceedings. Courts cannot consider reopening without directly addressing the issues of the criminal accused and of the incarcerated accused including the ability to meet with and assist defense counsel, “attend” virtual hearings, meaningfully participate in virtual hearings, and the potential for virtual hearings to impede the development of an attorney-client relationship.

For example, defense counsel currently have little or no opportunity to meet privately with their clients. This limitation undermines the establishment of the attorney-client relationship and, even where that relationship predates the pandemic, this limitation undermines the work of defense counsel. Further, these issues are not remedied by facilitating courthouse consultations. A meaningful attorney-client relationship requires that defense counsel be able to perform essential Sixth Amendment functions including pretrial investigation which includes spending time with the

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<sup>17</sup> See, e.g., [https://wwwnc.cdc.gov/eid/article/26/8/20-1274\\_article](https://wwwnc.cdc.gov/eid/article/26/8/20-1274_article) (threat posed by SARS-CoV-2 with its propensity to cause large outbreaks among persons in office workplaces); <https://www.pnas.org/content/early/2020/05/12/2006874117> (ordinary speaking -- typical in a jury trial setting -- are increasingly considered to be a likely mode of SARS-CoV-2 transmission); Appendix A (Dr. Michele Barry, M.D., FACP).

<sup>18</sup> <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html> (cloth face covering especially important in areas of significant community-based transmission).

<sup>19</sup> [https://wwwnc.cdc.gov/eid/article/26/7/20-1595\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article) (discussing high infection rate of presymptomatic and asymptomatic COVID-19 patients).

client preparing social history, reviewing discovery, discussing pretrial and trial procedures, and discussing potential outcomes. As recognized by the ABA Criminal Justice Standards for the Defense Function,<sup>20</sup> these constitutionally mandated functions foster the relationship necessary to defend a case and, where appropriate, engage in plea bargaining.

### **III. Measures Designed to Facilitate Reopening Must Not Abridge Fundamental Constitutional, Statutory, or Customary Rights (Principles 6, 7, and 8).**

NACDL appreciates the temporary need to consider innovative solutions to navigate the COVID-19 pandemic but emphasizes that these mechanisms cannot be reconciled with Right of Confrontation at trial, and, in most cases, Due Process and Effective Assistance Rights in pre-trial processes. Processes being considered are requiring masks, moving trials to overlarge rooms to ensure social distancing, reducing the size of jury pools, and/or conducting proceedings virtually.<sup>21</sup> NACDL therefore submits that that alternative processes developed to allow court reopening during the pandemic cannot ever offend accused persons' civil liberties and can never replace in-person *criminal trial* processes. Alternative procedures may be used in pre-trial processes only with the knowing consent of the accused and upon a case-specific finding that the accused will not suffer any prejudice including infringement of the rights listed above as well as the Right to Equal Protection of Law.

Remedial measures such as virtual or "Zoom" trials offend the constitution in several respects. First, the Sixth Amendment guarantees the accused the fundamental right to confront their accuser.<sup>22</sup> Second, an accused person's right to due process and confrontation includes the right to be *present* at his trial. The Supreme Court has never recognized the constitutionality of a virtual criminal trial and has only allowed virtual witness testimony in the narrowest of circumstances.<sup>23</sup> Third, allowing virtual *voir dire* compromises the ability to get up-close and explore potential juror demeanor and bias as expressed through non-verbal communication.

Virtual mechanisms do not just undermine accused persons' rights discussed above but threaten to fundamentally alter the psychology of jurors.<sup>24</sup> Scientific studies support the proposition that

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<sup>20</sup> American Bar Association Criminal Justice Standards for the Defense Function, available at [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/).

<sup>21</sup> Dubin, Josh, *COVID-19's Next Victim? The Rights to the Accused* (to be published in *The Champion Magazine*, June 2020).

<sup>22</sup> In this respect, the Supreme Court has previously rejected the notion that the Confrontation Clause can be satisfied by virtual examination *Cf.* Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.) ("As we made clear in [*Maryland v.*] *Craig*, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence* – which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image.")

<sup>23</sup> See *Maryland v. Craig*, 497 U.S. 836 (1990).

<sup>24</sup> Dubin, at 19-20.

“proximity affects empathy.”<sup>25</sup> Thus, separating an accused person from the jury by virtual mechanisms (or plexiglass or mask for that matter) dehumanizes the person on trial and reduces juror empathy. What is more, jurors participating virtually will be deprived of the complete panoply of non-verbal cues used to assess witness credibility. Nonverbal communication encompasses 55% of communication, including eye contact, facial expressions, and body movements.<sup>26</sup> In person examination allows for jurors to measure the entirety of a witness’s non-verbal communication and not just a two-dimensional bust. Finally, virtual trials deprive accused persons of a fair trial because jurors will pay less attention to the testimony when observing via “Zoom” or other platform. Since the outbreak of COVID-19, multiple articles have been written about the infirmity of virtual business and social interaction.<sup>27</sup> Research has shown that Zoom calls drain participants’ energy, in part, because they are forced to focus more intently on conversations in order to absorb information due to the lack of non-verbal cues we normally rely upon.<sup>28</sup>

The ability of an accused person to secure an impartial jury gleaned from a fair cross-section of the community during the pandemic is also sharply curtailed. Vulnerable subsets – whether based on medical<sup>29</sup> or economic conditions – are particularly likely to be underrepresented in jury pools. This includes elderly persons, immunocompromised persons, and most troubling racial and ethnic minorities. Courts have already issued recommendations for resuming court operations that include limiting or suspending preemptory challenges and granting automatic deferrals of jury service to essential workers, jurors with vulnerable health conditions or living with those who are vulnerable to COVID-19 exposure, and jurors just returning to work after being furloughed, as a way to limit the number of potential jurors called to serve.<sup>30</sup> The CDC recently published a report

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 21.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 25.

<sup>29</sup> According to the CDC, nine categories of persons are at a higher risk for severe illness from COVID-19: people 65 years and older, people living in nursing homes or long-term care facilities, people with chronic lung disease or moderate or severe asthma, people who have serious heart conditions, people who are immunocompromised, people with severe obesity, people with diabetes, and people with chronic kidney disease undergoing dialysis, people with liver disease. CDC, “People Who Are at Higher Risk for Severe Illness,” available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

<sup>30</sup> Webinar, National Center for State Courts, May 22, 2020, “How state courts are using innovative technologies and responsible health and safety practices to resume jury trials.” Maricopa County, for example, anticipates resuming jury trials on June 18, 2020. To reduce the number of people in a court room, Maricopa County is considering a number of measures including temporarily reducing the number preemptory challenges; National Center for State Courts, *Managing Jurors and Jury Trials During COVID-19*, available at [http://www.ncsc-jurystudies.org/\\_data/assets/pdf\\_file/0023/8438/juries-covid-19-webinar.pdf](http://www.ncsc-jurystudies.org/_data/assets/pdf_file/0023/8438/juries-covid-19-webinar.pdf); Supreme Court of Arizona, *COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup Best Practice Recommendations*, May 1, 2020, pp. 12-20, available at [https://www.nccourts.gov/assets/inline-files/Arizona-Plan-B-Best-Practices-and-Recommendations-FINAL-5-1-2020.pdf?Ki3g3weoamBINzzqf39r0Bs.iUI\\_x9Cy](https://www.nccourts.gov/assets/inline-files/Arizona-Plan-B-Best-Practices-and-Recommendations-FINAL-5-1-2020.pdf?Ki3g3weoamBINzzqf39r0Bs.iUI_x9Cy); Indiana Supreme Court Office of Judicial Administration, *Resuming Operations of the Trial Courts, COVID-19 Guidelines for Indiana’s Judiciary*, May 13, 2020, p. 14; available at <https://www.in.gov/judiciary/files/covid19-resuming-trial-court-operations.pdf>;

that included race and ethnicity data from 580 patients hospitalized with lab-confirmed COVID-19 found that 45% of individuals for whom race or ethnicity data was available were white, compared to 59% of individuals in the surrounding community. However, 33% of hospitalized patients were black compared to 18% in the community and 8% were Hispanic, compared to 14% in the community. These data suggest an overrepresentation of Blacks and Hispanics among hospitalized patients and a disproportionate burden of illness and death among racial and ethnic minority groups.<sup>31</sup>

Recent sociological studies at Northwestern University further support a finding that the pandemic will cause an underrepresentation of women in jury pools. Hardship in the pandemic has been disproportionately experienced by women who are more likely to have lost their jobs, and are more likely to be caring for children, elders, or the ill.<sup>32</sup> The economic consequences of the pandemic have most significantly impacted the retail industry in which women are more likely to be employed. According to data from Northwestern's COVID-19 Social Change Survey, a nationally representative survey administered every week since early March, women are also more worried about becoming ill.<sup>33</sup>

Furthermore, in assessing the viability of alternative processes including virtual or remote hearings, courts must avoid placing an accused in a position in which s/he must elect between one set of rights to the detriment of others. For example, an accused who is detained pre-trial must not be compelled to choose between the right to a speedy trial (potentially motivated by threat of contagion in detention), on one hand, and the right to confront prosecution witnesses and be physically present and participate in the trial, on the other. Placing the accused in this structural quandary will contribute to coercive plea bargaining (and the trial penalty) and will, given relative rates of pre-trial detention, have a greater impact on the indigent and people of color. Moreover, this structural issue will lead to wrongful convictions and a plethora of post-conviction challenges.

In light of all of these factors and recognizing that all alternative processes implicate fundamental constitutional rights, it is axiomatic that the use of these devices under any circumstances may only take place when an accused person has been fully informed by qualified, conflict-free counsel and exercises a genuinely knowing and voluntary consent.

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Nebraska Administrative Office of the Courts and Probation, *COVID-19: Recovery and Reconstitution Guidance for the Trial Courts*, April 2020, p. 6, available at <https://www.nccourts.gov/assets/inline-files/Nebraska-COVID-19-Recovery-and-Reconstitution-Guidance.pdf?WN8nD.TOs6RSsEwyVpKY5qdL2QuMVt3n>.

<sup>31</sup> CDC, "CDC 24/7: Saving Lives, Protecting People," available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>.

<sup>32</sup> Appendix B, Report by Beth Redbird, PhD, Assistant Professor, Department of Sociology, Northwestern University (June 2, 2020) .

<sup>33</sup> *Id.*

#### **IV. Measures Designed to Facilitate Reopening Must Not Exacerbate the Historic Failures of the Criminal Legal System (Principles 9 and 10).**

Over the last decade, Americans across the spectrum have recognized that the criminal legal system has failed to fulfill broadly shared expectations. A broad spectrum has criticized the erosion of the right to trial through coercive plea-bargaining practices, excessive use of pre-trial detention, overcriminalization, and disparate treatment across race and socio-economic lines. Over this same period of time, Americans across the social and political spectrum have endeavored to redress the historic failings of the criminal legal system and, despite profound divisions in our society, have developed shared values and strategies for restoring faith in the criminal legal process. Any measures developed to deal with the pandemic cannot set us back in this necessary transformation.

With respect to Equal Protection, any proposal for court reopening must address the disproportionate impact on vulnerable groups including pre-trial detainees, people of color and other susceptible individuals and groups, and socio-economically disadvantaged groups and individuals. It is probable that historically well-funded institutional actors (USAOs, DA offices, etc.) could reap structural benefits from a technology driven court system compared to chronically underfunded public defender offices or court-appointed counsel (especially in underfunded state systems).<sup>34</sup>

To redress these concerns, courts should consider mechanisms that minimize the impact on the accused during the pandemic. Most importantly, courts can lessen the pressure on the accused by maximizing the use of pre-trial release and allowing accused to waive, unilaterally, the right to a jury trial. The former would reduce pressure to plead guilty to avoid pre-trial detention in unsafe conditions. The latter would, similarly, allow the accused to exercise the right to trial by minimizing the risk of exposure to participants in the process as well as the risk, discussed above, of jurors motivated by fear of exposure.

In fact, the pressure created by the pandemic suggests that courts should reconsider and remedy excessive use of pre-trial detention. Just as the pandemic has exposed inequalities in public health, it has further exposed the fact that courts routinely detain individuals before trial in lieu of practical, available, and safe mechanisms for pre-trial release. NACDL has previously reported that excessive pretrial detention has eroded the right to jury trial, exacerbated coercive plea bargaining practices, and caused the innocent to plead guilty.<sup>35</sup> These collateral consequences of unnecessary pretrial detention have fallen heaviest upon the indigent and communities of color.

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<sup>34</sup> In this respect, it is worth noting that local and state budgets, of course, are likely to be reduced in the near future. This eventuality will further undermine the capacity of underfunded defenders to enhance and employ technology to the same degree as other institutional actors.

<sup>35</sup> <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> (*The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*)



## Appendix A

### Questions Propounded to and Answers Provided by:

**Michele Barry, MD, FACP**

*Drs. Ben and A. Jess Shenson Professor, Senior Associate Dean, Global Health, Director Stanford University Center for Innovation in Global Health, Professor of Medicine and Senior Fellow at the Woods Institute and The Freeman Spogli Institute.*

**May 25, 2020**

### Questions

1. How is COVID-19 typically transmitted?

COVID 19 IS MOSTLY TRANSMITTED THRU COUGHING AND SNEEZING AND LARGE DROPLETS FALLING BUT IN DENSE SETTINGS LIKE AN UNVENTILATED JURY ROOM THAT HAS HAD PEOPLE SPEAKING FOR HOURS THE VIRUS CAN BE FOUND IN SMALLER AIR DROPLETS IN THE AIR—AIRBORNE TRANSMISSION HAS BEEN DOCUMENTED. THERE HAVE BEEN EXAMPLES OF CHURCHES AND DENSELY SEATED RESTAURANTS WHERE PEOPLE HAVE CONTRACTED THE DISEASE BY PRESUMED AIRBORNE TRANSMISSION FROM AN ASX SOURCE.

[https://wwwnc.cdc.gov/eid/article/26/7/20-0764\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article)

<https://www.pnas.org/content/early/2020/05/12/2006874117>

2. Can asymptomatic individuals transmit the disease?

YES THIS HAPPENS NOT INSIGNIFICANTLY SEE

[https://wwwnc.cdc.gov/eid/article/26/7/20-1595\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article)

3. Does the risk of transmission increase with the number of persons present in a room?

YES DENSITY OF PEOPLE MATTERS. BEST IS IF PEOPLE CAN BE AT LEAST 6 FEET APART BUT AN ACTIVE SNEEZE AND COUGH CAN GO



FURTHER EVEN UP TO 9 FEET. VENTILATION MATTERS. DURATION OF CONTACT MATTERS

4. Is the risk of transmission increased if people speak for several minutes or more?

YES. SEE CITATION

<https://www.pnas.org/content/early/2020/05/12/2006874117>

5. Is transmission accelerated if an infected person coughs or sneezes?

DEFINITELY YES

6. For how long are aerosolized droplets present in a closed room?

THE BEST EXPERIMENTAL DATA COMES FROM A NEJM ARTICLE WHICH FOUND AIRBORNE VIRUS FOR UP TO THREE HOURS. BUT THIS IS EXPERIMENTAL SHEDDING SIMULATING AEROSOL. NOT HUMAN TESTING .. VIRUS HAS BEEN FOUND ON SPECIFIC SURFACES FOR UP TO 72 HOURS. <https://www.nejm.org/doi/full/10.1056/NEJMc2004973>

7. Given the number of people necessary to be in a courtroom for several hours a day, is there a risk of COVID-19 transmission?

YES

8. Does distancing each person 6 or more feet apart eliminate completely the risk of transmission of the disease throughout the courtroom.

NO BUT IT IS A START AND MASK WEARING IMPORTANT TO PREVENT ASYMPTOMATIC SPREAD.

9. Recognizing that wearing of face masks can reduce the risk of transmission, can wearing face masks eliminate completely the risk of transmission?

NO

10. If individuals remove their mask when required to speak does that increase the risk of transmission?

YES

11. If plexiglass shields that extend upwards two or three feet were erected in front of each area where persons are located in the courtroom does that eliminate completely the risk of transmission?

NO BUT IT WOULD HELP. BEST TO TEST PEOPLE BY NASAL SWAB BEFORE TRIAL TO DETERMINE NEGATIVITY AT THAT MOMENT IN TIME. CONSIDER RETESTING EVERY 4 DAYS (MEAN INCUBATION TIME) IF A POINT OF CARE TEST BECOMES AFFORDABLE.

<https://www.dailytargum.com/article/2020/03/rutgers-researchers-develop-45-minute-test-for-coronavirus>

12. In a variation of the above question, if the shields do not entirely enclose each individual (i.e., completely surround each person and extend to the ceiling), does their use eliminate completely the risk of transmission in the courtroom?

IN MY OPINION NO BUT A VERY GOOD START—NO STUDIES BUT THEY HAVE BEEN USED IN ASIA IN SCHOOLROOMS. YOU WILL HAVE MORE VULNERABLE POPULATIONS IN THE JURY ROOM— OLDER, COMORBID DISEASES, LATINX AND AFRICAN AMERICAN DESCENT. THESE FOLKS NEED DISTANCING OF 6-9 FEET AND MASKS.

13. What measure or combination of measures would be necessary to significantly reduce the risk of disease transmission during the conduct of a jury trial as described above? (i.e., testing of all participants – if so, how frequently; sanitizing - what manner, how often; mask usage – must they remain in place without exception, etc.....)

QUERY ANY SYMPTOMS BEFORE ENTERING THE COURT HOUSE OR COURTROOM /IF NEGATIVE CONSIDER THERMAL TEMPERATURE/IF AFFORDABLE TESTING WOULD BE HELPFUL—NOW A 45 MINUTE POINT OF CARE NASAL SWAB TEST BY CEPHEID IS AVAILABLE. RECOGNIZE YOU MIGHT MISS LOW TITER INCUBATING BUT THOSE ARE PROBABLY LOW RISK FOR TRANSMISSION --YOU WOULD PICK UP ASX CARRIERS WITH HIGH VIRAL TITERS AS THEY WILL HAVE A POSITIVE NASAL SWAB. PRIOR TO A JURY ROOM USE SANITIZE ALL HIGH TOUCH SURFACES.(EG DOOR HANDLES, DESKTOPS) CONSIDER NEW MASKS FOR EACH PARTICIPANT EVERY DAY AS ONE ENTERS WITH HAND SANITIZING STATION. MASKS SHOULD REMAIN IN PLACE

AS A BARRIER TO AEROSOL AND NOT REMOVED FOR SPEAKING—  
SURGICAL MASKS ARE ADEQUATE/IF YOU HAVE A HIGH RISK  
IMMUNOCOMPROMISED HOST USE A N95 MASK ON THAT PERSON  
ALBEIT NOT PERFECT SOLUTION

14. Even assuming all the precautions identified above, is there still a remaining risk of transmission given the number of individuals who must be present to conduct a jury trial for at least several hours a day?

YES. ANYTHING THAT COULD BE DONE BY VIDEO/ZOOM IS  
PREFERABLE

15. To eliminate the risk of transmission, what considerations should be given to how people get to the courthouse?

PREFERABLY BY CAR AND NOT CROWDED SUBWAY BUT IF YOU CAN  
TEST THAT IS BEST WAY TO ENSURE THE LEAST POSSIBLE VIRUS  
ENTERING THE COURTROOM

16. What consideration should be given to how people enter the courthouse and pass through security screening?

AS ABOVE QUERIES FOR SYMPTOMS,TEMPERATURE SCREEN,  
SANITIZER /HANDWASHING FOR 20 SECOND AND NEW  
MASKS. SANITIZE/HANDWASH BEFORE ENTERING COURTHOUSE—  
OUTSIDE OR IN AN ATRIUM IF POSSIBLE

17. Is there an increased risk of transmission when individuals are present in an elevator? How can that risk be eliminated?

YES USE DISPOSABLE CUT-TIP TO PRESS BUTTON AND WEAR MASK.  
LIMIT TO 1-2 PEOPLE PER ELEVATOR. OR USE STAIRS BUT STAGGER  
THE TIMING SO SPACED AND ALLOW ONE WAY ONLY.

18. Is there an increased risk of transmission in a public restroom?

YES. FLUSHING TOILETS CAN AEROSOLIZE THE VIRUS. FECES IS THE  
MAIN ISSUE. USE A LID TO CLOSE BEFORE FLUSHING AND WASH  
HANDS BEFORE AND AFTER. WEAR MASK. ALERT PEOPLE TO THIS  
POSSIBILITY.

19. What factors make a public restroom more or less likely to increase the risk of transmission?

OBVIOUSLY URINALS CANNOT BE MOVED BUT ONE COULD LIMIT A PEOPLE ENTERING THE BATHROOM. MASKS SHOULD BE USED. HANDWASHING EMPHASIZED BEFORE AND AFTER. EPISODIC SANITIZING OF FLUSH HANDLES IMPORTANT. FECAL AEROSOLIZATION THE MAIN RISK.- NOT URINE.

20. Is the risk of disease transmission increased if toilets do not have lids?

YES

## Appendix B

**Report by:**

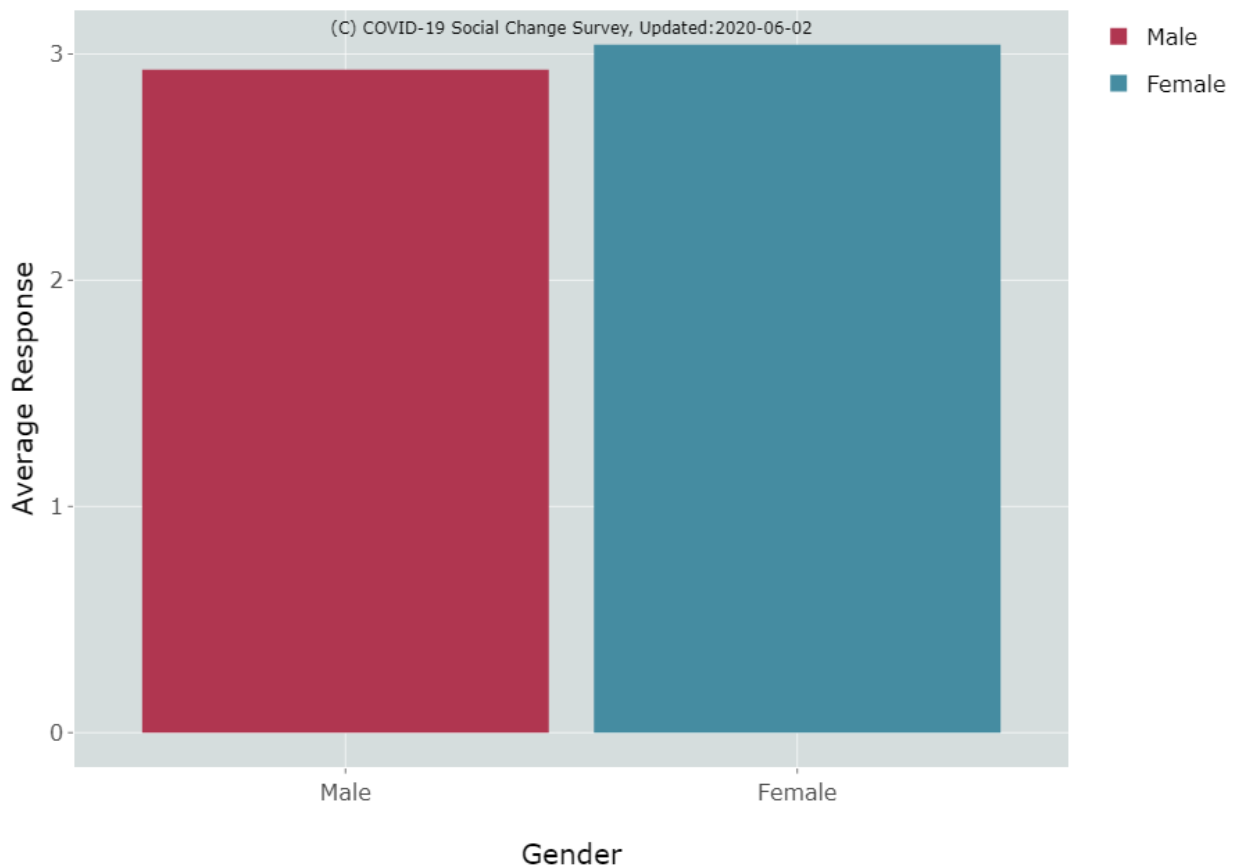
**Beth Redbird, PhD, Assistant Professor, Department of Sociology,  
Northwestern University**

According to data from the COVID-19 Social Change Survey (<http://CoronaData.us>), a nationally representative weekly survey of U.S. public opinions, behaviors, and attitudes related to the COVID-19 pandemic, assembled by a team of social scientists at Northwestern University, Women are bearing a disproportionate amount of the strain caused by the pandemic. Data from about 8,000 U.S. respondents shows:

- Women are more likely to be providing care-giving for children and elders.
- Jobs data from the Federal Reserve (<https://fred.stlouisfed.org/>) shows women are more likely to have lost their jobs or be underemployed.
- Women are more likely to have experienced a family disruption caused by COVID.

How much has the outbreak disrupted the lives of? Your family

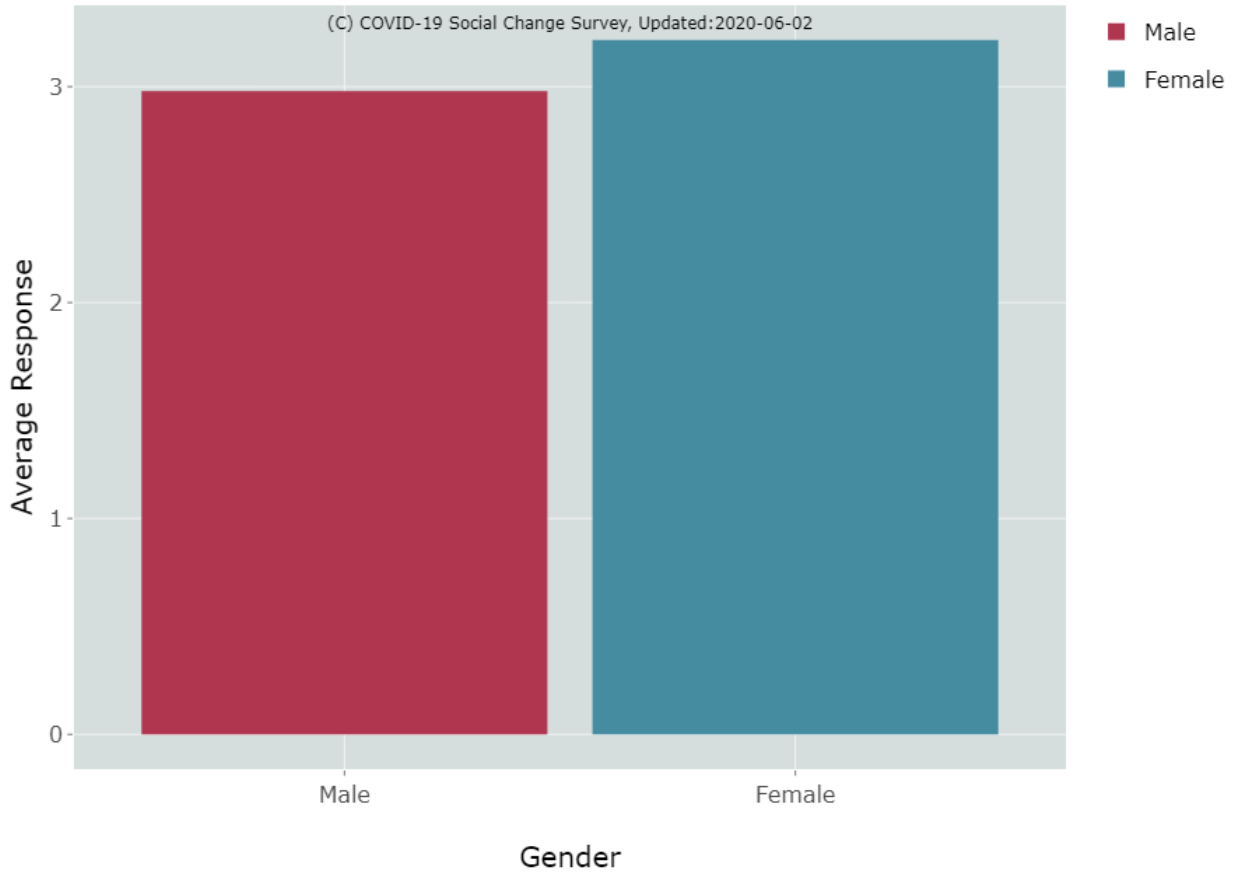
Min: Not much of a disruption - Max: A large disruption



- As a result, women are more likely to be worried about catching COVID.

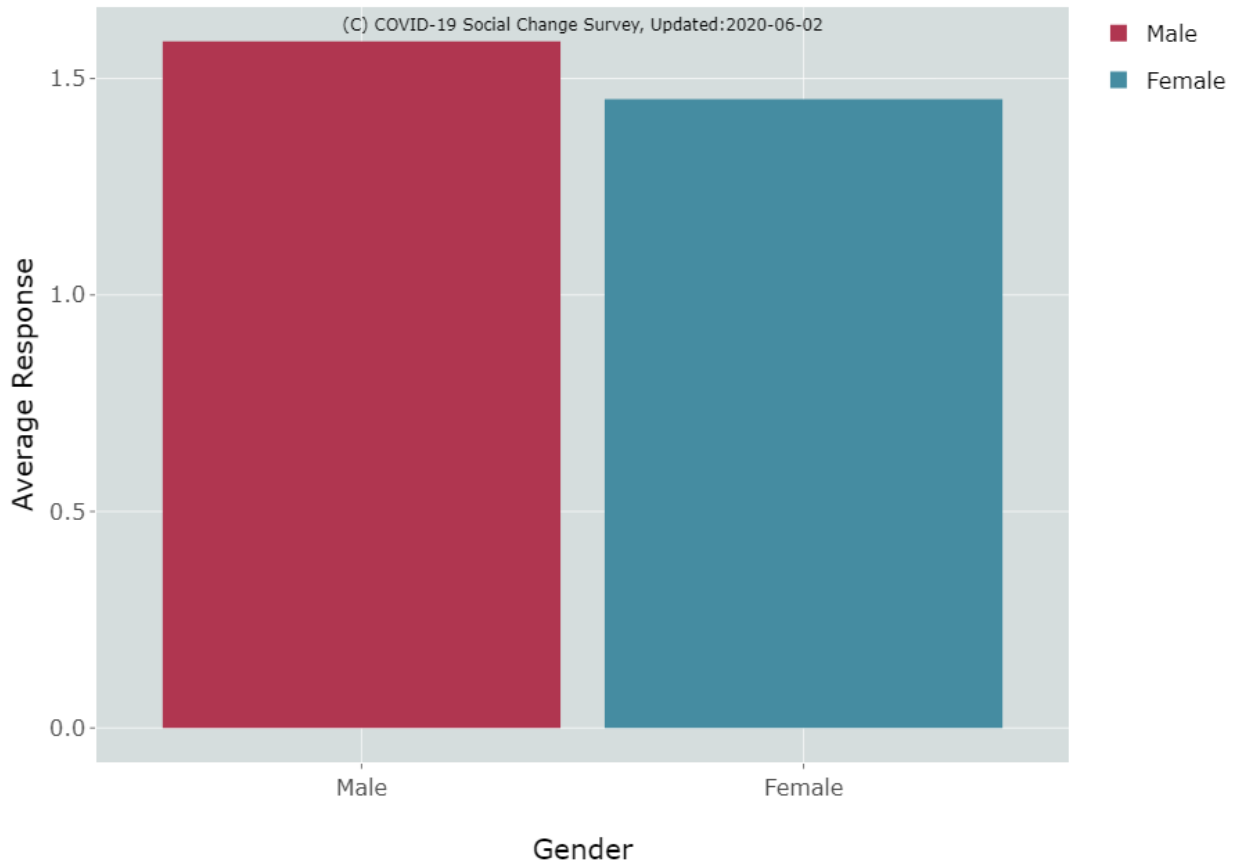
### How worried are you about: Catching the Coronavirus?

Min: Not at all worried - Max: Very worried



- As a result, women are also more likely to be stressed and unhappy.

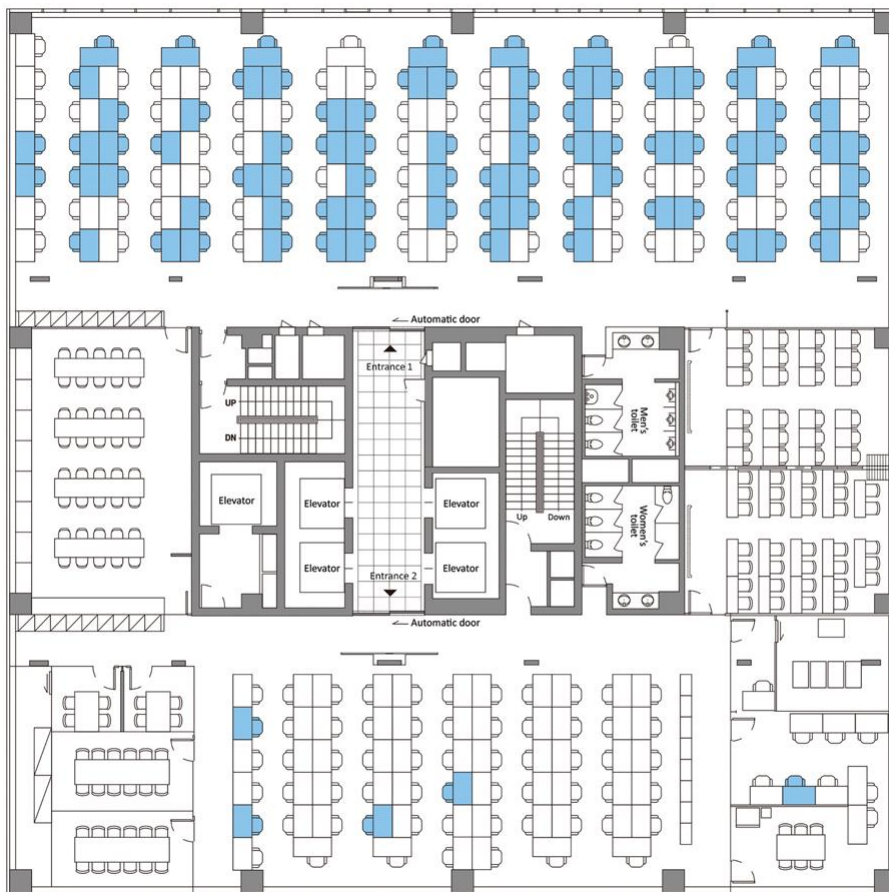
Taken all together, how happy would you say you are these days?  
Min: Not too happy - Max: Very happy



# Appendix C

## Declaration of Laura Rasmussen-Torvik, PhD, MPH

1. My name is Laura Rasmussen-Torvik. I am the Chief of Epidemiology in the Department of Preventive Medicine at Northwestern University. I have a PhD in Epidemiology and have held a faculty position at Northwestern for over 10 years. My CV is attached to this declaration.
2. I was asked by NACDL to comment on the safety of reopening criminal courts while the country still is dealing with an active COVID-19 pandemic. It is my professional opinion that we still know too little about COVID-19 to declare virtually any activity “safe”. However, case reports from locations where there was considerable spread “superspreading events” can provide us information about areas that are particularly high risk.
3. As detailed in the CDC journal “Emerging Infectious Diseases” (Volume 26, Number 8, in early release at [https://wwwnc.cdc.gov/eid/article/26/8/20-1274\\_article](https://wwwnc.cdc.gov/eid/article/26/8/20-1274_article)) in March 2020 there was an outbreak of COVID-19 at a South Korean Call Center. In this outbreak, 94 out of 216 employees working on a single floor contracted COVID-19. (See Figure from the paper below, with the seating places of infected individuals in blue)





The authors of the study conclude:

“This outbreak shows alarmingly that severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) can be exceptionally contagious in crowded office settings such as a call center. The magnitude of the outbreak illustrates how a high-density work environment can become a high-risk site for the spread of COVID-19 and potentially a source of further transmission. Nearly all the case-patients were on one side of the building on 11th floor. Severe acute respiratory syndrome coronavirus, the predecessor of SARS-CoV-2, exhibited multiple superspreading events in 2002 and 2003, in which a few persons infected others, resulting in many secondary cases. Despite considerable interaction between workers on different floors of building X in the elevators and lobby, spread of COVID-19 was limited almost exclusively to the 11th floor, which indicates that the duration of interaction (or contact) was likely the main facilitator for further spreading of SARS-CoV-2.”

It is my professional opinion that conditions in this call center are likely similar to those in a courtroom and thus courtrooms represent a high-risk site for the spread of COVID-19.

4. In the situation we are currently faced with, where we must make decisions with little data, it is my professional opinion that all should follow the advice laid out for businesses by the CDC with regards to meetings and gatherings  
<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

Specifically:

**“Minimize risk to employees when planning meetings and gatherings:**

- Use videoconferencing or teleconferencing when possible for work-related meetings and gatherings.
- Cancel, adjust, or postpone large work-related meetings or gatherings that can only occur in-person in accordance with state and local regulations and guidance.
- When videoconferencing or teleconferencing is not possible, hold meetings in open, well-ventilated spaces continuing to maintain a distance of 6 feet apart and wear cloth face coverings.”

I declare under penalty of perjury that the foregoing information I have provided is true and correct to the best of my knowledge, information, memory, and belief.

June 2, 2020  
Evanston, Illinois

/s/ Laura Rasmussen-Torvik  
Laura Rasmussen-Torvik