

## VIRTUAL GUILTY PLEAS

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### ABSTRACT

*The coronavirus pandemic led criminal courts across the country to switch to virtual hearings to protect public health. As the pandemic subsides, many policymakers have called for the continued use of the remote format for a range of criminal proceedings. To guide decisions whether to use remote criminal justice on a regular basis, it is important to review the advantages and disadvantages of the practice.*

*Remote criminal proceedings have been praised for their convenience and efficiency, but have also raised concerns. Many have worried that videoconferencing inhibits effective communication between defendants and their counsel, hinders defendants' understanding of the process, impedes effective confrontation of witnesses, and prejudices the court's perceptions of the defendant and witnesses.*

*Previous scholarly work has attempted to evaluate remote criminal proceedings through legal and policy analysis, surveys of practitioners, and a comparison of outcomes of in-person and remote proceedings. This Article adds insights based on direct observations of over three hundred remote criminal proceedings in misdemeanor and felony courts across Michigan and Texas.*

*Our observations reveal that judicial review of guilty pleas in the virtual setting is as brief and superficial as it is in person and may fail to detect inaccurate, coerced, or uninformed guilty pleas. But the virtual format presents additional risks to the fairness and integrity of the plea process, including the disengagement from the process by defendants, the difficulty of counsel and defendant to communicate privately, and the potentially prejudicial effects of inadequate technology and informal settings.*

*The Article concludes by arguing that states should not use remote plea hearings on a regular basis after the pandemic is over. To the extent they do continue conducting remote plea hearings, they must bolster procedural safeguards in the proceedings. Judges must review virtual pleas more closely, verify that defendants are making an informed and voluntary choice to proceed remotely, take measures to ensure that defendants are represented adequately, and address the potentially prejudicial effects of the remote setting. These measures can help protect fairness in the plea process and ensure that virtual guilty pleas remain constitutionally valid.*

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## INTRODUCTION

The coronavirus pandemic led criminal courts across the country to switch from in-person to virtual hearings to protect public health.<sup>1</sup> From arraignments to plea and sentencing hearings, state and federal criminal proceedings have taken place over digital platforms.<sup>2</sup> Although the pandemic is subsiding, many policymakers have proposed continuing to use virtual criminal proceedings on a regular basis, citing benefits of the remote format beyond protecting public health.<sup>3</sup>

As legislators and courts consider such proposals, it is important to evaluate the advantages and disadvantages of virtual criminal proceedings. The remote format has been praised for its convenience and efficiency, but it has also raised concerns.<sup>4</sup> Many have worried that the use of videoconferencing in criminal proceedings inhibits communication between

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<sup>1</sup> See *Coronavirus and the Courts*, NAT'L CTR. STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency> [<https://perma.cc/XNL8-8FY6>] (last visited Jan. 18, 2021) (advising courts to encourage virtual hearings during the pandemic).

In this Article, I use the terms “virtual,” “remote,” “videoconference,” and “online” interchangeably to denote criminal proceedings which are conducted via digital platforms and in which at least one participant is not physically present in the courtroom.

<sup>2</sup> Jenia I. Turner, *Remote Criminal Justice*, 53 TEXAS TECH. L. REV. 197, 223–25 (2021).

<sup>3</sup> See, e.g., Assemb. B. No. 700, 2021-2022 Leg., Reg. Sess. (Cal. 2021) (proposing to allow virtual arraignments and pleas in misdemeanor cases); S.B. No. 6734, 2021-2022 Leg., Reg. Sess. (N.Y. 2021) (proposing to expand the use of virtual criminal non-jury proceedings); S.B. No. 255, 2021-2022 Leg., Reg. Sess. (N.C. 2021) (proposing to allow court proceedings by “audio/video transmission”); H.B. No. 113, 2021-2022 Leg., Reg. Sess. (N.C. 2021) (authorizing “remote audio-video proceedings in court”); S.B. No. 690, 2021 Leg., 87th Sess. (Tex. 2021) (authorizing various court proceedings to be conducted “remotely”); S.B. No. 114, 2020 Leg., Reg. Sess. (Vt. 2020) (stating that a defendant shall be deemed present in court if appearing by means of “contemporaneous audio or video transmission”); see also Alyssa Bethencourt, *El Paso Judge Says Virtual Court Hearings Could Be Permanent Post-Pandemic*, KFOX14 (Mar. 3, 2021), <https://kfoxtv.com/news/local/el-paso-judge-says-virtual-court-hearings-could-be-permanent-post-pandemic> [<https://perma.cc/YA93-UYKY>] (explaining that virtual hearings are going well enough to continue using them after the pandemic is over); Henry Redman, *The Court System Is Returning to Normal, but Virtual Court Is Here To Stay (Sometimes)*, WIS. EXAM’R. (May 26, 2021, 7:00 AM), <https://wisconsinexaminer.com/2021/05/26/virtual-court-is-here-to-stay/> [<https://perma.cc/JG5G-XW6Q>] (“[C]ourts in Wisconsin are moving to make virtual court a permanent fixture.”); Eric Scigliano, *Zoom Court Is Changing How Justice Is Served*, ATLANTIC (Apr. 13, 2021), <https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392/> [<https://perma.cc/J6A9-J8FG>] (noting that the Conference of Chief Justices and the Conference of State Court Administrators supported “mov[ing] as many court processes as possible online”).

<sup>4</sup> See Turner, *supra* note 2, at 216–22, 246–57 (discussing the advantages and disadvantages of remote proceedings).

defendants and their counsel, hinders effective confrontation of witnesses, and prejudices the court's perceptions of the defendant and witnesses.<sup>5</sup>

Previous scholarly work has attempted to evaluate the advantages and disadvantages of remote criminal proceedings through legal and policy analysis, surveys, and a comparison of outcomes of in-person and remote proceedings.<sup>6</sup> This Article adds insights based on direct observations of three hundred and twenty-six remote criminal proceedings in misdemeanor and felony courts across Michigan and Texas.

In an effort to provide public access to remote criminal proceedings conducted during the coronavirus pandemic, several states, including Texas and Michigan, began livestreaming the proceedings.<sup>7</sup> This arrangement

<sup>5</sup> *Id.*

<sup>6</sup> *See, e.g.*, CAROLYN MCKAY, THE PIXELATED PRISONER: PRISON VIDEO LINKS, COURT 'APPEARANCE' AND THE JUSTICE MATRIX 3–4 (2018) (reviewing videoconference proceedings through review of doctrine and interviews of prisoners); Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 *BUFF. L. REV.* 1275, 1276 (2020) (examining doctrine and social science relating to virtual proceedings); Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 *NW. U. L. REV.* 1875 (2021) (analyzing advantages and disadvantages of virtual proceedings and proposing reforms to make the proceedings fairer); TAYLOR BENNINGER, COURTNEY COLWELL, DEBBIE MUKAMAL & LEAH PLACHINSKI, VIRTUAL JUSTICE? A NATIONAL STUDY ANALYZING THE TRANSITION TO REMOTE CRIMINAL COURT 10–12 (Stan. Crim. Just. Ctr. 2021) (analyzing advantages and disadvantages of virtual criminal proceedings through a national survey of defense attorneys and multi-state interviews of attorneys, judges, and court personnel); SARAH E. DUHART CLARKE & JESSICA SMITH, VIRTUAL PROCEEDINGS IN NORTH CAROLINA: ADAPTING TO A GLOBAL PANDEMIC 1, 2 (UNC Sch. Gov't 2021) (surveying defense attorneys, prosecutors, judges, and court clerks about the advantages and disadvantages of virtual criminal proceedings in North Carolina); Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 *J. CRIM. L. & CRIMINOLOGY* 869, 869–70 (2010) (comparing outcomes of in-person and videoconferenced bail hearings); NIGEL FIELDING, SABINE BRAUN, GRAHAM HIEKE & CHELSEA MAINWARING, VIDEO ENABLED JUSTICE EVALUATION 1, 3 (Sussex Police & Crime Comm'r & Univ. Surrey 2020), <https://www.sussex-pcc.gov.uk/media/4862/vej-final-report-ver-12.pdf> [<https://perma.cc/3BFT-SQH9>] (evaluating virtual criminal proceedings in England in comparison to in-person proceedings); Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 *TUL. L. REV.* 1089 (2004) (analyzing policy and literature on virtual criminal proceedings); MATTHEW TERRY, STEVE JOHNSON & PETER THOMPSON, VIRTUAL COURT PILOT: OUTCOME EVALUATION, (U.K. MINISTRY JUST. 2010), <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf> [<https://perma.cc/G3XV-96MZ>] (evaluating virtual criminal proceedings in England through interviews of practitioners, court and police station observations, and empirical assessments of outcomes); Turner, *supra* note 2 (analyzing policy and doctrine and conducting surveys of practitioners in Texas about their experiences with remote criminal proceedings).

<sup>7</sup> *See, e.g.*, [MiCourt Virtual Courtroom Directory](https://micourt.courts.michigan.gov/virtualcourtroomdirectory), [<https://perma.cc/RZ7M->

offered the public and researchers an unprecedented opportunity to observe the everyday workings of the criminal justice system. With the click of a button and without leaving their homes, people around the world could witness criminal case hearings across the United States.

Taking advantage of this development, between August 24, 2020, and February 5, 2021, two law student research assistants, Brooke Vaydik and Evan Rios, and I began watching and documenting remote criminal proceedings in Texas and Michigan.<sup>8</sup> We chose these states for two principal reasons. First, unlike several other states that have livestreamed select criminal proceedings during the pandemic, Texas and Michigan already had dedicated YouTube channels for their courts in August 2020, and they made criminal proceedings in both urban and rural areas widely and easily accessible online.<sup>9</sup> Second, the rules on judicial review of guilty pleas and on virtual proceedings in these two states had several important differences whose effects we could study.<sup>10</sup>

Because guilty pleas are such a dominant feature of our criminal process,<sup>11</sup> we focused our observations on plea hearings. We observed 294 plea hearings, and thirty-two other hearings, including sentencing, probation revocation, and pretrial hearings.<sup>12</sup> We tracked the length of virtual plea

X4JL] (last visited May 28, 2021) (providing a virtual courtroom directory for courts in Michigan); SUP. CT. N.J., COVID-19- Updated Guidance on Remote Proceedings in the Trial Courts; Options for Observing Court Events and Obtaining Video and Audio Records; Court Authority to Suspend the Commencement of Certain Custodial Terms (Apr. 20, 2020), <https://www.njcourts.gov/notices/2020/n200420a.pdf?c=8vE> [<https://perma.cc/J4NC-34YG>] (prioritizing livestreaming for most criminal matters in New Jersey); *Texas Court Live Streams*, TEX. JUD. BRANCH, <http://streams.txcourts.gov> (last visited May 28, 2021) (providing links to the available livestreams of Texas courts); *Livestream Courts*, WIS. CT. SYS., <https://www.wicourts.gov/courts/livestream.htm> (last visited May 28, 2021) (providing links to the available livestreams of Wisconsin courts).

<sup>8</sup> Evan Rios observed 177 hearings, Brooke Vaydik observed 109 hearings, and I observed 40 hearings and reviewed all of the documentation by Rios and Vaydik to ensure consistent coding.

<sup>9</sup> See MiCourt Virtual Courtroom Directory, *supra* note 7; *Texas Court Live Streams*, *supra* note 7.

<sup>10</sup> See *infra* Part I.A. (discussing constitutional and statutory rules on judicial review of guilty pleas).

<sup>11</sup> See *State Court Sentencing of Convicted Felons 2004—Felony Case Processing in State Courts*, BUREAU JUST. STAT., <https://static.prisonpolicy.org/scans/bjs/fssc04.pdf> [<https://perma.cc/9WUH-GA5E>] (last visited Nov. 1, 2020) (finding that ninety-five percent of state convictions were obtained through guilty pleas).

<sup>12</sup> Of these hearings, 183 took place in Texas, and 143 in Michigan; 209 were felonies, and 117 were misdemeanors. Among the remote plea hearings, 170 were in Texas (116 felonies and 54 misdemeanors), and 124 were in Michigan (65 felonies and 59 misdemeanors). See app. tbl. 1.

proceedings, the depth of judicial inquiry into the validity of guilty pleas, and the rate of judicial approval of plea agreements.<sup>13</sup> We also paid close attention to the effects of the remote format on the proceedings.<sup>14</sup> We documented technological problems that affected the ability of the participants to see and hear each other and to take part in the proceedings.<sup>15</sup> We also tracked whether judges obtained the defendant's consent to use the remote format and whether judges informed defendants about the right to consult with counsel privately during the remote proceeding.<sup>16</sup>

This Article describes our findings and discusses their implications for the future of remote criminal proceedings and plea procedure more broadly. We found that most judges conducted only brief inquiries into the validity of guilty pleas, did not ask defendants whether they consented to the use of the virtual format, and did not inform defendants of the right to speak privately with counsel during the virtual hearing.<sup>17</sup> Few took steps to address the frequent distractions, disruptions, and other deficiencies of the remote format.<sup>18</sup>

The perfunctory judicial scrutiny of virtual guilty pleas we observed is consistent with findings on in-person plea hearings.<sup>19</sup> Such hasty review departs from judges' constitutional duty to exercise "the utmost solicitude" in reviewing guilty pleas and may fail to detect uninformed, coerced, or inaccurate guilty pleas.<sup>20</sup> It is particularly troubling when it occurs in the remote setting, which poses special risks of unfairness.<sup>21</sup> The Article reviews the risks of remote plea proceedings and argues that states should not use

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In the Texas hearings, we observed 64 judges from 35 judicial districts across the state. They represent 9% of the 728 state judges in Texas. *Profile of Appellate and Trial Judges as of Sept. 1, 2020*, TEX. JUD. BRANCH, <https://www.txcourts.gov/media/1450020/judge-profile-sept-2020.pdf> [<https://perma.cc/6FHZ-YXVA>]. Of these judicial districts, 20 represented urban or suburban counties, and 15 represented rural counties. *See* app. tbl. 2.

In Michigan, we observed 48 judges from 25 counties across the state. They represent about 11% of all trial judges (452 district and circuit court judges, not all of whom handle criminal matters), and almost one-third of the 83 Michigan counties. Of the counties we observed, 12 were urban or suburban, and 13 were rural. *See* app. tbl. 2.

<sup>13</sup> *See infra* Part I.B; app. tbl. 3.

<sup>14</sup> *See infra* Part II.B.

<sup>15</sup> *Id.*; app. tbl. 4.

<sup>16</sup> *Id.*

<sup>17</sup> *See infra* Parts I.B & II.B; app. tbls. 3 & 4.

<sup>18</sup> *See infra* Part II.B.

<sup>19</sup> *See infra* Part I.B.

<sup>20</sup> *See* *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (describing the court's duty of "utmost solicitude" in reviewing felony guilty pleas).

<sup>21</sup> *See infra* notes 280–291 and accompanying text.

them on a regular basis after the pandemic is over.<sup>22</sup> To the extent that states do rely on such proceedings, they must adopt procedural safeguards to address the special challenges of the remote format.<sup>23</sup> Such measures can reduce the unique risks of virtual guilty pleas and help protect fairness and constitutional rights in the process.

## I. JUDICIAL REVIEW OF GUILTY PLEAS: LAW AND PRACTICE

Guilty pleas are the main way our criminal justice system obtains convictions.<sup>24</sup> Because a guilty plea circumvents the procedural protections that accompany a full-blown trial, the law emphasizes the importance of careful and thorough judicial review of guilty pleas as a means of ensuring fairness and accuracy in the process.<sup>25</sup> In practice, however, studies of in-person plea hearings have shown judicial review of pleas to be quick and relatively superficial.<sup>26</sup> We find that judicial review is similarly hasty when plea hearings are conducted remotely.<sup>27</sup> Although courts and practitioners assert that remote proceedings save time for everyone involved, the extra time has not been used to reinvigorate and deepen judicial review of guilty pleas and close the gap between law and practice.

### A. *Constitutional and Statutory Rules on Judicial Review of Guilty Pleas*

A guilty plea is a momentous decision by defendants, as it represents a waiver of the right to a trial by jury and all accompanying procedural protections.<sup>28</sup> To ensure its compliance with the Constitution, judges must verify, at a public hearing and on the record, that a guilty plea is knowing,

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<sup>22</sup> See *infra* note 296 and accompanying text.

<sup>23</sup> See *infra* Part III.

<sup>24</sup> See BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., FEDERAL JUSTICE STATISTICS, 2012–STATISTICAL TABLES 17 tbl.4.2 (2015) (finding that ninety-seven percent of federal convictions were disposed of via guilty pleas). For state statistics, see *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables* tbl.21, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., <https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/BMZ8-UMPN>] (last updated Nov. 1, 2020) (finding that close to ninety-seven percent of state convictions were obtained through guilty pleas).

<sup>25</sup> See *infra* Part I.A.

<sup>26</sup> See *infra* Part I.B.

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

<sup>28</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970).

intelligent, and voluntary.<sup>29</sup> While these core constitutional requirements apply to plea proceedings across all states and the federal system, the rules implementing the constitutional standards vary in the depth of judicial inquiry they require.<sup>30</sup> For example, some states interpret the voluntariness and knowledge requirements to mandate an inquiry into the mental competence of pleading defendants, while other states do not.<sup>31</sup> Similarly, to ensure a knowing plea, some states require judges to admonish non-citizen defendants about the immigration consequences of a guilty plea, while other states do not.<sup>32</sup>

Rules of procedure in most jurisdictions further mandate that judges confirm the factual basis of a guilty plea, at least in felony cases.<sup>33</sup> Like more than forty other states, Michigan requires that the court determine the accuracy of a guilty plea at the plea hearing.<sup>34</sup> By contrast, in Texas, the factual basis can be established through a written stipulation by the defendant.<sup>35</sup> In a few other states, the court is not required to determine the factual basis at all,<sup>36</sup> or the defendant may waive the factual basis requirement.<sup>37</sup>

The purpose of the rules requiring judicial review of guilty pleas is to ensure the fairness and accuracy of guilty pleas and the legitimacy of the process. The voluntariness inquiry aims to verify that the defendant is

<sup>29</sup> *Id.* at 758; *Boykin v. Alabama*, 395 U.S. 238, 241 (1969).

<sup>30</sup> Amy DeZember et al., *Plea Validity in Circuit Court: Judicial Colloquies in Misdemeanor vs. Felony Charges*, *PSYCH., CRIME & L.* 1, 2 (2021); Tina M. Zottoli et al., *State of the States: A Survey of Statutory Law, Regulations and Court Rules Pertaining to Guilty Pleas Across the United States*, 37 *BEHAV. SCI. & L.* 388, 403–12 (2019).

<sup>31</sup> Compare *TEX. CODE CRIM. PROC. ANN.* art. 26.13(b) (West 2021), with *MICH. CT. R.* 6.302; see also Wayne LaFave et al., *Determining Voluntariness of Plea and Competency of Defendant to Plead*, 5 *CRIM. PROC.* § 21.4(b) (4th ed. 2020) (discussing different states' approaches).

<sup>32</sup> Compare *TEX. CODE CRIM. PROC. ANN.* art. 26.13(a)(4) (West 2021), *CAL. PENAL CODE* § 1016.5, and 725 *ILL. COMP. STAT.* 5/113-8, with *MICH. CT. R.* 6.302; cf. *People v. Guzman*, 43 N.E.3d 954, 960–61 (Ill. 2015) (holding that trial court is not constitutionally required to advise defendant of potential immigration consequences and citing other state and federal cases holding the same).

<sup>33</sup> See, e.g., *FED. R. CRIM. P.* 11(b)(3); Wayne LaFave et al., *Determining Factual Basis of a Plea*, 5 *CRIM. PROC.* § 21.4(f) (4th ed. 2020) (discussing the factual basis requirement in state and federal jurisdictions); Zottoli et al., *supra* note 30, at 403–12 (finding that all but seven states require that judges verify the factual basis of a guilty plea). In many states, the factual basis requirement has not been extended to misdemeanor cases. John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 *U. PA. L. REV.* 88, 89–90 (1977).

<sup>34</sup> *MICH. CT. R.* 6.610(f), 6.302.

<sup>35</sup> *TEX. CODE CRIM. PROC. ANN.* art. 1.15 (West 2021); see also *Menefee v. State*, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009).

<sup>36</sup> E.g., *LA. CODE CRIM. PROC. ANN.* art. 556.1 (2020); *OHIO R. CRIM. P.* 11; *Jones v. Commonwealth*, 513 S.E.2d 431, 435 (Va. App. Ct. 1999).

<sup>37</sup> *COLO. R. CRIM. P.* 11(b)(6).

waiving the right to a jury trial of his own free will and not because he was threatened, coerced, or otherwise improperly influenced.<sup>38</sup> The knowledge requirement helps ensure that the defendant understands the advantages and disadvantages of resolving the case through a guilty plea: that he knows the charges he is pleading guilty to, the rights and protections he is waiving, the applicable minimum and maximum punishments, and the potential consequences of pleading guilty.<sup>39</sup>

To ensure that the plea is intelligent, courts also verify that the defendant has the requisite mental competence, education, and language ability to appreciate the advantages and disadvantages of waiving her trial rights.<sup>40</sup> Toward this end, many courts further inquire whether the defendant has consulted with counsel about the effects and desirability of pleading guilty.<sup>41</sup> In brief, because the defendant is waiving a range of constitutional rights that normally protect the fairness of the process and the integrity of the outcome, courts have to ensure that this waiver is based on a full appreciation of the consequences of forgoing these protections.

Finally, by reviewing the factual basis of a plea, courts help to protect the accuracy of the verdict and reduce the risk that an innocent defendant might plead guilty or that a defendant might plead to charges that do not accurately represent his or her conduct. As the authors of a prominent criminal procedure treatise explain, the factual basis requirement “protect[s] a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.”<sup>42</sup> It also “increases the

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<sup>38</sup> See *Brady v. United States*, 397 U.S. 742, 754–55 (1970).

<sup>39</sup> See *id.* at 748; *Boykin v. Alabama*, 395 U.S. 238, 241–42 (1969); *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *Bousley v. United States*, 523 U.S. 614, 618 (1998); Wayne LaFave et al., *Determining Understanding of Possible Consequences*, 5 CRIM. PROC. § 21.4(d) (4th ed. 2020).

<sup>40</sup> See *Brady*, 397 U.S. at 756; *Godinez v. Moran*, 509 U.S. 389, 396 (1993); *State v. Brown*, 716 N.W.2d 906, 917 (Wis. 2006); see also Allison D. Redlich & Alicia Summers, *Voluntary, Knowing, and Intelligent Pleas: Understanding the Plea Inquiry*, 18 PSYCH., PUB. POL’Y & L. 626, 627–28 (2012).

<sup>41</sup> See, e.g., *Lutgen v. United States*, 797 F. App’x 509, 510 (11th Cir. 2020); *United States v. Kobrosky*, 711 F.2d 449, 451–52 (1st Cir. 1983); *Beck v. Angelone*, 173 F. Supp. 2d 461, 479 (E.D. Va.), *report and recommendation adopted*, 113 F. Supp. 2d 941 (E.D. Va. 2000); *Christie v. State*, 915 So. 2d 1073, 1075 (Miss. Ct. App. 2005); *Pacheco v. State*, No. 08-07-00167-CR, 2009 WL 2343130 (Tex. App. July 29, 2009); Hornby, J. – Script of Proceeding – 9/12/18, <https://www.med.uscourts.gov/pdf/dbhscript.rule11.pdf> [<https://perma.cc/8S62-KVCD>]; R. SUP. CT. VA., Form 6.

<sup>42</sup> LaFave et al., *supra* note 33, § 21.4(f).

visibility of charge reduction practices [and] provides a more adequate record” in the case.<sup>43</sup>

In a number of jurisdictions, including Texas, the statutory requirements of judicial review vary based on the seriousness of the case. For example, unlike in felony cases, in misdemeanor cases, the Texas Code of Criminal Procedure does not require the court to ensure that a guilty plea is voluntary, knowing, or factually based.<sup>44</sup> By contrast, in other states, including Michigan, statutory rules expressly require judges in both misdemeanor and felony cases to determine that a guilty plea is “understanding, voluntary, and accurate” by addressing the defendant at the plea hearing.<sup>45</sup>

Arguably, the Constitution’s Due Process Clause itself requires judges to verify that guilty pleas are voluntary and informed even in misdemeanor cases. The defendant is waiving the same rights when pleading guilty to a misdemeanor and to a felony—the right to confront witnesses, the right to a trial by an impartial jury,<sup>46</sup> and the privilege against self-incrimination.<sup>47</sup> Under the Due Process Clause, waivers of these constitutional rights in misdemeanor cases must be voluntary and knowing just as they must be in felony cases.<sup>48</sup> But as mentioned earlier, the Due Process standards for judicial review of guilty pleas are relatively vague and broad.<sup>49</sup> Accordingly,

<sup>43</sup> *Id.* The factual basis requirement is supposed to prevent the problem of “fictional pleas” analyzed by Thea Johnson in *Fictional Pleas*, 94 IND. L.J. 855 (2019). For an argument in favor of certain factually baseless guilty pleas, see Darryl K. Brown, *Factually Baseless Enforcement of Criminal Law Is Okay. Full Enforcement Is Not*, 104 MARQ. L. REV. 511, 531–38 (2020).

<sup>44</sup> Compare TEX. CODE CRIM. PROC. ANN. 27.14(a) (West 2021), *with id.* 27.13, 26.13, 1.15.

<sup>45</sup> Compare MICH. CT. R. 6.302 (outlining rules for reviewing guilty pleas in felony cases) *with* MICH. CT. R. 6.610(f)(1) (outlining rules for reviewing guilty pleas in misdemeanor cases). *But cf.* MICH. CT. R. 6.610(f)(7) (permitting a guilty plea via written waiver and without the personal appearance of the accused under certain circumstances in misdemeanor cases).

<sup>46</sup> As a federal constitutional matter, the right to a jury trial applies only in those misdemeanors that carry a potential sentence of more than six months imprisonment. *Baldwin v. New York*, 399 U.S. 66, 68–69 (1970). In Texas, however, the state constitution has been interpreted to provide the right to a jury trial in all misdemeanor cases, including minor traffic offenses. TEX. CONST. art. 1, § 10; TEX. PEN. CODE ANN. § 12.41(3) (West 2021); Adam M. Gershowitz, *Is Texas Tough on Crime but Soft on Criminal Procedure?*, 49 AM. CRIM. L. REV. 31, 62 (2012).

<sup>47</sup> *Mills v. Mun. Ct.*, 515 P.2d 273, 280–81 (Cal. 1973).

<sup>48</sup> *Id.*; *see also* *Perkins v. State*, 7 S.W.3d 683, 685 (Tex. App. 1999); *McMillan v. State*, 703 S.W.2d 341, 344 (Tex. App. 1985), *rev’d on other grounds*, 727 S.W.2d 582 (Tex. Crim. App. 1987). *But cf.* *People v. Mills*, 175 Mich. App. 236, 238, 438 N.W.2d 82, 83 (1988) (noting a “split of authority” among Michigan appeals courts on whether the court must advise defendants of *Boykin* rights when accepting a misdemeanor guilty plea).

<sup>49</sup> *See, e.g.*, *United States v. Ruiz*, 536 U.S. 622, 630 (2002) (“[T]he Constitution, in respect to a defendant’s awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver

if statutory rules do not specify the details of judicial review in misdemeanor cases, that review can be somewhat less demanding than it is in felony cases.<sup>50</sup>

In addition to determining the validity of guilty pleas at the plea hearing, judges often review any plea agreements negotiated in exchange for the plea. In many states and at the federal level, the parties must disclose on the record—typically at the plea hearing—any plea agreement they have negotiated.<sup>51</sup> Plea agreements about the sentence are generally not binding on the court because judges maintain the ultimate responsibility for sentencing.<sup>52</sup> In many states, judges have to tell the defendant—typically at the plea hearing—whether they would accept the plea agreement or not. If they reject an agreement, at least under certain circumstances, they must permit the defendant to withdraw his or her guilty plea.<sup>53</sup>

In brief, the law on guilty plea review entrusts judges with the “solemn duty” to ensure that guilty pleas are constitutionally sound, fair, and accurate.<sup>54</sup> And while some case law and statutory provisions suggest that this review is supposed to be careful and probing, much of the law leaves judges with enormous discretion in how deeply they inquire into the validity guilty pleas. As the next Section describes, most judges have failed to use

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of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.”).

50 See, e.g., *McMillan*, 703 S.W.2d at 344; *Advice on Nature of Charge*, 4 WITKIN, CAL. CRIM. LAW 4TH PRETRIAL § 305 (2020).

51 FED. R. CRIM. P. 11(c)(2) (requiring disclosure of plea agreements “in open court” or, on showing of good cause, in camera); TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2021) (providing that the court must “inquire as to the existence of a plea bargain agreement between the state and the defendant”); MICH. CT. R. 6.302 (requiring the parties to state any plea agreement on the record or make it part of the case file). See generally Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 979 (2021) (listing jurisdictions requiring such disclosure).

52 See, e.g., MICH. CT. R. 6.302(c)(3):

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow an agreement to a sentence for a specified term or within a specified range or a recommendation agreed to by the prosecutor.

See also TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2) (West 2021) (providing that “the recommendation of the prosecuting attorney as to punishment is not binding on the court.”).

53 See, e.g., *State v. Jeffries*, 806 N.W.2d 56, 62 (Minn. 2011); *State v. Bullplume*, 208 P.3d 378, 383 (Mont. 2009); *Goosby v. State*, 917 S.W.2d 700, 706 (Tenn. Crim. App. 1995); *State v. Currier*, 758 A.2d 818, 821 (Vt. 2000); *State v. Conwell*, 10 P.3d 1056, 1060 (Wash. 2000). For a review and critique of contrasting state approaches to this question, see Michael D. Cicchini, *Deal Jumpers*, 2021 U. ILL. L. REV. 1325.

54 See *State v. Freese*, 13 P.3d 442, 448 (Nev. 2000) (noting that “the acceptance of a plea of guilty is a solemn duty”).

their discretion to engage in probing inquiries of guilty pleas and have instead put their faith in the prosecutor and the defense attorney to ensure that pleas are knowing, voluntary, and factually based.

*B. The Practice of Judicial Review of Guilty Pleas*

*1. Duration of Plea Hearings*

Despite case law demanding that judges exercise “the utmost solicitude” in reviewing guilty pleas,<sup>55</sup> legal scholars have noted that plea colloquies tend to be “rote and perfunctory” and that as long as “the defendant parrots the correct phrases, the judge is unlikely to scrutinize the plea any further.”<sup>56</sup> A few empirical studies have confirmed this insight and found that plea hearings last on average fourteen minutes or less and misdemeanor hearings are even shorter, just under eight minutes.<sup>57</sup>

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<sup>55</sup> *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *see also State v. Stone*, 331 N.E.2d 411, 415 (Ohio 1975) (“[F]ederal decisions . . . establish that trial courts must exercise the utmost solicitude in satisfying themselves that a guilty plea is understandingly and voluntarily made.”); *Bazemore v. State*, 535 S.E.2d 760, 763 (Ga. 2000) (“The waiver of constitutional rights that occurs when a plea of guilty is entered is so great that it demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes.”) (internal quotation marks omitted) (quoting *Bowers v. Moore*, 471 S.E.2d 869, 871 (Ga. 1996)).

<sup>56</sup> Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 751 (2010); *see also Rachel E. Barkow, Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1026 (2006) (describing the typical inquiry into plea validity as “cursory”); Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1429–31 (2016) (recommending more careful judicial scrutiny of the factual basis of guilty pleas); LaFave et al., *supra* note 33, § 21.4(f) nn. 210–21 (listing cases permitting the court to find factual basis based on stipulations of the parties or written records); Laurie L. Levenson, *Unnerving the Judges: Judicial Responsibility for the Rampart Scandal*, 34 LOY. L. REV. 787, 791–92 (2001) (detailing both judges’ reliance on the prosecutor’s version of the facts in assessing a guilty plea and their hesitation to probe witnesses in determining the true facts of a case); Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests That Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1689 (2013) (describing judicial review of pleas and plea bargains as cursory and “toothless”).

<sup>57</sup> Allison D. Redlich, *The Validity of Pleading Guilty*, in 2 ADVANCES IN PSYCHOLOGY AND LAW 1, 13–14, 20–21 (Brian H. Bornstein & Monica K. Miller eds. 2016) (discussing studies showing that plea hearings last on average less than ten minutes and that most tender-of-plea forms omit mention of factual guilt); *see also Dezember et al., supra* note 30, at 8 (finding that plea hearings in felony courts in a suburban Virginia county lasted on average just under eight minutes in cases reduced to misdemeanors and just over fourteen minutes in felony cases); Kelsey S. Henderson, Erika N. Fountain, Allison D. Redlich & Jason A. Cantone, *Judicial Involvement in Plea Bargaining*, PSYCH. PUB. POL’Y & L. 14 (2021), <http://dx.doi.org/10.1037/law0000032> (finding that state judges surveyed estimated spending on average about 12 minutes on plea colloquy in felony cases and about 8 minutes in misdemeanor cases).

Our findings on the duration of remote plea hearings are consistent with the findings of empirical studies of in-person hearings. We found that plea hearings lasted on average around nine minutes and that misdemeanor plea hearings were a few minutes quicker than felony plea hearings.<sup>58</sup> In Texas, misdemeanor hearings lasted on average around six minutes whereas in Michigan, they lasted just over eight minutes.<sup>59</sup> Felony hearings were of comparable length in the two states: on average just over ten minutes in Texas and almost eleven minutes in Michigan.<sup>60</sup> The slightly longer duration of misdemeanor hearings in Michigan, when compared to Texas, is not surprising: While Texas law is less demanding in its plea colloquy requirements for misdemeanor cases than for felony cases, the requirements are virtually the same for felonies and misdemeanors in Michigan.<sup>61</sup>

While some commentators and practitioners have suggested that the virtual format may be more efficient and may shorten the length of hearings,<sup>62</sup> our findings do not support this conclusion. Remote proceedings may bring efficiency in other ways (e.g., by eliminating travel to the courtroom), but virtual plea hearings do not appear to be shorter than in-person ones. Conversely, some practitioners have suggested that remote hearings tend to be longer because of the difficulty reviewing and fixing paperwork remotely or because judges take longer to ensure that defendants understand the novel format.<sup>63</sup> Again, our findings do not support these observations and instead suggest that the virtual format does not significantly influence the duration of plea proceedings.

## 2. *Inquiry into the Validity of Guilty Pleas*

The inquiries into voluntariness and knowledge that we observed were generally brief and rote, as predicted by legal scholarship and prior empirical research.

To assess voluntariness, judges typically asked questions along the following lines: “Did anyone force you or threaten you to plead guilty?” and “Are you pleading guilty of your own will?” In addition, some judges asked,

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<sup>58</sup> See *infra* app. tbl. 3.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See *supra* note 45 and accompanying text.

<sup>62</sup> See Turner, *supra* note 2, at 242–43.

<sup>63</sup> *Id.* at 243–44.

“Did anyone promise you anything (other than what is in the plea agreement) in exchange for pleading guilty?” In Texas, judges inquired into voluntariness in 97% of felony cases and 69% of misdemeanor cases.<sup>64</sup> In Michigan, those numbers were respectively 95% and 80%.<sup>65</sup> Our findings are broadly consistent with previous findings from in-person hearings, where judges in 97.5% of felony cases and roughly 70% of misdemeanor cases inquired into voluntariness at the plea hearing.<sup>66</sup>

With respect to knowledge, we found that Texas judges in 98% of felony cases, and 76% of misdemeanor cases discussed *at least one* aspect of the defendant’s knowledge about the guilty plea and its implications.<sup>67</sup> That number was 98% for Michigan felony cases and 95% for Michigan misdemeanor cases.<sup>68</sup> The rate of inquiry into knowledge that we observed was higher than that found in a 2019 study of in-person plea hearings in a different jurisdiction, where 78% of judges in felony cases and about 37% of judges in misdemeanor cases inquired into or stated the defendant’s knowledge of the guilty plea.<sup>69</sup>

With respect to specific aspects of knowledge, in all but a few instances, judges in Michigan and Texas informed defendants of the charges in the case.<sup>70</sup> Judges did not typically discuss the elements of the charges, however,

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<sup>64</sup> See *infra* app. tbl. 3.

<sup>65</sup> *Id.*

<sup>66</sup> Dezimmer et al., *supra* note 30, at 16; Email from Allison Redlich, Professor, George Mason University, to author (May 20, 2019, 11:32 AM CST) (on file with author).

<sup>67</sup> See *infra* app. tbl. 3. If judges informed defendants about the rights waived, maximum or minimum punishment, or elements of the charges, or if they inquired into the defendant’s education, mental competence, or citizenship, we counted this as having inquired into some aspect of a knowing guilty plea. This does not mean, however, that the inquiry was adequate in establishing that the guilty plea was knowing. A guilty plea may be found not to be knowing if the court fails to inform the defendant about a critical aspect such as the rights waived or the maximum punishment applicable upon a guilty plea.

<sup>68</sup> *Id.*

<sup>69</sup> Dezimmer et al., *supra* note 30, at 15.

<sup>70</sup> The Due Process Clause requires that, for a guilty plea to be knowing, defendants must “receive[] ‘real notice of the true nature of the charge against [them], the first and most universally recognized requirement of due process.’” *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (citations omitted). The safer course is for judges to tell defendants of the charges, although the Supreme Court has explained that “the judge [need not] himself explain the elements of each charge to the defendant . . . . Rather, the constitutional prerequisites of a valid plea may be satisfied where . . . the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel.” *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005).

unless there was a question turning on these elements—for example, the relevant punishment or the adequacy of the factual basis of the plea.<sup>71</sup>

In a large majority of the Texas cases we observed (88% of felony cases and 67% of misdemeanor cases), judges also stated the rights that defendants were waiving by pleading guilty.<sup>72</sup> In Michigan, judges mentioned the rights waived in 95% of felony cases and 93% of misdemeanor cases.<sup>73</sup> In more than two-thirds of cases we observed in Texas and Michigan, judges also told defendants of the relevant maximum punishment (the percentage was higher in felony cases in both states).<sup>74</sup>

Judges in Texas also referenced the minimum punishment in 61% of cases we observed (68% of felony and 44% of misdemeanor cases), while judges in Michigan did so in only 10% of cases (15% of felony and 5% of misdemeanor cases).<sup>75</sup> While the rules in both states require courts to inform felony defendants of any applicable mandatory minimum sentence,<sup>76</sup> the different sentencing structures in the two states likely explain the different practice. In Michigan, only a few statutes impose mandatory sentencing minimums,<sup>77</sup> whereas in Texas, all felony cases and some misdemeanor cases

<sup>71</sup> In neither state does the law require a discussion of the elements of the charges at every plea hearing. MICH. CT. R. 6.302(B)(1) (providing that courts must advise a defendant of “the name of the offense to which the defendant is pleading” but also that “the court is not obliged to explain the elements of the offense, or possible defenses”); *see also* TEX. CODE CRIM. PROC. ANN. art. 26.13(a) (West 2021) (requiring a range of admonishments, but not including elements of the charges among them); *Ex Parte Betancourt*, No. 08-05-00063-CR, 2006 WL 1875576, at \*8 (Tex. Crim. App. July 6, 2006) (citing *Bradshaw*, 545 U.S. at 183) (“Where a defendant is represented by competent counsel, the court usually may rely on counsel’s assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.”).

<sup>72</sup> Comparison Data Sheet, Row 18 (on file with author and U. Pa. J. Const. L.).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, Row 20; *see also* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1) (West 2021) (requiring the court to admonish a defendant, prior to accepting his or her guilty plea, of “the range of the punishment attached to the offense.”).

<sup>75</sup> Comparison Data Sheet, Row 21 (on file with author and U. Pa. J. Const. L.).

<sup>76</sup> In Texas, the Code of Criminal Procedure requires the court to inform felony defendants of the “range of the punishment attached to the offense,” TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1) (West 2021), whereas in Michigan, the court must tell felony defendants about “the maximum possible prison sentence for the offense . . . and any mandatory minimum sentence required by law.” MICH. CT. R. 6.302.

<sup>77</sup> *See* Safe and Just Mich., *Felony Firearm in Michigan: A Case Study in What’s Wrong with Mandatory Minimums*, SAFE AND JUST MICH. BLOG, (Aug. 7, 2018), <https://www.safeandjustmi.org/2018/08/07/felony-firearm-in-michigan-a-case-study-in-whats-wrong-with-mandatory-minimums> [<https://perma.cc/CFX8-LEG4>] (“Michigan has few

carry mandatory minimums.<sup>78</sup> Because the question of a mandatory minimum is less likely to arise in Michigan, judges are less likely to need to inform defendants of it.

In Texas, judges also regularly (in 82% of felony cases and 74% of misdemeanor cases) admonished defendants about the potential immigration consequences of the guilty plea.<sup>79</sup> Judges in Michigan were significantly less likely (in only 19% of cases) to inquire into the defendant's citizenship or mention possible immigration consequences of pleading guilty.<sup>80</sup> The gap can be explained by the different rules applicable in the two states. In Texas, the Code of Criminal Procedure requires courts in felony cases to admonish defendants who are pleading guilty that "if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law."<sup>81</sup> By contrast, in Michigan, courts are not required to inform defendants of potential immigration consequences of a guilty plea.<sup>82</sup>

As part of the knowledge inquiry, a number of Texas judges further asked defendants if they had had sufficient opportunity to consult with counsel about the plea<sup>83</sup> and whether they had reviewed the plea paperwork with counsel.<sup>84</sup> Some also asked the defendants whether they were satisfied with

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mandatory minimums, and none related to drug crimes. However, there are a couple mandatory minimums that have significant impacts within the current system, most notably MCL 750.227b, commonly known as 'felony firearm.'").

78 See, e.g., TEX. PENAL CODE ANN. §§ 12.31–12.35, 12.43 (West 2021) (imposing minimum sentences for all felony offenses and for certain misdemeanor offenders).

79 Comparison Data Sheet, Row 15 (on file with author and U. Pa. J. Const. L.). Some judges first inquired into the defendant's citizenship and then gave the admonition, while others gave the admonition without inquiring into citizenship.

80 *Id.*

81 TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (West 2021).

82 See *People v. Osaghae*, 596 N.W.2d 911, 914 (Mich. 1999) (holding that state law does not require judges to advise defendants about the potential immigration consequences of a guilty plea); see also MICH. CT. R. 6.302 (requiring that the court inform defendant of certain consequences of a guilty plea, not including immigration consequences).

83 See, e.g., Felony (Reduced to Misdemeanor) Plea Hearing, *State v. C.R.*, Aug. 27, 2020, 364<sup>th</sup> District Court, El Paso County, TX; Felony Plea Hearing, *State v. W.C.*, Aug. 26, 2020, 156<sup>th</sup> District Court, Bee County, TX; Felony Plea Hearing, *State v. L.B.*, Aug. 28, 2020, 336<sup>th</sup> District Court, Fannin County, TX.

84 See, e.g., Felony (Reduced to Misdemeanor) Plea Hearing, *State v. A.C.*, Sept. 9, 2020, Second Criminal District Court, Dallas County, TX.

their attorney.<sup>85</sup> These inquiries help establish that a plea is knowing and that the defendant is adequately represented, but they are not expressly required by the rules.

When it came to intelligence, Texas judges in most felony cases we observed (82%) checked for mental competence, which is expressly required under the Code of Criminal Procedure.<sup>86</sup> When asking about mental competence, Texas judges often addressed the attorney instead of or in addition to the defendant.<sup>87</sup> But in Texas misdemeanor cases, only 30% inquired into competence, as such an inquiry is not required by the Code.<sup>88</sup> Furthermore, in a small minority of cases (12% of felony and 4% of misdemeanors), Texas judges asked about the education level of the defendant.<sup>89</sup>

Michigan judges were significantly less likely to ask about the mental competence or education level of the defendant. Judges in Michigan inquired into mental competence in just over 2% of cases, and they inquired into education in about 1% of cases.<sup>90</sup> The notable difference between Texas and Michigan judges when it comes to inquiry into competence likely reflects the fact that unlike the Texas Code, Michigan rules of criminal procedure do not expressly require such an inquiry.<sup>91</sup>

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<sup>85</sup> See, e.g., Felony (Reduced to Misdemeanor) Plea Hearing, State v. C.R., Aug. 27, 2020, 364<sup>th</sup> District Court, El Paso County, TX; Felony Plea Hearing, State v. J.A., Aug. 28, 2020, 168<sup>th</sup> District Court, El Paso County, TX; Felony Plea Hearing, State v. M.G., Sept. 2, 2020, 117<sup>th</sup> District Court, Nueces County, TX.

<sup>86</sup> Comparison Data Sheet, Row 16 (on file with author and U. Pa. J. Const. L.); see also TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (West 2021) (“No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary.”).

<sup>87</sup> See, e.g., Felony (Reduced to Misdemeanor) Plea Hearing, State v. C.L., Jan. 8, 2021, 167<sup>th</sup> District Court, Travis County, TX. Courts have held that the court can ask defense attorneys the question about competence, if they make the ultimate determination about sanity on the basis of this inquiry as well as other observations and interactions with the defendant. *Lucero v. State*, 502 S.W.2d 750, 753 (Tex. Crim. App. 1973).

<sup>88</sup> Comparison Data Sheet, Row 16 (on file with author and U. Pa. J. Const. L.).

<sup>89</sup> *Id.*, Row 17.

<sup>90</sup> *Id.*, Rows 16–17.

<sup>91</sup> MICH. CT. R. 6.302 (listing the elements of the inquiry to ensure that the guilty plea is understanding and voluntary, but not requiring courts to verify that the defendant is mentally competent). Michigan case law requires that where some evidence raises questions about the defendant’s competence, courts should not merely rely on a prior competency hearing, but should instead inquire into the mental competence of the defendant at the plea hearing. *People v.*

When it comes to verifying the factual basis of a plea, we found significant differences in Michigan and Texas practice, reflecting the two states' distinct rules on this question. In Texas, the law does not require the court to inquire into the factual basis of the guilty plea at the hearing. Instead, the factual basis of a guilty plea can be satisfied through a written stipulation.<sup>92</sup> By contrast, in Michigan, courts must verify at the plea hearing that a guilty plea is “understanding, voluntary, and *accurate*.”<sup>93</sup> As commentators have noted, and the law in many states affirms, the Michigan approach—requiring judges to inquire into the facts directly at the plea hearing—is superior in its effectiveness.<sup>94</sup>

Because the Texas Code of Criminal Procedure does not require such an inquiry at the hearing, we found that Texas judges asked about the factual basis in only 28% of felony cases and 9% of misdemeanor cases.<sup>95</sup> By contrast, judges in Michigan conducted an inquiry into factual basis in 95% of felony plea hearings and 90% of misdemeanor hearings.<sup>96</sup> In Texas, instead of verifying the facts at the hearing, judges tended to simply confirm that the parties had filed stipulations establishing the factual basis—this occurred in 59% of the felony hearings and 35% of misdemeanor hearings

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Matheson, 245 N.W.2d 551, 555 (Mich. App. Ct. 1976). This holding does not, however, require courts, as a matter of course, to ask defendants or their attorneys about the mental competence of the defendant at the plea hearing.

<sup>92</sup> TEX. CODE CRIM. PROC. ANN. art. 1.15 (West 2021).

<sup>93</sup> MICH. CT. R. 6.302.

<sup>94</sup> See, e.g., Jones v. State, 705 S.W.2d 874, 877 (Ark. 1986) (noting that “the trial court could, and should, comply with Rule 24.6 by continuing a direct inquiry of the defendant as to the factual basis for his plea.”); State v. Finney, 834 N.W.2d 46, 62–63 (Iowa 2013) (affirming the importance of determining the factual basis of the plea on the record); CAL. PENAL CODE § 1192.5 (West 2019) (providing that in felony cases, the “court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.”); FLA. R. CRIM. P. 3.170 (“No plea of guilty or nolo contendere shall be accepted . . . without the court first determining, in open court . . . that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness and that there is a factual basis for the plea of guilty.”); GA. SUPER. CT. R. 33.9 (“Notwithstanding the acceptance of a plea of guilty, judgment should not be entered upon such plea without such inquiry on the record as may satisfy the judge that there is a factual basis for the plea.”); N.J. CT. R. 3:9-2 (“The court . . . may refuse to accept a plea of guilty and shall not accept such plea without first questioning the defendant personally, under oath or by affirmation, and determining by inquiry of the defendant and others, in the court’s discretion, that there is a factual basis for the plea.”); see also ABA STANDARDS OF CRIM. JUST. 14-1.6(a) (“In accepting a plea of guilty or nolo contendere, the court should make such inquiry as may be necessary to satisfy itself that there is a factual basis for the plea.”); LaFave et al., *supra* note 33, § 21.4(f) (noting that questioning the defendant at the hearing is “sometimes said to be the best method” of determining factual basis).

<sup>95</sup> See *infra* app. tbl. 3.

<sup>96</sup> See *id.*

we observed.<sup>97</sup> There is no reason to believe our findings on factual basis inquiries are limited to virtual plea hearings—given the different rules, we expect the distinct approaches to factual basis in Michigan and Texas to occur during in-person hearings as well.

Finally, among all the hearings we observed in Texas and Michigan, judges rejected only five guilty pleas as invalid, which represents 1.7% of the sample.<sup>98</sup> Our findings are consistent with those for guilty pleas rendered at in-person hearings, for which a recent study found an acceptance rate of above 98%.<sup>99</sup>

### 3. *Review of Plea Agreements*

In both Texas and Michigan, at the plea hearing, the parties must also disclose any plea agreement they have negotiated.<sup>100</sup> The parties and the court discussed the terms of the plea agreement on the record during the hearing in about 96% of Texas cases and 90% of Michigan cases.<sup>101</sup> In cases where no plea agreement was mentioned, defendants were likely pleading “open” to the court, without an agreement with the prosecutor.

As noted in Part II.A, agreements between the parties about the sentence are not binding on the court.<sup>102</sup> In Texas, after the parties disclose the plea agreement on the record at the plea hearing, the court must state “whether it will follow or reject the agreement in open court and before any finding on the plea.”<sup>103</sup> If the court refuses to follow the agreement, the defendant can

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<sup>97</sup> Comparison Data Sheet, Rows 7–8, 47 (on file with author and U. Pa. J. Const. L.).

<sup>98</sup> See Felony Plea Hearing, State v. W.C., Aug. 26, 2020, 156<sup>th</sup> District Court, Bee County, TX (rejecting guilty plea because of disagreement with charge reduction that does not accurately reflect the facts); Felony Plea Hearing, State v. M.F., Sept. 22, 2020, Seventh District Court, Smith County, TX (rejecting guilty plea because defendant said he had not had the opportunity to go over the paperwork with his attorney); Misdemeanor Plea Hearing, State v. D.P., Sept. 1, 2020, Third Circuit Court, Wayne County, MI (rejecting guilty plea and plea agreement because reduced charges did not accurately reflect the facts); Felony Plea Hearing, State v. D.S., Sept. 1, 2020, Third Circuit Court, Wayne County, MI (rejecting guilty plea for lack of factual basis because defendant denied knowing that heroin he was charged with possessing was in the car where he was sitting when stopped by police); Misdemeanor Plea Hearing, State v. M.G., Oct. 29, 2020, Thirty-Sixth District Court, Wayne County, MI (dismissing charge of driving without a license, to which defendant was going to plead guilty, because the case was too old).

<sup>99</sup> Dezimmer et al., *supra* note 30, at 7.

<sup>100</sup> TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2021); MICH. CT. R. 6.302 (C)(1).

<sup>101</sup> Comparison Data Sheet, Row 36 (on file with author and U. Pa. J. Const. L.).

<sup>102</sup> TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2021); MICH. CT. R. 6.302.

<sup>103</sup> TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2) (West 2021).

withdraw his plea.<sup>104</sup> In Michigan, the court may provide its view on a sentencing agreement at various points in the process, from a probable cause hearing, to the plea hearing, or the sentencing hearing.<sup>105</sup> And as in Texas, if the court rejects the agreement, the defendant can withdraw the guilty plea.<sup>106</sup>

As part of our observations, we also kept track of the percentage of cases in which the court accepted or rejected the plea agreement at the hearing. We found around extremely low rejection rates in both states—around 1%.<sup>107</sup>

In Michigan, the plea agreement rejection rate we recorded is not very meaningful because in the large majority of felony hearings we observed, Michigan judges simply did not state their views about the plea agreement.<sup>108</sup> As Nancy King and Ronald Wright have reported, Michigan judges frequently share their views on sentencing agreements at an earlier point in the process, the probable cause hearing, as a means of encouraging and guiding the parties' negotiations.<sup>109</sup> In addition, as we observed, Michigan judges frequently postpone their decision on the agreement until sentencing

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<sup>104</sup> *Id.*

<sup>105</sup> *People v. Cobbs*, 505 N.W.2d 208, 212 (Mich. 1993) (“At the request of a party, and not on the judge’s own initiative, a judge may state on the record the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense.”).

<sup>106</sup> *People v. Killebrew*, 330 N.W.2d 834, 843 (Mich. 1982).

<sup>107</sup> Comparison Data Sheet, Rows 39, 41 (on file with author and U. Pa. J. Const. L.). Of Michigan judges who stated whether they would accept or reject the plea agreement at the plea hearing, only 1% of felony court judges rejected an agreement, and no misdemeanor judges rejected a plea agreement. Felony Plea Hearing, *State v. D.P.*, Sept. 1, 2020, Third Circuit Court, Wayne County, MI. In Texas, no misdemeanor plea agreements were rejected, and only one felony plea agreement was rejected. Felony Plea Hearing, *State v. J.B.*, Sept. 25, 2020, 168th District Court, El Paso County, TX.

<sup>108</sup> See *infra* note 111 and accompanying text.

<sup>109</sup> Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 339–41 (2016). In Michigan, judges are not supposed to initiate plea discussions, but on the parties’ request, they may pronounce what sentence would be acceptable to the court if the defendant pleads guilty. *People v. Cobbs*, 505 N.W.2d 208, 212 (Mich. 1993). As King & Wright report based on interviews with Michigan judges and practitioners, these pronouncements often occur at the probable cause hearing. King & Wright, *supra*, at 339–41.

In Texas, judges are not supposed to participate in plea negotiations. *Lynch v. State*, 318 S.W.3d 902, 903 (Tex. App. 2010) (“A trial judge should avoid participation in plea negotiations until an agreement has been reached, in order to ‘avoid the appearance of any judicial coercion or prejudgment of the defendant since such influence might affect the voluntariness of the defendant’s plea.’”) (quoting *Perkins v. Court of Appeals*, 738 S.W.2d 276, 282 (Tex. Crim. App. 1987)).

in order to review the presentencing report.<sup>110</sup> This occurred in 92% of felony cases and 37% of misdemeanor cases.<sup>111</sup> Because we did not follow cases all the way from arraignment through sentencing, we likely missed some rejections of plea agreement at the sentencing hearing. Moreover, in Michigan, some of the “acceptances” we saw at the plea hearing might also have resulted from modifications of the agreement based on a prior negative indication by the judge so any acceptance rate we report might be overstated.

Importantly, the agreements we observed in Michigan generally tended not to be to a specific sentence, but rather to a sentencing range, so even when a judge accepted a plea agreement, he or she retained significant discretion over the ultimate sentence. At the same time, in a high percentage of plea hearings in Michigan (77%), a reduction or dismissal of charges was part of the plea agreement mentioned at the hearings we observed (compared to merely 29% of the Texas plea hearings we observed).<sup>112</sup> The relatively high rate of charge bargains in Michigan may reflect the parties’ attempt to reach a more predictable disposition when they cannot rely on judges to accept their sentencing agreement.

While Michigan practice did not allow us to determine reliably the rate at which judges accepted or rejected plea agreements, in Texas, the rules require judges to state their view about the plea agreement at the plea hearing. Accordingly, Texas judges did so in all misdemeanor hearings and 91% of felony hearings we observed.<sup>113</sup> In the remaining cases, judges either postponed their decision until a subsequent sentencing hearing,<sup>114</sup> or there

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<sup>110</sup> In some counties in Michigan, to minimize the odds of a surprise revelation in the presentencing report, the defense can request a “predisposition investigation” before the plea hearing, which allows the defendant to “review the [presentencing] report and recommendation before making a decision about pleading.” *Plea Bargaining—Plea Bargains and Judicial Involvement; Defense View*, 1A GILLESPIE MICH. CRIM. L. & PROC. § 16:39 (2d ed. 2020).

<sup>111</sup> Comparison Data Sheet, Row 40 (on file with author and U. Pa. J. Const. L.). In Michigan, even some judges who have accepted a plea agreement at the plea hearing might change their views at sentencing, after reading the presentencing report. Interviews with Michigan judges and practitioners reveal that the presentencing report rarely leads judges to change their view on the applicable sentence, however. King & Wright, *supra* note 109, at 377–80.

<sup>112</sup> Comparison Data Sheet, Row 12 (on file with author and U. Pa. J. Const. L.).

<sup>113</sup> *Id.*, Row 40.

<sup>114</sup> George E. Dix & John M. Schmolesky, *Statutory Regulation of Plea Bargaining—Judicial Acceptance of Deal*, 43 TEX. PRAC., CRIM. PRAC. AND PROC. § 40:66 (3d ed. 2020) (stating that occasionally, Texas courts will “accept a plea of guilty or nolo contendere subject to accepting or rejecting the plea agreement after examining the presentence investigation report”) (citing *Ortiz v. State*, 933 S.W.2d 102 (Tex. Crim. App. 1996)).

was no plea agreement. In the cases where Texas judges did express a view about the plea agreement at the plea hearing, Texas judges very rarely rejected the agreements. They did so in one felony case (i.e., 1%) and no misdemeanor cases we observed.<sup>115</sup>

Our findings are consistent with studies of in-person judicial review of plea agreements in Texas. In his 1970s study of Texas plea bargaining practices, Albert Alschuler found that “five of the[] six [Houston felony court] judges followed the prosecutor’s sentence recommendation in almost every guilty-plea case that came before them,” while the sixth, “considered a maverick by prosecutors and defense attorneys alike,” accepted the plea agreement in around 90% of cases.<sup>116</sup> Another contemporaneous study of sentencing by Houston felony court judges likewise found extremely high rates of acceptance of the prosecutor’s sentencing recommendations, ranging from 88% to 100% for different judges.<sup>117</sup> Thus, both in person and online, Texas judges tend to defer to the parties’ sentencing agreements in the vast majority of cases.

#### 4. *Analysis of Observations*

Our observations of remote plea hearings offer three main insights about judicial review of guilty pleas. First, when rules on judicial review of guilty pleas are clearly articulated and specific, judges will generally follow them. At the same time, even clear rules do not yield strict compliance if enforcement mechanisms are weak. Second, judges rarely use their discretion to conduct more probing inquiries into guilty pleas or to reject plea agreements, even when doing so might be in the interests of justice. Third, online as in person, judges tend to be passive players in the plea review process, relying heavily on the parties to ensure fairness and integrity.

When rules on judicial review imposed clear and specific requirements, the judges we observed generally followed them. For example, because Michigan rules require that the court review the factual basis of the plea at

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<sup>115</sup> Comparison Data Sheet, Rows 39, 41 (on file with author and U. Pa. J. Const. L.); Felony Plea Hearing, *State v. J.B.*, Sept. 25, 2020, 168th District Court, El Paso County, TX.

<sup>116</sup> Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1063–64 (1976).

<sup>117</sup> *Id.* (citing James N. Johnson, *Sentencing in the Criminal District Courts*, 9 HOUS. L. REV. 944, 992 (1972)) (reporting that “three of the ten judges who then sat in felony cases followed the prosecutor’s recommendation in 100% of the cases that came before them; one other judge followed the prosecutor’s recommendation in 99% of his cases, two in 98%, one in 96%, one in 92%, and one—in [the “maverick”]—in 88%.”).

the hearing, 93% of Michigan judges did so.<sup>118</sup> Likewise, because the Texas Code expressly requires judges to establish mental competence and admonish the defendant about immigration consequences before accepting a felony plea, 82% of the Texas felony court judges we observed did so.<sup>119</sup>

When the rules did not require these inquiries, however, judges were significantly less likely to conduct them, even when doing so could improve fairness in the process. In other words, judges rarely used their discretion to go beyond the minimum requirements to ensure a plea is knowing, voluntary, or factually based. For example, despite broad agreement that inquiry into the factual basis at the hearing is good practice that helps ensure fairness and integrity in the plea process,<sup>120</sup> most of the Texas judges we observed did not engage in such inquiry and were content to rely on the parties' written stipulations to a factual basis.<sup>121</sup> Likewise, inquiries into the defendant's mental competence and admonitions about the immigration consequences of a guilty plea help establish that defendants' pleas are knowing and voluntary. But where such inquiries were not expressly required, as in Michigan, few judges conducted them on their own initiative.<sup>122</sup> Accordingly, clear and precise rules about the questions and admonitions expected of judges at the plea hearing would help ensure that the court adequately examines the voluntariness, knowledge, and factual basis of guilty pleas.

Even clear rules do not yield perfect compliance, however, if judges are given significant leeway to depart from them or if enforcement mechanisms are weak. For example, while a large majority of the Texas judges we observed followed the express Code requirements in admonishing and questioning defendants at felony plea hearings, not all did so. Judges did not advise defendants of the rights waived by pleading guilty in about 12% of felony hearings, did not inquire into mental competence or mention immigration consequences in roughly 18% felony cases, and did not mention

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<sup>118</sup> See *supra* note 34 and accompanying text & app. tbl. 3 (demonstrating that Michigan judges are instructed to review the factual basis of the plea bargain and that they were much more likely to do this compared to Texas judges).

<sup>119</sup> See *supra* notes 31–32, 79, 81, 86–87 and accompanying text.

<sup>120</sup> See *supra* note 94 and accompanying text.

<sup>121</sup> See *infra* app. tbl. 3.

<sup>122</sup> See *supra* notes 80, 90 and accompanying text (noting that in our observations, Michigan judges mentioned potential immigration consequences in only 19% of cases and inquired into the defendant's mental competence in just over 2% of cases).

the expected punishment range upon pleading guilty in 30% of felony hearings we observed.<sup>123</sup>

In part, this is due to the flexibility built into the rules. First, the Texas Code of Criminal Procedure allows the court to provide most of the admonitions in writing (except for the warning pertaining to immigration consequences, which has to be provided both in writing and orally), so at least some of its requirements were likely fulfilled through the plea paperwork signed by the defendant and filed with the court.<sup>124</sup> Standard plea forms usually lay out the charges filed, the rights waived, the minimum and maximum penalty expected, and certain other consequences of the guilty plea.<sup>125</sup> Furthermore, the Texas Code notes that “substantial compliance by the court [with the provisions on inquiring into the plea’s voluntariness and knowledge] is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court.”<sup>126</sup>

In Michigan, too, large majorities of judges tend to follow requirements that are expressly stated in the Rules. We found close to perfect compliance in felony cases with the rule that judges must advise defendants of the maximum punishment applicable and of the rights waived.<sup>127</sup> At the same time, in misdemeanor cases, 42% of Michigan judges we observed did not state the maximum punishment applicable, despite a rule requiring them to do so.<sup>128</sup> But in Michigan, as in Texas, case law provides that substantial compliance with the plea hearing rules is generally sufficient to preserve the validity of the plea.<sup>129</sup>

Finally, in both Michigan and Texas, appeals waivers are commonly part of plea agreements and preclude regular appellate review of the plea process.<sup>130</sup> In those appeals that are filed, harmless error review for non-

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<sup>123</sup> See *supra* notes 72–75, 79, 86 and accompanying text.

<sup>124</sup> TEX. CODE CRIM. PROC. ANN. art. 26.13 (d) (West 2021).

<sup>125</sup> See, e.g., 282nd Judicial District Court Dallas County, Tex., Plea Agreement Form, [https://www.dallascounty.org/Assets/uploads/docs/courts/criminal\\_district/282/Plea%20Agreement%20Form.pdf](https://www.dallascounty.org/Assets/uploads/docs/courts/criminal_district/282/Plea%20Agreement%20Form.pdf) [<https://perma.cc/JW4J-3PCW>].

<sup>126</sup> TEX. CODE CRIM. PROC. ANN. art. 26.13(c) (West 2021).

<sup>127</sup> Comparison Data Sheet, Rows 18, 20 (on file with author and U. Pa. J. Const. L.) (finding 95% compliance with the rule that defendants must be advised of rights waived and 97% compliance with the rule that defendants must be advised of the maximum punishment applicable in felony cases).

<sup>128</sup> *Id.*, Row 20.

<sup>129</sup> *People v. Saffold*, 631 N.W.2d 320, 327 (Mich. 2001).

<sup>130</sup> See, e.g., MICH. CT. R. 6.302(B)(5); 282nd Judicial District Court Dallas County, Tex., Plea Agreement Form, *supra* note 125.

constitutional violations further limits the incentives of trial judges to comply strictly with the requirements relating to review of guilty pleas.<sup>131</sup> In addition to pushing for specific and mandatory rules, therefore, reformers must consider other ways to incentivize judges to follow these rules—whether by increasing oversight (for example, by removing the harmless error standard when a judge repeatedly fails to provide an admonishment) or by making it easier to comply with the rules (for example, by creating standard plea inquiry forms to guide judges), or both.<sup>132</sup>

At a more general level, our observations tend to confirm that, in virtual plea hearings just as in traditional ones, U.S. judges are typically passive players in a plea bargaining process driven by the parties.<sup>133</sup> The plea hearings we observed were brief and formulaic. Most judges failed to use their discretion to probe into the accuracy of guilty pleas in any meaningful way, and they accepted almost all guilty pleas. In the cases where we observed judges taking action on plea agreements (almost all cases in Texas and most misdemeanor cases in Michigan), judges also ratified virtually all agreements presented to them by the parties.<sup>134</sup>

It is notable that judicial review of plea hearings remained superficial even when judges knew that the hearings were livestreamed online and could

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<sup>131</sup> See, e.g., *High v. State*, 964 S.W.2d 637, 638 (Tex. Crim. App. 1998) (per curiam) (holding that failure to admonish defendant at plea hearing about punishment range attached to the offense is subject to a harm analysis); *Cox v. State*, 113 S.W.3d 468, 469–71 (Tex. App.—Texarkana 2003), *aff'd In re Cox*, No. PD-1314-03, 2003 Tex. Crim. App. LEXIS 847, at \*1 (Crim. App. Nov. 19, 2003) (holding that a trial court’s failure to notify a pleading defendant that a prosecutor’s sentencing recommendations were non-binding was harmless error); *Johnson v. State*, 712 S.W.2d 566, 568 (Tex. App.—Houston [1st Dist.] 1986) (“substantial [trial court] compliance with . . . admonishment provisions . . . [is] sufficient unless the defendant shows harm”); *People v. Coppy*, No. 196151, 1997 WL 33330636, at \*1 (Mich. Ct. App. Dec. 30, 1997) (per curiam) (“[F]ailure of the trial court to inquire of defendant regarding additional promises or inducements underlying his plea of guilty, although in violation of the court rule, is not one of those trial court errors which automatically results in appellate relief,” but is instead subject to harm analysis.).

<sup>132</sup> See Justin Murray, *Policing Procedural Error in the Lower Criminal Courts*, 89 FORDHAM L. REV. 1411 (2020) (arguing that “in addition to examining whether an error affected the outcome, as current law directs, a reviewing court should also consider, [among other factors], whether reversal would substantially help to prevent future errors”).

<sup>133</sup> E.g., DARRYL BROWN, *FREE MARKET CRIMINAL JUSTICE* 81, 117 (2015) (“Judges are more passive and do less to develop the evidentiary record or otherwise compensate for any defense inadequacies.”); ABRAHAM GOLDSTEIN, *THE PASSIVE JUDICIARY* (1981) (commenting on the degree of discretion afforded prosecutors by judges); Henderson et al., *supra* note 57, at 3; see also Russell M. Gold, “Clientless” Prosecutors, 51 GA. L. REV. 693, 709–15 (2017) (explaining that judicial review of settlements between the parties is less rigorous in criminal than in civil cases).

<sup>134</sup> See *supra* note 107 and accompanying text.

be observed by numerous members of the public around the country.<sup>135</sup> Moreover, the hearings remained brief even though the remote format has generally been praised for saving time and resources for judges by reducing travel time and hearing delays and improving scheduling flexibility.<sup>136</sup> Whatever time the courts may have saved by proceeding remotely was not invested in more in-depth judicial review of guilty pleas or plea agreements. As noted earlier, such lack of thorough review heightens the risk of ill-informed and coerced guilty pleas, including from innocent defendants.<sup>137</sup> It also makes it more likely that defendants will plead to charges that do not reflect their conduct and receive a sentence that is not proportionate to their blameworthiness.<sup>138</sup> Given these concerns, it is worth contemplating why judges persist with cursory plea hearings.

One explanation is that judges trust the prosecutor and the defense attorney to be effective agents for the state and the defendant, respectively; judges therefore rely on the parties to ensure that the plea is voluntary, informed, and factually based.<sup>139</sup> Indeed, the Supreme Court has broadly approved of such judicial deference, holding that “[w]here a defendant is represented by competent counsel, the court usually may rely on that counsel’s assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.”<sup>140</sup> This laissez-faire approach to plea bargaining is reflective of a broader adversarial attitude to the criminal process, in which “judges . . . do less to develop the

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<sup>135</sup> In practice, remote hearings we observed typically yielded an audience of just a few members, and it is possible that judges were aware of the low audience numbers. The exception were hearings that remained online after they were completed, as was the case with at least one court in Michigan. In that case, remote plea hearings regularly netted more than a hundred views.

<sup>136</sup> See, e.g., Turner, *supra* note 2, at 212–14, 238–43 (reporting results of survey of Texas judges and practitioners and prior scholarly commentary on the efficiency benefits of remote criminal proceedings).

<sup>137</sup> See *supra* notes 38–43 and *infra* notes 271–273 and accompanying text.

<sup>138</sup> *Id.*

<sup>139</sup> As Stephanos Bibas has explained, however, there are many reasons why prosecutors and defense attorneys may at times not be faithful agents for their principals. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2470–86 (2004). In a recent survey, judges recognized the important role that judicial review plays in ensuring fairness in the plea process. Judges generally agreed that “they are the most responsible for ensuring the validity of the plea,” but at the same time, a majority also noted that this is a “shared responsibility across legal actors.” Henderson et al., *supra* note 57, at 7, 14.

<sup>140</sup> Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005); see also *Ex Parte Betancourt*, No. 08-05-00063-CR, 2006 WL 1875576, at \*8 (Tex. App. July 6, 2006); *United States v. Rodriguez-Penton*, 547 F. App’x 738, 740 (6th Cir. 2013) (“The Court put the onus on counsel, not on sentencing judges [to inform defendants of deportation consequences of a guilty plea].”).

evidentiary record or otherwise compensate for any defense inadequacies.”<sup>141</sup>

Judicial deference to the parties’ plea agreements, which we observed in Texas, also encourages the continued use of plea bargaining, as the parties can negotiate more easily in the knowledge that their agreement will not be disturbed.<sup>142</sup> Judges therefore may remain relatively passive in reviewing plea agreements in an effort to promote more predictable and efficient dispositions, with the ultimate goal of saving time and resources.<sup>143</sup> Such passivity, however, comes at the expense of judicial authority over sentencing.<sup>144</sup>

## II. VIRTUAL PLEA HEARINGS: LAW AND PRACTICE

In addition to documenting the type of review that judges conduct in remote plea hearings, we tracked how the online setting influenced the plea process: whether defendants were asked at the hearing to consent to the use of the remote format; whether they were informed of the right to consult

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<sup>141</sup> BROWN, *supra* note 133, at 81.

<sup>142</sup> See Alschuler, *supra* note 116, at 1066–67 (noting that judges rarely impose sentences harsher than those negotiated and recommended by prosecutors in order to avoid “disappointing reasonable expectations that the system has created”).

<sup>143</sup> See *id.* (noting that judges often passively accept plea agreements “in order to make the guilty-plea system work smoothly”).

<sup>144</sup> See *id.* (“To the extent that judges yield to prosecutors in . . . the guilty-plea system . . . , they sacrifice their independence.”); see also Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 210 (2019) (“[P]lea bargaining is a cooperative effort between the system’s assumed adversaries (prosecutors and defendants) to avoid legislatively and judicially directed outcomes.”); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 849 (2018) (“That judges routinely approve plea bargains does not mean that they are powerless. It suggests only that judges’ preferences align with those of the attorneys who work in their courts.”). Texas judges have broad authority to impose a sentence they believe appropriate in a particular case. Texas does not use sentencing guidelines, and statutory ranges are generally very wide, giving judges broad discretion at sentencing. *E.g.*, TEX. PENAL CODE ANN. § 12.32 (West 2021) (establishing a range of five to ninety-nine years of imprisonment for first-degree felonies); *id.* § 12.33 (establishing a range of two to twenty years of imprisonment for second-degree felonies). A defendant could opt to have a jury impose the sentence even after pleading guilty, but this option is rarely used in guilty plea cases. See, e.g., *Burnett v. State*, 88 S.W.3d 633, 635–36 (Tex. Crim. App. 2002) (noting that the defendant in the case pleaded guilty, but rejected a plea offer from the prosecution and instead requested that the punishment be set by a jury); George E. Dix & John M. Schmolesky, *Consent and Approval by Prosecutor*, 43 TEX. PRAC., CRIM. PRAC. & PROC. § 40:12 (3d ed. 2020) (“In most cases in which the defendant pleads guilty, the defendant waives a jury with the agreement of the prosecutor, often as a part of a plea agreement, and the judge determines punishment.”).

confidentially with counsel during remote plea hearings; and whether technological disruptions or the informal setting of remote proceedings risked impairing fairness in the process. As this Part explains, the answers to these questions may affect the constitutional validity of remote plea proceedings.

*A. Constitutional and Statutory Rules on Virtual Plea Hearings*

The decision to permit remote plea proceedings may implicate several constitutional rights of defendants: the Due Process right to be physically present at the proceeding; the Sixth Amendment right to counsel; the Due Process right to a fair proceeding; and the Sixth Amendment right to a public trial.<sup>145</sup> How these rights apply in the face of competing state interests differs somewhat depending on whether the technology is used in ordinary times or in response to a declared emergency such as the coronavirus pandemic. In an emergency, the state's interest in protecting public health and safety weighs more heavily, and remote proceedings are likely to be justified more easily.<sup>146</sup> This Section reviews the law in both ordinary and emergency settings.

*1. The Right to Be Physically Present*

The first relevant constitutional question is whether states can hold remote plea hearings without obtaining the defendant's waiver of the right to be physically present. The U.S. Supreme Court has held that criminal defendants have the right to be physically present at critical stages of the criminal process in felony cases, "whenever [their] presence has a relation, reasonably substantial, to the fullness of [their] opportunity to defend against the charge[s]."<sup>147</sup> Physical presence is required "to the extent that a fair and just hearing would be thwarted by [the defendant's] absence, and to that extent only."<sup>148</sup>

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<sup>145</sup> The discussion of the constitutional provisions that apply to plea hearings builds on my prior work in Turner, *supra* note 2, at 7–11, 13–14, 29–34. For additional analysis of the constitutional law that applies to virtual remote proceedings, see Deniz Ariturk, William E. Crozier & Brandon L. Garrett, *Virtual Criminal Courts*, U. CHI. L. REV. ONLINE (Nov. 16, 2020), <https://lawreviewblog.uchicago.edu/2020/11/16/covid-ariturk/> [<https://perma.cc/EKJ4-YEKJ>]; 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/3J5Y-NCFG>].

<sup>146</sup> Turner, *supra* note 2, at 29–34.

<sup>147</sup> Snyder v. Mass., 291 U.S. 97, 105–06 (1934).

<sup>148</sup> *Id.* at 107–08.

Lower courts have held that the right to be present applies to plea hearings, because these hearings are a critical stage of the criminal process.<sup>149</sup> At the same time, the right to physical presence has not been held to extend to misdemeanor cases.<sup>150</sup> Likewise, the right does not apply if “presence would be useless, or the benefit but a shadow.”<sup>151</sup>

The Court has not directly addressed whether the use of videoconferencing at a plea hearing might thwart a “fair and just hearing” or, conversely, whether the benefits of physical presence are too hypothetical or marginal to trigger due process protection.<sup>152</sup> Lower courts have divided on this question.<sup>153</sup> A couple have concluded that Due Process is met when a defendant appears via video, even over his objection, because video proceedings are functionally equivalent to in-person proceedings under certain circumstances.<sup>154</sup> Specifically, if the technology is advanced enough to allow the parties and the court to see and hear each other well, and defendant and counsel can communicate adequately and in confidence, any benefits from an in-person appearance at a plea or sentencing hearing would be “but a shadow.”<sup>155</sup> In a few other states, even though courts have not

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<sup>149</sup> See, e.g., *People v. Lindsey*, 772 N.E.2d 1268, 1276 (Ill. 2002) (finding that arraignment and jury waiver are “critical” stages of a criminal proceeding at which a defendant has the right to be present); see also Zachary M. Hillman, *Pleading Guilty and Video Teleconference: Is A Defendant Constitutionally “Present” When Pleading Guilty by Video Teleconference*, 7 J. HIGH TECH. L. 41, 43–44 (2007) (“[D]efendant’s presence is constitutionally required during all critical stages of the proceeding.” And, pleading guilty is a critical stage “because of the numerous rights given up and because the direct result is the defendant’s conviction”); Wayne LaFave et al., *Presence of the Defendant: Origins and Scope of the Right to Be Present*, 6 CRIM. PROC. § 24.2(a) (4th ed.) (stating that a defendant’s right to be present “is not restricted to situations where the defendant is ‘actually confronting witnesses or evidence against him,’” but extends to any proceeding with a “relation, reasonably substantial to . . . his opportunity to defend against the charge.”).

<sup>150</sup> LaFave et al., *supra* note 149.

<sup>151</sup> *Snyder*, 291 U.S. at 106–07.

<sup>152</sup> See *id.* at 106–08.

<sup>153</sup> Hillman, *supra* note 149, at 53–55; Turner, *supra* note 2, at 8–9.

<sup>154</sup> See, e.g., *State v. Peters*, 615 N.W.2d 655, 660 (Wis. App. 2000), *rev’d on other grounds by* 628 N.W.2d 797 (Wis. 2001) (noting that “an audio-video hookup may well be the legal equivalent of physical presence” and that using CCTV to conduct plea and sentencing hearing does not “inherently damage the fairness or justness of the plea hearing”) (quoting *Scott v. Florida*, 618 So.2d 1386, 1388 (Fla. Dist. Ct. App. 1993)); see also Hillman, *supra* note 149, at 53–54 (discussing cases).

<sup>155</sup> *Snyder*, 291 U.S. at 106–07; see also *Peters*, 615 N.W.2d at 660 (holding that videoconference plea and sentencing hearing did not violate Due Process because the technology used did not thwart “fairness and justice”).

directly addressed the constitutional question, statutes have permitted videoconference pleas in felony cases without the defendant's consent.<sup>156</sup>

In most states that provide for remote plea hearings in felony cases, however, the consent of the defendant is required.<sup>157</sup> And a few state courts have held that the Due Process Clause mandates physical presence at plea hearings and therefore a remote plea hearing can be held only with the defendant's consent.<sup>158</sup> Other courts have also held that the use of video at sentencing may bias the factfinder against a remote defendant and that the remote format undermines the dignity of the proceedings.<sup>159</sup>

Texas and Michigan take diverging approaches to the use of remote plea hearings in ordinary times. In Texas, the Code of Criminal Procedure requires the defendant to consent in writing for a plea hearing to occur by video.<sup>160</sup> By contrast, in Michigan, rules of criminal procedure permit courts to conduct remote felony plea hearings without the defendant's consent.<sup>161</sup> Michigan courts have not examined whether these rules are constitutional under the Due Process Clause. But notably, Michigan appeals courts have held that felony *sentencing* cannot be held remotely without the defendant's

<sup>156</sup> ALASKA R. CRIM. P. 38.2; GA. SUPER. CT. R. 9.2; IDAHO CRIM. R. 43.1; IOWA R. CRIM. P. 2.27; MICH. CT. R. 6.006.

<sup>157</sup> *See, e.g.*, ARIZ. R. CRIM. P. 1.5(c)(3); CAL. PENAL CODE § 977(a)(1); HAW. R. PENAL P. 43(e); 725 ILL. COMP. STAT. § 5/106D-1(c) (2021); LA. CODE CRIM. PROC. ANN. art. 562 (2020); MINN. R. CRIM. P. 1.05; MISS. CODE ANN. § 99-1-23(1) (2021); MO. REV. STAT. § 561.031 (2021); MONT. CODE ANN. §§ 46-12-211, 46-16-105 (2019); N.D. SUP. CT. ADMIN. R. 52 (4)(B); OHIO R. CRIM. P. 43; PA. R. CRIM. P. 119 & cmt.; TEX. CODE CRIM. PROC. ANN. art. 27.18 (West 2021); WASH. CRIM. R. LTD. JURIS. 3.4(2).

<sup>158</sup> *See, e.g.*, *People v. Stroud*, 804 N.E.2d 510, 516-17 (Ill. 2004) (citing *People v. Guttendorf*, 723 N.E.2d 838, 840-41 (Ill. App. Ct. 2000)) (holding that for plea hearings, the right to be present requires that the defendant be physically present unless the defendant waives that right); *State v. Miller*, 182 P.3d 158, 165 (N.M. Ct. App. 2008) (holding that acceptance of no contest plea via video does not “offer the same level of meaningful human interaction as a face-to-face meeting” and is “inconsistent with substantial justice”) (internal quotation marks omitted); *see also* *Scott v. State*, 618 So. 2d 1386, 1388 (Fla. Dist. Ct. App. 1993) (noting that remote sentencing and plea hearings are valid only upon the defendant's waiver of the right to be present); *In re Videoconferencing Approval in Gen. Sessions Courts for Sixth Judicial Circuit*, 776 S.E.2d 748 (S.C. 2015) (“No videoconference proceeding may take place in the Sixth Judicial Circuit unless the Defendant consents in writing and orally on the record to appear at the hearing by videoconference, rather than in person.”); *State v. Soto*, 817 N.W.2d 848, 860 (Wis. 2012) (“When videoconferencing is proposed for a plea hearing . . . [t]he judge shall . . . ascertain . . . whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing . . . [and] suggest to the defendant that he has the option of refusing.”).

<sup>159</sup> *See, e.g.*, *People v. Heller*, 891 N.W.2d 541, 543 (Mich. App. 2016) (“Sentencing by video dehumanizes the defendant who participates from a jail location, unable to privately communicate with his or her counsel and likely unable to visualize all the participants in the courtroom.”).

<sup>160</sup> *See* TEX. CODE CRIM. PROC. ANN. art. 27.18 (West 2021).

<sup>161</sup> MICH. CT. R. 6.006.

consent—in part because the rules of criminal procedure do not specifically authorize it and in part because it would violate the Due Process Clause.<sup>162</sup> To the extent that a Michigan remote plea hearing features the imposition of a sentence, therefore, it must be conducted with the consent of the defendant.

In *People v. Heller*, the Michigan Court of Appeals explained that a defendant has a right to be physically present at sentencing because sentencing is a “grave moment in the criminal process [which] often seals a defendant’s fate or dictates the contours of his or her future.”<sup>163</sup> Moreover, “[s]entencing is ‘an intensely human process,’” and sentencing via video can “dehumanize[] the defendant who participates from a jail location, unable to privately communicate with his or her counsel and likely unable to visualize all the participants in the courtroom.”<sup>164</sup> The court cited to social science research showing that “video conferencing . . . may color a viewer’s assessment of a person’s credibility, sincerity, and emotional depth” and that “individuals who appear in court via video conferencing are at risk of receiving harsher treatment from judges or other adjudicators.”<sup>165</sup> Finally, the court explained that the video format can impair the perceived fairness of the process because it lacks the “dignity” of the “courtroom setting” and thus “clashes with the judge’s duty to acknowledge the humanity of even a convicted felon.”<sup>166</sup>

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<sup>162</sup> *Heller*, 891 N.W.2d at 543 (“[S]entencing is a critical stage of a criminal proceeding at which a defendant has a constitutional right to be present, and virtual appearance is not a suitable substitute for physical presence.”); *see also* *People v. Brown*, No. 334498, 2017 WL 6061175, at \*3 (Mich. Ct. App. Dec. 7, 2017) (per curiam) (remanding case for resentencing because there was “no indication on the record by defendant, defense counsel, or the trial court that defendant specifically knew his right to be present and that he expressly waived this right”); *People v. Ames*, No. 333239, 2017 WL 3441489, at \*3 (Mich. Ct. App. Aug. 10, 2017) (per curiam) (denying resentencing because defendant signed a written waiver of his right to be physically present at sentencing).

<sup>163</sup> *Heller*, 891 N.W.2d at 543.

<sup>164</sup> *Id.* (quoting *United States v. Davern*, 970 F.2d 1490, 1516 (6th Cir. 1992)).

<sup>165</sup> *Id.* at 544 (citing Amy Salzyn, *A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario*, 50 *OSGOODE HALL L.J.* 429, 445 (2012)).

<sup>166</sup> *See id.* at 543 (“A defendant’s right to allocute before sentence is passed—to look a judge in the eye in a public courtroom while making his or her plea—stems from our legal tradition’s centuries-old recognition of a defendant’s personhood, even at the moment he or she is condemned to prison.”); *see also id.* at 544 (citing *Del Piano v. United States*, 575 F.2d 1066, 1069 (3d Cir. 1978)):

Sentencing is more than a rote or mechanical application of numbers to a page. It involves a careful and thoughtful assessment of ‘the true moral fiber of another,’ a task made far more complex when the defendant speaks through a microphone from a remote location . . . . *Heller*’s absence from the sentencing nullified the dignity of the proceeding and its participants, rendering it fundamentally unfair.

The rationales offered by the *Heller* court to ban remote sentencing hearings, unless the defendant expressly consents to the remote format, apply with equal force to plea hearings. In plea hearings, just as in sentencing hearings, the use of video can negatively influence the court's perception of the defendant.<sup>167</sup> And a plea hearing is a “grave moment in the criminal process [that] often seals a defendant's fate or dictates the contours of his or her future.”<sup>168</sup> The judge must decide whether a guilty plea is valid and whether to accept the plea and accompanying agreement or to send the parties back to the negotiating table or to trial.<sup>169</sup> The court's decision whether to accept a guilty plea and the accompanying agreement has a critical effect on the punishment that the defendant would receive. Because the use of video at plea hearings can have serious negative repercussions for the defendant, the defendant's consent should be required, just as it is required for remote sentencing hearings. For all of these reasons, most state statutes and courts that have authorized video plea hearings require the defendant's consent.<sup>170</sup>

Even if the Due Process Clause ordinarily requires in-person appearance during plea and sentencing proceedings, an emergency such as the coronavirus pandemic may alter the constitutional analysis. During a pandemic, the state's interests in protecting public health and ensuring the speedy resolution of criminal cases may well trump the defendant's right to be physically present at a plea hearing.<sup>171</sup> Indeed, in response to the coronavirus pandemic, the Michigan and Texas Supreme Courts issued emergency orders that authorized courts to conduct a range of remote

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<sup>167</sup> For empirical studies on this point, see notes 280–282, 291–293 and accompanying text.

<sup>168</sup> *See id.*

<sup>169</sup> *See supra* Part I.A.

<sup>170</sup> *See supra* notes 157–158 and accompanying text.

<sup>171</sup> *See* Commonwealth v. McBryde, No. 662 WDA 2020, 2021 WL 1831824 at \*15 (Pa. Super. Ct. May 7, 2021) (upholding a non-consensual video plea during the pandemic on the grounds that it was authorized by the Pennsylvania Supreme Court's emergency order); *see also* Clarington v. State, 314 So. 3d 495, 509 (Fla. Dist. Ct. App. 2020) (upholding constitutionality of remote probation-violation hearing during a public health emergency); United States v. Rosenschein, 474 F. Supp. 3d 1203, 1210–11 (D.N.M. 2020) (upholding constitutionality of remote suppression hearing during a public health emergency); Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 832 (Mass. 2021) (“The Commonwealth's interest in protecting the public health during the COVID-19 pandemic is significant and, combined with its interest in the timely disposition of a case, would, in many instances, outweigh the defendant's interest in an in-person [suppression] hearing.”); State v. Vega-Larregui, 248 A.3d 1224, 1248 (N.J. 2021) (upholding the constitutionality of remote grand jury proceedings during a public health emergency). *See generally* Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (permitting states to impose rationally based measures—in that case, mandatory smallpox vaccinations—that limit individual liberties in order to protect public health).

criminal proceedings, including plea hearings, without the consent of the defendant.<sup>172</sup>

Yet the emergency orders also acknowledged that their scope is limited by constitutional provisions, leaving open the possibility for challenges on Due Process grounds.<sup>173</sup> Recognizing the continued application of constitutional provisions to remote proceedings during the pandemic, guidelines issued by the Michigan State Court Administrative Office provide that “[t]he court should address, on the record, that the parties are waiving any right they may have to be present in the courtroom for the proceeding.”<sup>174</sup> Several other states, as well as the federal system, have continued to require the defendant’s consent to plea hearings even during the coronavirus emergency, recognizing the high stakes of such hearings.<sup>175</sup> A Texas appeals court also struck down two remote guilty pleas that occurred during the pandemic without the defendant’s consent; the court concluded that the Texas Supreme Court’s Emergency Order did not trump the preexisting statutory right to be physically present during a plea hearing.<sup>176</sup>

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<sup>172</sup> Mich. Sup. Ct., Order Expanding Authority for Judicial Officers to Conduct Proceedings Remotely, Admin. Ord. No. 2020-6 (Apr. 7, 2020), *rescinded by order entered July 26, 2021* [<https://perma.cc/BD63-BYMQ>] [hereinafter Michigan Supreme Court Emergency Order]; Tex. Sup. Ct., First Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-007 (Mar. 13, 2020), <https://www.txcourts.gov/media/1446056/209042.pdf> [<https://perma.cc/ZG2M-2SHL>] [hereinafter Texas Supreme Court First Emergency Order].

<sup>173</sup> Michigan Supreme Court Emergency Order, *supra* note 172 (noting that remote proceedings conducted during the emergency “must be consistent with a party’s Constitutional rights”); Texas Supreme Court, First Emergency Order, *supra* note 172 (noting that the order’s provisions are “subject . . . to constitutional limitations”).

<sup>174</sup> Mich. State Ct. Admin. Off., Michigan Trial Courts Virtual Courtroom Standards and Guidelines (Apr. 7, 2020), [https://www.courts.michigan.gov/4a1e83/siteassets/court-administration/standardsguidelines/operations/vcr\\_stds.pdf](https://www.courts.michigan.gov/4a1e83/siteassets/court-administration/standardsguidelines/operations/vcr_stds.pdf) [<https://perma.cc/H2WL-QDEH>].

<sup>175</sup> *See, e.g.*, Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 529 (to be codified in 18 U.S.C. § 3001) (“Video teleconferencing or telephone conferencing . . . may only take place with the consent of the defendant, or the juvenile, after consultation with counsel.”); Cal. Cts., California Emergency Rules Related to COVID-19, <https://jcc.legistar.com/View.ashx?M=F&ID=8234474&GUID=79611543-6A40-465C-8B8B-D324F5CAE349> [<https://perma.cc/RJE7-XZDD>] (last visited Nov. 22, 2021) (“In criminal proceedings, courts must receive the consent of the defendant to conduct the proceeding remotely . . . .”); *see also* ADVISORY COMM. ON CRIM. RULES, MEETING AGENDA, Nov. 2, 2020, at 149 (proposing rules for remote plea hearings for future emergencies and requiring the defendant’s express consent to the remote format).

<sup>176</sup> State’s Petition for Discretionary Review, *Lira v. State*, No. 11-20-00148-CR, 2021 WL 1134801, at \*3 (Tex. Crim. App. Mar. 25, 2021) (granted May 19, 2021); State’s Petition for Discretionary Review, *Huddleston v. State*, No. 11-20-00149-CR, 2021 WL 924850, at \*3 (Tex. Crim. App. Mar. 11, 2021), (granted May 19, 2021).

In brief, while many jurisdictions permitted remote hearings to occur without the defendant's consent during the COVID emergency, in ordinary times, most states and the federal system require such consent. A video plea hearing does not ordinarily fulfill the Due Process right to be present. Accordingly, remote plea hearings can be held only if defendants knowingly and voluntarily waive that right.

## 2. *The Right to Counsel*

The right to counsel is also at issue when criminal proceedings occur via video. The Sixth Amendment's right to counsel includes the right of the defendant to confer privately with counsel before and during the proceedings.<sup>177</sup> As the California Supreme Court has explained:

[I]f an accused is to derive the full benefits of his right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney . . . . To afford him those benefits it is essential that he should be allowed to consult with his counsel, not only during the actual trial, but prior thereto, in order to prepare for his defense . . . . It is equally essential to the enjoyment of this constitutional guarantee that the accused should have the right to a private consultation with his counsel.<sup>178</sup>

While the Sixth Amendment ensures the defendant's right to consult privately with counsel, the case law does not specify how that right is to be implemented. Do judges have to take proactive measures to protect the right—for example, by informing defendants of the right to confer privately with counsel during remote proceedings? Or does the right simply mean that courts should not stand in the way of such private consultation when it is requested?

Some state laws take a more generous view of the right to private consultation during remote proceedings and require courts to “inform the defendant on the record how to, at any time, communicate privately with counsel” when a criminal proceeding occurs via video.<sup>179</sup> Recently proposed emergency federal rules on remote criminal proceedings similarly require courts to “find[] that the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding”; to

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<sup>177</sup> See, e.g., *Geders v. United States*, 425 U.S. 80, 88–89 (1976) (noting the importance of the right to consult privately with counsel not only during trial, but also during recess, “because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer’s guidance”).

<sup>178</sup> *Barber v. Mun. Ct. for Luis Obispo Cnty.*, 598 P.2d 818, 822–23 (Cal. 1979).

<sup>179</sup> OHIO R. CRIM. P. 43(A)(2)(d); see also ARIZ. CODE JUD. ADMIN. § 5-208 (2010) (“Prior to the start of proceedings, and if defendant is represented by an attorney who is not present at the remote custodial site, the court shall inform the defendant of the available means of confidential communications with defense counsel.”).

make such a finding, the court would presumably have to discuss the matter with the defendant.<sup>180</sup> Rules and guidelines in other states simply require the court to ensure that counsel and defendant have the ability to communicate confidentially, without specifically mandating that defendants be informed of that right.<sup>181</sup> The Texas statute on videoconference plea proceedings places the burden on the defendant to request that private communication with his attorney be provided during the proceeding.<sup>182</sup> Finally, other state rules, as well as the Texas pandemic-related emergency order, fail to mention what measures, if any, courts must take to ensure that the right to counsel is fully protected during remote proceedings.<sup>183</sup> Even where the rules are silent, however, the Sixth Amendment serves as a backstop to ensure that defendants are allowed to confer with counsel privately during remote proceedings.<sup>184</sup>

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<sup>180</sup> Draft FED. R. CRIM. P. 62(d)(2)(B), *in* ADVISORY COMM. ON CRIM. RULES, MEETING AGENDA, Nov. 2, 2020, at 143.

<sup>181</sup> *E.g.*, ALASKA R. CRIM. P. 38.2(a) (“Any approved system must provide for a procedure by which the defendant may confer with the defendant’s attorney in private.”); MINN. R. CRIM. P. 1.05 subd. 10(3) (“The court must ensure that the defendant has adequate opportunity to confidentially communicate with counsel, including, where appropriate, suspension of the audio transmission and recording or allowing counsel to leave the conference table to communicate with the defendant in private.”); WASH. SUPER. CT. CRIM. R. 3.4(e)(3) (“Video conference facilities must provide for confidential communications between attorney and client.”). In Michigan, the rules on videoconferencing do not address the question, but videoconferencing standards promulgated by the State Court Administrative Office provide that when defense counsel and client are not in each other’s presence during a remote proceeding, they “shall be able to have private, confidential communication during the proceeding.” Mich. State Ct. Admin. Off., *supra* note 174. Furthermore, the emergency order issued to permit remote proceedings during the coronavirus pandemic expressly states that any remote procedure must permit confidential communications between the defendant and her counsel. Michigan Supreme Court Emergency Order, *supra* note 172.

<sup>182</sup> TEX. CODE CRIM. PROC. ANN. art. 27.18 (West 2021) (noting that a court may conduct a videoconference plea hearing if, among else, “on request of the defendant, the defendant and the defendant’s attorney are able to communicate privately without being recorded or heard by the judge or the attorney representing the state.”).

<sup>183</sup> *See, e.g.*, MICH. CT. R. 6.006; Texas Supreme Court First Emergency Order, *supra* note 172.

<sup>184</sup> *See* Order Upon Defendant’s Motion to Continue Sentencing, *State v. Thomas*, No. 1905019003, 2021 WL 1053853 ¶ 31 n.31 (Del. Super. Ct. Mar. 19, 2021) (granted Mar. 19, 2021) (noting in dictum that compliance with the right to counsel during a virtual sentencing proceeding could be ensured “by allowing private attorney-client consultation through the use of the audiovisual platform’s ‘breakout room’ feature *along with a simple admonition by the sentencing judge prior to the hearing* that either counsel or the defendant could request private consultation with each other at any time”) (emphasis added).

### 3. *The Right to a Fair Hearing*

The fairness of remote plea hearings can also be affected by technological disruptions, lack of access to the technology necessary to participate in a remote hearing, and the potentially biasing effects of the informal setting of remote hearings. If technological difficulties cause a defendant or his attorney to not be able to observe, hear, or participate in a material part of the proceeding, this may violate the Due Process Clause “to the extent that a fair and just hearing would be thwarted by [the defendant’s] absence”—in this case, a forced absence caused by a technological malfunction.<sup>185</sup> On the other hand, missing short snippets of a proceeding as a result of a glitch would not be a due process violation if the benefit of full presence during those moments would be too speculative.<sup>186</sup> Along the same lines, lack of access to adequate technology can contribute to unfairness in the process to the extent that it results in inability to participate adequately in the proceedings.<sup>187</sup>

In some cases, the informality of remote hearings could also impair the fairness of the process. Certain casual surroundings might lead the court to believe that a defendant is not taking the process seriously.<sup>188</sup> They may also feature substandard lighting, poor audio quality, background noise, and other distractions.<sup>189</sup> While these features often reflect a lack of resources or inadequate advice by counsel, they may nonetheless subtly bias the court’s judgment of the defendant’s character and result in a more negative outcome for the defendant.<sup>190</sup>

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<sup>185</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 107–08 (1934).

<sup>186</sup> *Id.* at 106–07.

<sup>187</sup> *Cf. Ake v. Oklahoma*, 470 U.S. 68, 77 (1985):

We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

<sup>188</sup> *See, e.g., BENNINGER ET AL., supra* note 6, at 157–59 (mentioning interviewees concerns that defendants were not taking the remote proceedings seriously).

<sup>189</sup> *See infra* Part II.B.3 (reporting that such problems were observed in remote plea hearings in Texas and Michigan); *BENNINGER ET AL., supra* note 6, at 77 (reporting findings of multi-jurisdictional survey of criminal justice actors who reported that defendants and witnesses often lack access to quality internet connections, which can result in poor audio quality and disruptions, and also lack access to quiet spaces, which creates background noise and distractions); *id.* at 169, 173 (noting that 78.3% of surveyed defense attorneys “had experienced problems with poor audio quality, while 60.4% had experienced issues of poor video quality” and 49.2% “reported that camera placement inhibited views of the defendant.”).

<sup>190</sup> *See infra* notes 280–285 and accompanying text.

#### 4. *The Right to a Public Trial*

Finally, the remote format can affect the right of the defendant to a public trial and the public's parallel right to access the proceedings.<sup>191</sup> Public access to the proceedings is regarded as an important guarantee of fairness, “an effective restraint on possible abuse of judicial power,”<sup>192</sup> and a key prerequisite to public confidence in the criminal process.<sup>193</sup> It applies not only at trial, but also at various non-trial proceedings, including plea hearings.<sup>194</sup> The right to a public trial can be restricted, however, if necessary to further an overriding state interest, such as protecting the safety of a testifying witness<sup>195</sup> or, during the pandemic, protecting public health.<sup>196</sup> The court must ensure that any “closure [is] no broader than necessary to protect” the compelling state interest.<sup>197</sup> Partial closures of the court, where only some members of the public are excluded or where exclusions occur for only part of the proceeding, can be imposed for a “substantial reason.”<sup>198</sup>

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<sup>191</sup> The Sixth Amendment gives the defendant the right to a public trial. U.S. CONST. amend. VI. The public also has a right to access the courts based on the First Amendment. U.S. CONST. amend. I; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). The discussion of the application of the right to a public trial in remote proceedings draws substantially on *Turner*, *supra* note 2.

<sup>192</sup> *In re Oliver*, 333 U.S. 257, 270 (1948).

<sup>193</sup> *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982).

<sup>194</sup> *See, e.g.*, *Lilly v. State*, 365 S.W.3d 321, 331–32 (Tex. Crim. App. 2012) (holding that highly restrictive policies that fail to accommodate public attendance during plea proceedings are impermissible); *In re Copley Press, Inc.*, 518 F.3d 1022, 1027 (9th Cir. 2008) (holding that plea colloquies must be open to the public); *United States v. Alcantara*, 396 F.3d 189, 198–202 (2d Cir. 2005) (holding that the right of public access applies to plea and sentencing proceedings); *United States v. Haller*, 837 F.2d 84, 86 (2d Cir. 1988) (concluding that “there is a right of access to plea hearings and to plea agreements”); *In re Wash. Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986) (holding that the First Amendment right of public access extends to plea and sentencing hearings).

<sup>195</sup> *See, e.g.*, *Moss v. Colvin*, 845 F.3d 516, 520 (2d Cir. 2017) (holding that protecting the safety of a testifying undercover officer can justify court closure); *United States v. Simmons*, 797 F.3d 409, 414 (6th Cir. 2015) (recognizing that the need to protect witnesses can in principle justify court closure, but finding that closure was not justified on the facts of the case).

<sup>196</sup> Stephen E. Smith, *The Right to a Public Trial in the Time of COVID-19*, 77 WASH. & LEE L. REV. ONLINE 1, 6–7 (2020), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol77/iss1/1> [<https://perma.cc/C3RT-8G2S>] (arguing that “[p]rotecting public health is indisputably an ‘overriding’ interest.”).

<sup>197</sup> *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

<sup>198</sup> *See* Smith, *supra* note 196, at 8 (noting that “the ‘substantial reasons’ courts have approved as justifying partial courtroom closures are quite similar to the ‘overriding interests’ that have supported valid complete closures.”).

While the use of videoconferencing technology may prevent members of the public to observe a case first-hand, it need not curtail public access altogether. States can still accommodate public access by broadcasting remote proceedings online or on television monitors installed in the courtroom and accessible to the public.<sup>199</sup> Partial closures of a remote proceeding—for example, providing a link to a video proceeding to only some members of the public, or interrupting the video feed for a portion of a proceeding—can also be justified if necessary to protect an important state interest, such as protecting public health.<sup>200</sup>

In Texas, the coronavirus emergency order stated that courts must provide for reasonable public access to remote proceedings, without specifying how.<sup>201</sup> In Michigan, the emergency order required that “access to the proceeding . . . be provided to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule.”<sup>202</sup> In both states, the administrative offices of courts set up YouTube channels for courts to broadcast remote proceedings and encouraged judges to use them.<sup>203</sup> Accordingly, remote criminal proceedings were regularly—though not uniformly—streamed live on the Internet.<sup>204</sup> In cases streamed online, Texas and Michigan courts complied with their duty to ensure reasonable public access to remote criminal proceedings during the pandemic.

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<sup>199</sup> *United States v. Gutierrez-Calderon*, No. 2016-0009, 2019 WL 3859753, at \*11 (D.V.I. Aug. 16, 2019); *Swain v. LaRose*, No. 3:15 CV 942, 2016 WL 8674570, at \*16 (N.D. Ohio July 29, 2016), *report and recommendation adopted*, No. 3:15 CV 942, 2016 WL 4486853 (N.D. Ohio Aug. 26, 2016); *Rollness v. United States*, No. C10-1440-RSL, 2013 WL 4498684, at \*18 (W.D. Wash. Aug. 21, 2013).

<sup>200</sup> Tex. Off. Ct. Admin., *Background and Legal Standards—Public Right to Access to Remote Hearings During COVID-19 Pandemic* (2020), <https://www.txcourts.gov/media/1447316/public-right-to-access-to-remote-hearings-during-covid-19-pandemic.pdf> [<https://perma.cc/H7XF-HJHQ>].

<sup>201</sup> Texas Supreme Court First Emergency Order, *supra* note 172.

<sup>202</sup> Michigan Supreme Court Emergency Order, *supra* note 172.

<sup>203</sup> MiCourt Virtual Courtroom Directory, *supra* note 7; Texas Court Live Streams, *supra* note 7.

<sup>204</sup> See Turner, *supra* note 2, at 229, 235–36 (noting that many courts in Texas and Michigan livestreamed criminal proceedings during the coronavirus pandemic in an effort to comply with the right to a public trial, but that survey of Texas judges and practitioners revealed that not all Texas courts publicly broadcast virtual criminal proceedings).

## B. *The Practice of Virtual Guilty Pleas*

### 1. *Waivers of the Right to Be Physically Present*

In our observations of remote plea hearings, we tracked whether judges obtained the defendant's consent to the remote format, whether judges told defendants about the right to consult privately with counsel during the remote proceeding, and whether technological glitches or other issues unique to the remote setting disrupted the proceedings.

Our observations revealed that only a minority of judges asked defendants whether they consented to the use of the remote format or whether they waived their right to appear in person at a plea hearing. In Texas, judges asked for the defendant's consent to proceed remotely in only 32% of the plea hearings we observed.<sup>205</sup> In Michigan, this occurred in 27% of remote plea hearings we watched.<sup>206</sup> Interestingly, in Michigan, judges obtained the defendant's waiver in 82% of felony sentencing hearings, consistent with pre-pandemic law requiring such waivers.<sup>207</sup> Yet in Texas, even though a statute also required the defendant's consent for remote plea hearings in ordinary times, this did not lead a high proportion of judges to ask for such consent during the pandemic.<sup>208</sup>

Our numbers likely underestimate somewhat the percentage of cases in which defendants waived their physical presence. A number of courts obtained written waivers of the right to an in-person hearing,<sup>209</sup> and judges may have considered these sufficient and therefore not asked for an oral waiver at the plea hearings. We did not have access to the case files, so we do not know the percentage of written waivers of the right to be present.

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<sup>205</sup> Comparison Data Sheet, Row 34 (on file with author and U. Pa.J. Const. L.); app. tbl. 4.

<sup>206</sup> Comparison Data Sheet, Row 34 (on file with author and U. Pa.J. Const. L.); app. tbl. 4.

<sup>207</sup> See *supra* note 162 and accompanying text; Comparison Data Sheet, Row 48 (on file with author and U. Pa.J. Const. L.).

<sup>208</sup> See TEX. CODE CRIM. PROC. ANN. art. 27.18 (West 2021).

<sup>209</sup> See, e.g., Waiver of Rights, Consent to Plea by Video Teleconferencing, Dallas County, Texas (on file with author); Waiver of Rights and Consent to Proceed by Video Teleconference, McLennan County, TX (on file with author). For examples of the use of written waivers before the pandemic, see *People v. Ames*, No. 333239, 2017 WL 3441489, at \*3 (Mich. Ct. App. Aug. 10, 2017) (noting that defendant executed a written waiver consenting to proceed via videoconference); TEX. CODE CRIM. PROC. ANN. art. 27.18 (West 2021) (requiring that the defendant and the prosecution file written consent to proceed with videoconferencing).

Even if we were able to consider written waivers, however, it is not likely that the rate of waivers overall would be significantly higher. We saw a number of cases in which courts obtained an oral waiver at the plea hearing in cases where defendants had also signed written waivers of the right to appear in person.<sup>210</sup> Some judges held up the written waiver form and confirmed that the defendant consented to the use of the remote format.<sup>211</sup> Likewise, courts regularly asked defendants to waive their trial-related rights at the plea hearing, even when these same waivers were mentioned in the plea paperwork signed by defendants.<sup>212</sup> So we would expect that even if a judge obtained from the defendant a written waiver of the right to be physically present, in most cases, the judge would also obtain an oral waiver from the defendant as well.

## 2. *Notice of the Right to Consult Privately with Counsel*

When it comes to the right to consult privately with counsel, a very small percent of judges in the remote plea hearings we observed (4% of those in Texas and 5% in Michigan) expressly reminded defendants of that right, since such a reminder is not required by the rules in either state.<sup>213</sup> Perhaps not surprisingly, in the absence of a reminder, few defendants made use of their right to consult with counsel confidentially. We observed only about a dozen defendants taking the opportunity to consult with counsel in a breakout room during a remote plea hearing, whether at counsel's, the client's, or the court's initiative.<sup>214</sup>

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<sup>210</sup> Indeed, the Michigan guidelines recommend that judges mention the waiver at the hearing. Mich. State Ct. Admin. Off., *supra* note 174.

<sup>211</sup> *See, e.g.*, Misdemeanor Plea Hearing, State v. A.W.S., Jan. 8, 2021, County Court at Law, Bexar County, TX (presiding judge screen-shared defendant's waiver of right to be present and asked if the defendant did, in fact, consent to a video hearing); Felony Plea Hearing, State v. M.M., Sept. 14, 2020, 187th District Court, Bexar County, TX (the judge informed defendant that that the proceeding was taking place virtually, then showed defendant his previously signed waiver and asked defendant if he had indeed signed the waiver).

<sup>212</sup> *See, e.g.*, Felony Plea Hearing, State v. E.B., Feb. 5, 2021, Third Circuit Court, Wayne County, MI (the judge confirmed defendant's awareness of the plea forms yet proceeded to explain the defendant's waived trial and appellate rights).

<sup>213</sup> Comparison Data Sheet, Row 35 (on file with author and U. Pa.J. Const. L.); app. tbl. 4. The rate did not differ significantly in misdemeanor and felony cases. *Id.*

<sup>214</sup> *See, e.g.*, Felony Plea Hearing, State v. K.M., Oct. 30, 2020, Third Circuit Court, Wayne County, MI; Misdemeanor Plea Hearing, State v. D.S., Dec. 21, 2020, Third Circuit Court, Wayne County, MI; Misdemeanor Plea Hearing, State v. G.A., Jan. 13, 2021, County Court at Law, Bexar County, TX (breakout room used to discuss difference between guilty plea and no contest plea); Felony Plea Hearing, State v. J.E., Jan. 20, 2021, Thirty-Ninth Circuit Court, Lenawee County, MI; Felony

While defense attorneys themselves should have (and may well have) told their clients about this right in preparation for the plea proceeding, defendants are less likely to invoke the right if they are not reminded at the hearing itself. Several empirical studies have found higher levels of passivity and disengagement among defendants who appear remotely than among those who appear in person.<sup>215</sup> Notably, studies show that defendants are less apt to seek counsel's help in immigration and criminal proceedings conducted via video.<sup>216</sup> A similar detached attitude likely also inhibits defendants from seeking to consult with counsel during a remote proceeding, particularly in the absence of a reminder during the hearing.

### 3. *Technological Problems, Disruptions, and Informal Settings*

Our observations further revealed a relatively small, but not insignificant number of cases in which technological glitches may have affected the

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Plea Hearing, State v. M.K., Jan. 29, 2021, Third Circuit Court, Wayne County, MI (breakout room used after client made statements negating the factual basis of the guilty plea); Felony Plea Hearing, State v. C.S., Jan. 28, 2021, Forty-Fifth Circuit Court, Saint Joseph County, MI (breakout room used after defendant had questions about the factual basis inquiry).

It is possible that some defendants communicated with counsel privately through other features (such as text or the private chat function on Zoom), but we saw no indication of this happening. Moreover, survey responses of defense attorneys in the Houston area suggest that communications with clients during Zoom hearings has been “very difficult” to “impossible”. Texas Indigent Defense Commission, Harris County Monitoring Report Supp. 64–65 (2021). Consultation by text is also not likely to be adequate for most matters requiring a dialogue between counsel and client, and it is likely to distract both parties from the hearing.

<sup>215</sup> See MCKAY, *supra* note 6, at 108–12 (finding that videoconferencing tends to impose a barrier to communication between detainees and court and “leave[s] detainees feeling distanced and disconnected from their legal proceedings”); Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 Nw. U. L. REV. 933, 938, 978 (2015) (finding “a robust association between depressed claimmaking and televideo” format in immigration proceedings); FIELDING ET AL., *supra* note 6, at 69–71 (explaining the sense of “detachment” and the “distancing effect” that virtual trials can have on defendants); Penelope Gibbs, *Defendants on Video—Conveyor Belt Justice or a Revolution in Access?*, TRANSFORM JUST. 18 (Oct. 2017), <https://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf> [<https://perma.cc/6B6F-MT4C>] (noting how virtual trials exacerbated defendants’ tendencies to disengage from court proceedings); Poulin, *supra* note 6, at 1104–05 (“The use of videoconferencing technology to bring the defendant to the courtroom inevitably creates a barrier between the defendant and the court.”); TERRY ET AL., *supra* note 6, at 22–23 (noting “[t]he perception of practitioners that defendants [take] the process less seriously than they would if they had [to appear] in person” and finding that defendants who appeared via video were less likely to ask for and receive legal representation than defendants who appeared in person).

<sup>216</sup> Eagly, *supra* note 215, at 938, 978; TERRY ET AL., *supra* note 6, at 23.

fairness of the proceedings to some degree.<sup>217</sup> Technological issues came up in about 16% of remote proceedings in Texas and 26% in Michigan, and varied from minor issues, such as occasional inability to hear one of the participants,<sup>218</sup> muting and unmuting problems,<sup>219</sup> audio lag leading to participants speaking over each other,<sup>220</sup> and other sound issues,<sup>221</sup> to more serious problems, such as a technological problem causing a participant to drop out of the hearing temporarily or permanently.<sup>222</sup> Two remote plea hearings had to be interrupted and conducted in multiple stages after the

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<sup>217</sup> Comparison Data Sheet, Row 13 (on file with author and U. Pa. J. Const. L.). In observations of remote family law hearings in Texas in the summer of 2020, while courts were still adapting to the remote format, Elizabeth Thornburg found technological problems in 38% of the observed hearings. Thornburg, *supra* note \*, at \*6. As in our study, many were relatively minor and involved muting issues and audio quality. *Id.*

<sup>218</sup> *See, e.g.*, Felony Plea Hearing, State v. L.H., Dec. 17, 2020, Third Circuit Court, Wayne County, MI (difficult to hear defense counsel); Misdemeanor Plea Hearing, State v. P.G., Sept. 2, 2020, Sixty-Second B District Court, Kent County, MI (appearing from jail, defendant could sometimes not hear the court and asked judge to repeat questions a few times).

<sup>219</sup> *See, e.g.*, Felony Plea Hearing, State v. L.H., Dec. 17, 2020, Third Circuit Court, Wayne County, MI (judge getting upset at defense counsel for giving directions to defendant on how to unmute as this was “messaging up the record”); Felony Sentencing Hearing, State v. B.C., Jan. 5, 2021, Third Circuit Court, Wayne County, MI (another defendant awaiting his own case was unmuted and made some noise during the defendant’s statement).

<sup>220</sup> *See, e.g.*, Misdemeanor Plea Hearing, State v. D.M., Dec. 11, 2020, Ninety-Fifth B District Court, Iron County, MI (noting how the judge reminded counsel not to speak over each other); Felony Probation Revocation Hearing, State v. A.W., Dec. 29, 2020, Fourth Circuit Court, Jackson County, MI (noting how defendant was consistently talking over the other parties).

<sup>221</sup> *See, e.g.*, Felony Plea Hearing, State v. L.C., Dec. 16, 2020, Ninth Circuit Court, Kalamazoo County, MI (defendant appeared by phone and had a terrible connection so it was very difficult to hear her and she was breaking in and out during the hearing); Misdemeanor Plea Hearing, State v. L.B., Dec. 15, 2020, 70<sup>th</sup> District Court, Saginaw County, MI (“terrible echo” made it difficult to follow the hearing); Felony Plea Hearing, State v. J.P., Nov. 6, 2020, Third Circuit Court, Wayne County, MI (defendant indicated that the volume was going in and out on his phone and noted several times that he couldn’t hear the court; the judge had to repeat himself several times); Misdemeanor Plea Hearing, State v. D.L., Oct. 29, 2020, Thirty-Sixth District Court, Wayne County, MI (defendant’s connection was poor and kept breaking up, it was difficult to hear defendant and for defendant to hear the court, so defendant kept asking, “Can you hear me?”; the defendant was also not visible part of the time); Misdemeanor Plea Hearing, State v. B.G., Oct. 29, 2020, Thirty-Sixth District Court, Wayne County, MI (defendant was muted at first and then his connection was poor and kept breaking up so judge said “Phone is exceedingly terrible, we are only catching every other syllable” and attorney repeated what defendant was trying to say).

<sup>222</sup> *E.g.*, Misdemeanor Plea Hearing, State v. L.P., Jan. 14, 2021, County Court at Law, Bexar County, TX (prosecutor cut out a few times); Felony Plea Hearing, State v. J.P., Jan. 21, 2021, Forty-Fifth Circuit Court, Saint Joseph County, MI (defendant and defense counsel froze for about ten seconds); Misdemeanor Plea Hearing, State v. N.H. Oct. 28, 2020, Eighty-Sixth District Court, Antrim County, MI (defense counsel’s video at one point fully froze and he dropped out of the Zoom hearing for several minutes).

defendants dropped out of the hearings due to technological problems.<sup>223</sup> At one felony sentencing hearing, the defendant experienced trouble connecting at the outset, and then his phone cut out and froze while the judge was handing down the sentence.<sup>224</sup>

In addition to sound or connection problems resulting from technological glitches, we witnessed a few other sound or image problems relating to the setting from which participants appeared. For example, some of the participants (defendants who appeared from detention centers or judges who appeared from the courtroom) wore masks, which occasionally made it more difficult to hear them.<sup>225</sup> Defendants were at times also participating with poor lighting or poor camera angles that made only part of their faces visible.<sup>226</sup> In one felony plea hearing, for example, the defendant was not on camera; instead, the camera on his phone was pointed at the roof of his car.<sup>227</sup> No one asked the defendant to adjust the angle of his camera.<sup>228</sup> In another case, the defendant's front camera did not appear to be working, so he filmed himself in the mirror of his bathroom.<sup>229</sup> At another hearing, the defendant was crying at several points during the hearing, and whenever she did so, she turned the camera to show her partner's face, who was sitting next to her.<sup>230</sup> The judge asked her to keep

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<sup>223</sup> Misdemeanor Plea Hearing, *State v. M.K.*, Jan. 14, 2021, County Court at Law, Aransas County, TX (the defendant dropped off the call twice during the hearing; when defendant returned, she struggled to get her audio connected properly, which resulted in delay of about three minutes); Felony Plea Hearing, *State v. V.G.*, Oct. 2, 2020, Forty-Ninth District Court, Webb County, TX (plea took place in two phases because defendant's phone died in the middle of the hearing).

<sup>224</sup> Felony Sentencing Hearing, *State v. K.B.*, Jan. 21, 2021, Third Circuit Court, Wayne County, MI.

<sup>225</sup> *See, e.g.*, Felony Sentencing Hearing, *State v. B.C.*, Jan. 5, 2021, Third Circuit Court, Wayne County, MI (judge wore mask and was a little difficult to hear); Misdemeanor Plea Hearing, *State v. P.W.*, Jan. 15, 2021, Dallas County Criminal Court No. 7, TX (judge asked defendant to remove mask so she could hear him).

<sup>226</sup> *See, e.g.*, Misdemeanor Plea Hearing, *State v. M.K.*, Jan. 14, 2021, County Court at Law, Aransas County, TX (after repeated audio problems, defendant put her ear to the phone to hear better, and her face was not visible while she was listening); Felony Plea Hearing, *State v. Y.D.*, Oct. 7, 2020, Thirty-Sixth District Court, Wayne County, MI (very difficult to see defendant because she appeared from a dark room); Misdemeanor Plea Hearing, *State v. M.M.*, Sept. 2, 2020, Sixty-Second B District Court, Kent County, MI (could not see defendant's full face as only the top of the head was within the camera's view); Misdemeanor Plea Hearing, *State v. M.G.*, Oct. 29, 2020, Thirty-Sixth District Court, Wayne County, MI (defendant's face was only partially visible for some of the hearing, until the judge asked him to move the camera so she could see him).

<sup>227</sup> Felony Plea Hearing, *State v. J.P.*, Nov. 6, 2020, Third Circuit Court, Wayne County, MI.

<sup>228</sup> *See id.* (noting the defendant was not visible during the hearing due to the angle of his camera).

<sup>229</sup> Felony Plea Hearing, *State v. L.W.*, Jan. 29, 2021, Third Circuit Court, Wayne County, MI.

<sup>230</sup> Felony Plea Hearing, *State v. M.K.*, Jan. 29, 2021, Third Circuit Court, Wayne County, MI.

the camera squarely on her face so the judge could see her.<sup>231</sup> In at least nine other cases, the defendants took part in the proceeding without a camera and could not be seen, but the court did not require that they appear by video.<sup>232</sup> In a few cases, the judge could only be heard, but not seen.<sup>233</sup>

Because we were observing the hearings remotely, we do not know what caused the technological problems that participants experienced—whether it was the devices the participants were using, the connection they were relying on, or a lack of familiarity with the technology. The vast majority of defendants who were not in custody were using their phones to appear remotely, and camera angles and lighting are less than optimal when a phone is used. Moreover, reports suggest that both access to technology and a stable Internet connection are likely to be difficult in poorer and rural communities.<sup>234</sup> It is therefore likely that in at least some of the cases we

<sup>231</sup> *Id.*

<sup>232</sup> Felony Plea Hearing, State v. L.C., Dec. 16, 2020, Ninth Circuit Court, Kalamazoo County, MI; Misdemeanor Plea Hearing, State v. J.S., Dec. 15, 2020, Eighth District Court, Kalamazoo County, MI; Misdemeanor Plea Hearing, State v. S.B., Dec. 14, 2020, Eighth District Court, Kalamazoo County, MI; Misdemeanor Plea Hearing, State v. H.W., Dec. 14, 2020, Seventy-Seventh District Court, Osceola County, MI; Misdemeanor Plea Hearing, State v. W.S., Oct. 23, 2020, Eighty-Sixth District Court, Leelanau County, MI; Felony Plea Hearing, State v. K.A., Oct. 21, 2020, Ninth Circuit Court, Kalamazoo County, MI; Misdemeanor Plea Hearing, State v. J.L., Oct. 14, 2020, Fiftieth District Court, Pontiac County, MI; Misdemeanor Plea Hearing, State v. T.C., Sept. 2, 2020, Sixty-Second B District Court, Kent County, MI; Misdemeanor Plea Hearing, State v. D.B., Aug. 31, 2020, Thirty-Sixth District Court, Wayne County, MI.

Similar difficulties were reported from the first virtual jury trial in a criminal case in Texas. As a group of Texas lawyers who observed the first virtual criminal jury trial in Texas recounted, multiple technological mishaps marred the jury selection process: “[m]ultiple jurors . . . unsure how to mute and unmute themselves, turn their video feed on or off, or move to their breakout room when instructed by the court”; “several jurors [not being able to] see the defense attorney when he first began his voir dire, so the proceedings had to stop in order for the court to teach the jurors how to switch from Gallery View to Active Speaker”; “[l]ots of questions . . . repeated because of bad connections or an audio lag” repeated “visual and audio problems” as a result of poor connectivity; and despite the court having issued devices to jurors who needed them, five jurors “excused due to various technology problems rang[ing] from computer viruses to an outdated operating system that did not permit one juror to access Zoom at all.” Jennifer Lapinski, Robert Hirschhorn & Lisa Blue, *Zoom Jury Trials: The Idea Vastly Exceeds the Technology*, TEX. LAW. (Sept. 29, 2020), <https://www.law.com/texaslawyer/2020/09/29/zoom-jury-trials-the-idea-vastly-exceeds-the-technology/?sreturn=20201121143911> [https://perma.cc/NR54-P225].

<sup>233</sup> *See, e.g.*, Misdemeanor Plea Hearing, State v. D.P., Sept. 1, 2020, Third Circuit Court, Wayne County, MI.

<sup>234</sup> As a report by the Brennan Center explains:

According to studies by the Pew Research Center, there are substantial disparities in access to internet broadband and computers according to income and race. Americans who live in rural communities are also less likely to have access to broadband internet. The same is true for people with disabilities, who may also require special technology in order to engage in online activities such as remote court proceedings.

observed, technological disruptions were the result of inadequate access to technology. Finally, some of the difficulties were also likely due to defendants or other participants not knowing how to use the technology effectively.<sup>235</sup>

Virtual hearings also tended to be relatively informal, in a way that detracted from the gravity of the proceedings and potentially prejudiced the judges' perceptions of defendants. Defendants who were not in custody usually appeared from their homes. While the background was often neutral (a wall or a window), occasionally, the informality of the environment was notable.<sup>236</sup> We saw more than one defendant trying to participate from bed,<sup>237</sup> one participating from a construction site,<sup>238</sup> and two others participating from a bathroom.<sup>239</sup> In one case, a judge chastised the defendant for eating and moving around during the remote hearing;<sup>240</sup> in

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ALICIA BANNON & JANNA ADELSTEIN, BRENNAN CTR. FOR JUST., *THE IMPACT OF VIDEO PROCEEDINGS ON FAIRNESS AND ACCESS TO JUSTICE IN COURT* 10 (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court> [<https://perma.cc/BS9C-5ZHB>] (footnotes omitted); *see also* Texas Indigent Defense Commission, Harris County Monitoring Report Supp. 52–58 (2021) (reporting defense attorney survey responses about clients' struggles with access to technology for videoconferencing consultations); Tarika Daftary-Kapur, Kelsey S. Henderson & Tina M. Zottoli, *COVID-19 Exacerbates Existing System Factors That Disadvantage Defendants: Findings from a National Survey of Defense Attorneys*, 45 *LAW & HUM. BEHAV.* 81, 87 (2021) (reporting findings from survey of defense attorneys about representing clients during the pandemic that “[t]echnological barriers, both in the form of clients accessing web platforms they had little experience with (e.g., Zoom) and a lack of access to devices (e.g., phones and computers), was also a common theme in these responses, mentioned by 29% of attorneys”).

<sup>235</sup> *See, e.g.*, Felony Plea Hearing, State v. L.H., Dec. 17, 2020, Third Circuit Court, Wayne County, MI (Dec. 17, 2020) (defendant struggled to unmute her microphone as needed, and defense counsel relied solely on his laptop microphone rather than headphones, making it difficult to hear him when he spoke); *see also* Lapinski, Hirschhorn & Blue, *supra* note 232.

<sup>236</sup> In addition to the informality of the background, defendants generally wore casual clothing. *See, e.g.*, Felony Plea Hearing, State v. R.J., Jan. 21, 2021, Ninth Circuit Court, Kalamazoo County, MI (Jan. 21, 2021) (defendant wearing pajamas during hearing).

<sup>237</sup> *E.g.*, Felony Plea Hearing, State v. J.C., Oct. 30, 2020, Third Circuit Court, Wayne County, MI.

<sup>238</sup> Felony Plea Hearing, State v. S., June 4, 2020, 296th District Court, Collin County, TX (defendant appeared from work on a construction site walking around with his phone in his hand, so judge stated “Can you sit down—you’re about to plead to a felony, I don’t want you walking around a damn work yard.”). This hearing was one of 61 remote criminal proceedings in Texas observed by Brooke Vaydik between May and July 2020 in relation to a previous project on remote criminal justice (data on file with author and U. Pa. J. Const. L.).

<sup>239</sup> Felony Sentencing Hearing, State v. A.M., Dec. 22, 2020, Third Circuit Court, Wayne County, MI; Felony Plea Hearing, State v. L.W., Jan. 29, 2021, Third Circuit Court, Wayne County, MI.

<sup>240</sup> Felony Plea Hearing, State v. L.H., Dec. 17, 2020, Third Circuit Court, Wayne County, MI.

two other cases, the defendants were smoking during the hearing.<sup>241</sup> Several defendants appeared from a car—while riding as passengers or after having pulled over from driving the car themselves.<sup>242</sup> News reports from Michigan and Texas Zoom hearings have similarly recounted examples of informal (and occasionally indecorous) remote hearings and noted judges’ frustration about the inability to preserve the dignity of the proceedings in an online format.<sup>243</sup> Likewise, one study of videoconference proceedings before COVID found that defendants appearing on video tended to be “less inhibited” than defendants appearing in person.<sup>244</sup> A number of cases we observed also featured background noise distractions—from kids to pets to cell phones ringing, lawnmowers buzzing, or alarms going off.<sup>245</sup>

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<sup>241</sup> Misdemeanor Plea Hearing, State v. A.P., Jan. 13, 2021, County Court at Law, Collin County, TX; Misdemeanor Plea Hearing, State v. M.H., Oct. 28, 2020, Seventy-Eighth District Court, Newaygo County, MI.

<sup>242</sup> See, e.g., Misdemeanor Plea Hearing, State v. D.L., Oct. 29, 2020, Thirty-Sixth District Court, Wayne County, MI (defendant attending hearing from car); Felony Plea Hearing, State v. M.E., Sept. 23, 2020, Forty-Fifth Circuit Court, St. Joseph County, MI (same); see also BENNINGER ET AL., *supra* note 6, at 157 (reporting that interviewed judges and attorneys complained about defendants driving or riding in vehicles during virtual hearings).

<sup>243</sup> Gabrielle Banks, *In Houston’s Zoom Court Proceedings, Decorum Often Gets Muted*, HOUS. CHRON. (Dec. 24, 2020, 8:38 AM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/In-Houston-s-Zoom-court-proceedings-decorum-15825974.php> [<https://perma.cc/DY2V-3GGT>]; Stephen Paulsen, *Crime and Punishment and Zoom Logins: Local Judge Prepares for First Virtual Trial in West Texas*, BIG BEND SENTINEL (Dec. 2, 2020, 5:55 PM), <https://bigbendsentinel.com/2020/12/02/crime-and-punishment-and-zoom-logins-local-judge-prepares-for-first-virtual-trial-in-west-texas/> [<https://perma.cc/9NLE-WHA8>]; Elisabeth Waldon, *Declining Decorum: Judges Strive to Maintain Order in the Courtroom in the Age of Zoom*, DAILY NEWS (Dec. 21, 2020), <https://thedailynews.cc/articles/declining-decorum/> [<https://perma.cc/P8QJ-BFLR>]; see also Martin Naylor, *Accused Appears at Derby Court from McDonald’s*, DERBY TEL. (Jan. 11, 2021, 9:24 AM), <https://www.derbytelegraph.co.uk/news/derby-news/defendant-enters-pleas-derby-crown-4859486> [<https://perma.cc/Z5WE-EVJH>] (reporting that judge in England reprimanded defendant for participating in virtual plea hearing from McDonald’s); *Bare-Chested Builder Annoys Judge*, COURT NEWS U.K. (Aug. 11, 2020), <https://courtnewsuk.co.uk/bare-chested-builder-annoys-judge/> [<https://perma.cc/manage/create?folder=7380>] (reporting that judge in England was not happy “when a bare chested builder [sic] facing a cocaine supply charge appeared in court via a video link . . . on his mobile phone from the construction site he was working on . . . with another topless man looking curiously over his shoulder”); BENNINGER ET AL., *supra* note 6, at 157–58 (reporting interviewees’ comments that defendants and other participants in virtual hearings engaged in behavior inappropriate for court and lacking formality and decorum).

<sup>244</sup> Emma Rowden & Anne Wallace, *Remote Judging: The Impact of Video Links on the Image and the Role of the Judge*, 14 INT’L J. L. IN CONTEXT 504, 516–18 (2018).

<sup>245</sup> See, e.g., Misdemeanor Plea Hearing, State v. T.W., Dec. 17, 2020, Third Circuit Court, Wayne County, MI (defendant’s child was noisy during the hearing); Misdemeanor Plea Hearing, State v. J.M., Jan. 13, 2021, County Court at Law, El Paso County, TX (dog barking in the background); Misdemeanor Plea Hearing, State v. J.V., Oct. 2, 2020, County Court at Law, El Paso County,

Occasionally, participants were also disrupted by other persons present in the room with them. In one case, the defendant's spouse spoke up to say that her husband did want to be represented by counsel, even though the husband himself said several times that there was no need for that and that he would represent himself.<sup>246</sup> In another case, the judge asked the defendant to tell any persons who were in the room to leave while the remote hearing was occurring.<sup>247</sup> In a third case, the defendant kept talking to someone off camera when he was not speaking or being addressed directly at the hearing.<sup>248</sup> Finally, in a remote hearing where the defendant was appearing from jail, police officers were talking loudly and laughing while the hearing was going on.<sup>249</sup>

Judges themselves were likely to be more formal even in remote proceedings. Most judges we observed were either working from the courtroom or appeared with a virtual background featuring a courtroom to simulate the same formality. But on rare occasions, the informality of the virtual setting proved impossible to avoid, as when a judge's dog would bark repeatedly during a hearing.<sup>250</sup> Defense attorneys and prosecutors typically appeared from a business or home office setting or had a formal virtual background. But occasionally, they also had a less formal setting or

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TX (judge's dogs kept barking during the hearing); Felony Plea Hearing, State v. M.A., Jan. 6, 2021, Third Circuit Court, Wayne County, MI (low-level smoke alarm making noise during the hearing, and a cell phone rang several times during the hearing); Felony Plea Hearing, State v. B.A., Jan. 29, 2021, Third Circuit Court, Wayne County, MI (background noise consistently coming from defendant's phone).

<sup>246</sup> This is based on the author's observations that were not recorded on a form because they concerned a remote arraignment, not a plea hearing.

<sup>247</sup> Pretrial Conference, State v. S.M., Sept. 1, 2020, Circuit Court Branch Thirty-One, Milwaukee County, WI.

<sup>248</sup> Felony Plea Hearing, State v. R.J., Jan. 21, 2021, Ninth Circuit Court, Kalamazoo County, MI.

<sup>249</sup> Felony Plea Hearing, State v. J.K., Dec. 14, 2020, Eighty-Fifth District Court, Benzie County, MI.

<sup>250</sup> Misdemeanor Plea Hearing, State v. J.V., Oct. 2, 2020, County Court at Law, El Paso County, TX; *see also* Misdemeanor Plea Hearing, State v. M.L., Jan. 15, 2021, County Court at Law, El Paso County, TX (judge's dog barked through hearing); Misdemeanor Plea Hearing, State v. A.W., Jan. 15, 2021, County Court at Law, El Paso County, TX (the same dog continued barking during the subsequent misdemeanor hearing that same day); *see also* Paulsen, *supra* note 243 (quoting one judge about the undue level of informality in the setting used by some judges who appear remotely).

distractions in the background.<sup>251</sup> For example, at least one defense attorney took part in a remote hearing while driving.<sup>252</sup>

#### 4. *Analysis of Observations*

In brief, our observations suggest that when rules on remote plea hearings do not expressly require courts to ensure that defendants are making a voluntary and informed decision to waive the protections of in-person proceedings, few judges take the initiative to inquire into the defendant's choice. This is consistent with our findings on judicial review of guilty pleas more generally. Judges tend not to introduce procedural safeguards into the plea process on their own, without a specific mandate from the rules.

While the judges' lack of inquiry into the defendant's choice to proceed remotely may be permissible in the context of the COVID emergency, in ordinary times, it would likely violate the Due Process Clause. The next Part elaborates steps that courts must take to ensure that any decision by defendants to enter a guilty plea remotely is voluntary and informed.<sup>253</sup>

Likewise, few judges take it upon themselves to remind defendants of their right to consult counsel confidentially during remote proceedings. Although the Sixth Amendment may not require such reminders, a brief and simple explanation of the defendant's entitlement to communicate privately with his attorney can help ensure that the right to counsel is adequately protected. A few states have adopted rules requiring judges to give such notices to defendants in remote hearings, and the National Center for State Courts has recommended the practice in its bench guide for remote hearings.<sup>254</sup> The next Part explains how such notice can be provided without significant cost to the efficiency of the process.<sup>255</sup>

Finally, our observations indicate that technological glitches and informal settings are common features of remote proceedings. Although most of the disruptions are relatively minor, some of them may meaningfully interfere

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<sup>251</sup> See, e.g., *Felony Plea Hearing, State v. Y.S.*, Oct. 16, 2020, Third Circuit Court, Wayne County, MI (prosecutor's daughter doing online school without headphones and a lot of noise coming from prosecutor's home).

<sup>252</sup> *Felony Plea Hearing, State v. L.B.*, Aug. 28, 2020, 336th District Court, Fannin County, TX.

<sup>253</sup> See *infra* notes 298–326 and accompanying text.

<sup>254</sup> OHIO CRIM. R. 43(A)(2)(d) (2008); ARIZ. CODE JUD. ADMIN. § 5-208 (2010); *Com. v. Curran*, Order, No. SJC-13093 (Sept. 29, 2021 Mass.); NAT'L CTR. FOR STATE CTS., CONDUCTING FAIR AND JUST REMOTE HEARINGS: A BENCH GUIDE FOR JUDGES 2, [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0025/51784/Remote-Hearing-Bench-Guide.pdf](https://www.ncsc.org/__data/assets/pdf_file/0025/51784/Remote-Hearing-Bench-Guide.pdf) [<https://perma.cc/9984-QRWL>].

<sup>255</sup> See *infra* Part III.

with the defendant's ability to participate effectively in the proceedings, and others may unduly prejudice the court's perceptions of the defendant.<sup>256</sup> Such distractions and glitches occur frequently enough that courts, defense attorneys, and state legislatures must take measures to address them. The next Part lays out more specific suggestions on what policymakers should do to ensure fairness in the process if they choose to retain remote plea hearings after the pandemic is over.

### III. PROTECTING FAIRNESS IN VIRTUAL PLEA HEARINGS

Our observations raise the question whether virtual plea hearings are the way of the future. Many prosecutors, judges, and court administrators have praised remote criminal proceedings for their efficiency and convenience and have suggested that the virtual format should continue to be used even after the pandemic is over.<sup>257</sup> Defense attorneys are more skeptical of the practice, but even among them, a large minority support the use of remote criminal proceedings, including plea hearings.<sup>258</sup> Legislatures around the country are considering bills to expand remote proceedings in ordinary times.<sup>259</sup>

But as empirical studies of in-person plea hearings have revealed, and our observations confirmed, procedural safeguards in the guilty plea process are

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<sup>256</sup> See *infra* notes 280–285 and accompanying text.

<sup>257</sup> BENNINGER ET AL., *supra* note 6, at 170; Turner, *supra* note 2, at 259–60 & tbl. 5; Hon. Brandon Birmingham, *Three Ways COVID-19 Makes the Criminal Courts Better*, DALL. EXAM'R (May 8, 2020), <https://dallasexaminer.com/editorial/local-commentaries/three-ways-covid-19-makes-the-criminal-courts-better/> [https://perma.cc/9KWF-LPL3]; Lyle Moran, *How Hosting a National Pandemic Summit Aided the Nebraska Courts System with Its COVID-19 Response*, ABA J.: LEGAL REBELS (May 13, 2020, 6:00 AM), [https://www.abajournal.com/legalrebels/article/rebels\\_podcast\\_episode\\_052](https://www.abajournal.com/legalrebels/article/rebels_podcast_episode_052) [https://perma.cc/D7T4-A3PK]; LaVendrick Smith, *Dallas County Judges Hear Criminal Cases via Video as Coronavirus Spreads*, DALL. MORNING NEWS (Apr. 14, 2020, 4:27 PM), <https://www.dallasnews.com/news/courts/2020/04/15/dallas-county-judges-hear-criminal-cases-via-video-as-coronavirus-spreads/> [https://perma.cc/5FC2-BQLY]; Mary Beth Faller, *Pandemic a 'Natural Experiment' for Reducing Incarceration, Prosecutors Say*, ASU NEWS (May 7, 2020), <https://asunow.asu.edu/20200507-arizona-impact-pandemic-natural-experiment-reducing-incarceration-prosecutors-say> [https://perma.cc/ZY73-8KKJ]; Jason Tashea, *The Legal and Technical Danger in Moving Criminal Courts Online*, BROOKINGS INST.: TECH STREAM (Aug. 6, 2020), <https://www.brookings.edu/techstream/the-legal-and-technical-danger-in-moving-criminal-courts-online/> [https://perma.cc/PZX5-WHYK].

<sup>258</sup> Turner, *supra* note 2, at 259–60 & tbl. 5.

<sup>259</sup> See *supra* note 3 (listing bills).

already lax and judicial review of guilty pleas rather perfunctory.<sup>260</sup> The use of the remote format further reduces the formality of the plea process.<sup>261</sup> As a result, it heightens the risk that the guilty plea will not be constitutionally sound, that the defendant will plead guilty to a crime he has not committed, or that the process will not be legitimate in the eyes of the defendant or the public.<sup>262</sup> Even if online plea hearings are more convenient and efficient, we must consider whether convenience and efficiency outweigh concerns about the unfairness and inaccuracy of the remote format.

The argument for remote plea hearings is that such hearings save time and resources for everyone involved.<sup>263</sup> Defendants who are out on bond do not need to take significant time off work or caregiving duties to attend the proceedings.<sup>264</sup> Particularly in misdemeanor cases, “[t]he time, effort, money, and opportunities lost as a direct result of being caught up in the system can quickly come to outweigh the penalty that issues from adjudication and sentence.”<sup>265</sup> Being able to resolve a case without going to court in person can reduce the punitive aspects of the process for out-of-custody defendants and allow them to remain employed, benefiting society as well.<sup>266</sup> Likewise, remote hearings can save travel time for defense attorneys and permit them to handle more cases in the same day and devote more time to each case.<sup>267</sup> Attorneys could represent defendants across longer distances, enhancing defense representation in rural areas.<sup>268</sup> Judges would also have more flexibility to schedule hearings and be more efficient in resolving such hearings.<sup>269</sup>

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<sup>260</sup> See *supra* Part I.B.

<sup>261</sup> See *supra* Part II.B.3.

<sup>262</sup> See, e.g., BENNINGER ET AL., *supra* note 6, at 161–63, 169–70; Turner, *supra* note 2, at 246–58.

<sup>263</sup> BENNINGER ET AL., *supra* note 6, at 60–69; Camille Gourdet et al., *Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology*, RAND CORP., at 4 (2020), <https://doi.org/10.7249/RR3222>; Poulin, *supra* note 6, at 1098–1101; Turner, *supra* note 2, at 212–15.

<sup>264</sup> Turner, *supra* note 2, at 240–42, 268.

<sup>265</sup> MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT* 30–31 (1979).

<sup>266</sup> See BENNINGER ET AL., *supra* note 6, at 133–34; Turner, *supra* note 2, at 240–42, 268.

<sup>267</sup> Robin Davis, Billie Jo Matelevich-Hoang, Alexandra Barton, Sara Debus-Sherrill & Emily Niedzwiecki, *Research on Videoconferencing at Post-Arrest Release Hearings: Phase I Final Report*, ICF INT’L 4–5 (May 29, 2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248902.pdf> [<https://perma.cc/B44F-FBGW>]; Turner, *supra* note 2, at 239–42.

<sup>268</sup> BANNON & ADELSTEIN, *supra* note 234, at 9 (citing RICHARD ZORZA, *VIDEO CONFERENCING FOR ACCESS TO JUSTICE: AN EVALUATION OF THE MONTANA EXPERIMENT* 1, 3 (June 2007)); Turner, *supra* note 2, at 212–13, 239–41.

<sup>269</sup> Gourdet et al., *supra* note 263, at 9; Turner, *supra* note 2, at 213, 240.

Advocates of remote plea hearings further argue that because these hearings are generally uncontested and do not involve testimonial evidence, the remote format would not endanger the fairness of the proceedings. As the prosecution argued in defending the appearance of counsel via a speakerphone at a plea hearing, such “hearings do not involve presentation of evidence and . . . simply formalize bargains previously negotiated by the prosecution and defense. ‘[D]efense counsel’s adversarial-testing role essentially disappears’ in a plea hearing, . . . and thus a telephone appearance is good enough.”<sup>270</sup> In brief, proponents of remote plea hearings argue that, given the generally consensual nature of such hearings, the efficiency benefits outweigh concerns that the lack of physical presence would undermine the fairness of the proceedings.

While plea hearings are generally not contested, the stakes at these hearings remain high. Evidence from exonerations shows that some defendants plead guilty to crimes they have not committed: Roughly 20% of exonerated persons identified by the National Registry of Exoneration as of January 2021 had pleaded guilty in their cases.<sup>271</sup> Research on defendant comprehension of plea forms also suggests that many defendants have difficulty understanding the implications of pleading guilty.<sup>272</sup> Finally, there is evidence that plea bargaining contributes to problematic disparities in sentencing and results in similarly situated defendants not being treated equally.<sup>273</sup> These concerns call for careful scrutiny of the plea process by courts.

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<sup>270</sup> Van Patten v. Deppisch, 434 F.3d 1038, 1044 (7th Cir. 2006), *cert. granted, judgment vacated sub nom.* Schmidt v. Van Patten, 549 U.S. 1163 (2007), and *judgment reinstated sub nom.* Van Patten v. Endicott, 489 F.3d 827 (7th Cir. 2007).

<sup>271</sup> Dezember et al., *supra* note 30, at 4; *Exoneration Detail List*, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> [https://perma.cc/Z9Z9-5M3R] (last visited Sept. 20, 2021); *see also* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84–86 (2005) (explaining how federal plea and sentencing laws and practices can lead innocent defendants to drop worthwhile defenses and plead guilty).

<sup>272</sup> *See* Allison D. Redlich & Catherine L. Bonventre, *Content and Comprehensibility of Adult and Juvenile Tender-of-Plea: Implications for Knowing, Intelligent, and Voluntary Guilty Pleas*, 39 LAW & HUM. BEHAV. 162, 171 (2015) (finding that “[t]ender-of-plea forms in our sample are likely to be incomprehensible to the average defendant.”).

<sup>273</sup> *See, e.g.*, BESIKI KUTATELADZE, WHITNEY TYMAS & MARY CROWLEY, RACE AND PROSECUTION IN MANHATTAN 6, 9 n.10 (July 2014) (finding racial disparities in misdemeanor plea offers in New York County); Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV.

As our observations confirm, however, judges tend not to review guilty pleas and plea agreements thoroughly; instead, they usually rely on defense attorneys and prosecutors to ensure fairness and integrity in the process.<sup>274</sup> The problem with this approach is that defense attorneys and prosecutors, for various reasons, may at times fail to protect fairness in plea bargaining.<sup>275</sup> Judicial review therefore remains a critical—and constitutionally required—safeguard in the plea process. Judges themselves recognize that although ensuring plea fairness is a shared responsibility of all legal actors, judges themselves are “the most responsible.”<sup>276</sup> And “however routine [plea] hearings may have become, the Supreme Court has not revised its view that entering a guilty plea . . . is ‘a grave and solemn act,’ to be treated, like all phases of the criminal process, as a ‘confrontation between adversaries.’”<sup>277</sup> Judicial review therefore must be done carefully—with the “utmost solicitude”—to ensure that a plea is voluntary and knowing and should not merely rubber stamp the parties’ paperwork or recitations at the hearing.<sup>278</sup>

The remote format, however, can make it more difficult for judges to exercise their oversight functions at plea hearings.<sup>279</sup> The virtual setting can bias judges’ perceptions of defendants, reduce engagement by defendants, and frustrate effective communication between counsel and defendant. Prior research has analyzed these and other pitfalls of virtual proceedings and suggests that they may negatively influence outcomes for defendants.

First, the defendant’s remote appearance may bias the court’s assessment of the case. This is especially likely if camera angles and lighting are

1187, 1213–38 (2018) (finding racial disparities in plea-bargaining outcomes in Wisconsin); Christie Metcalfe & Ted Chiricos, *Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process*, 35 JUST. Q. 223, 238–44 (2017) (finding racial disparities in plea outcomes in sampled felony cases).

<sup>274</sup> See *supra* notes 133–140144 and accompanying text.

<sup>275</sup> See, e.g., BROWN, *supra* note 133, at 137; Bibas, *supra* note 139, at 2470–86.

<sup>276</sup> See Henderson et al., *supra* note 57, at 7 (finding that a large majority of surveyed judges responded that were the “most responsible” for the reviewing the validity of guilty pleas).

<sup>277</sup> Van Patten v. Deppisch, 434 F.3d 1038, 1044–45 (7th Cir. 2006) (first quoting *Brady v. United States*, 397 U.S. 742, 748 (1970); and then quoting *United States v. Cronin*, 466 U.S. 648, 657 (1984)), *cert. granted, judgment vacated sub nom. Schmidt v. Van Patten*, 549 U.S. 1163 (2007), *and judgment reinstated sub nom. Van Patten v. Endicott*, 489 F.3d 827 (7th Cir. 2007).

<sup>278</sup> *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969) (“What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.”); see also *People v. Cummings*, 287 N.E.2d 291, 293 (Ill. App. Ct. 1972) (finding that a plea form “cannot substitute for the duty of the trial judge to personally address the defendant in open court.”).

<sup>279</sup> BENNINGER ET AL., *supra* note 6, at 138 (citing two interviewed judges’ concerns about assessing the voluntariness of the plea adequately in a remote format).

unflattering, or the setting is overly informal, coercive, or distracting.<sup>280</sup> Our observations confirm that informal settings and substandard lighting and camera angles are common in remote plea hearings.<sup>281</sup> Empirical research has noted the distorting effects that certain camera angles, small image sizes, and poor lighting can have on viewers' perceptions of a defendant or witness appearing remotely.<sup>282</sup> Likewise, poor audio quality, background noise, and glitches during video proceedings, all of which we observed in some of the remote proceedings, can lead observers to mistrust witnesses and defendants and "perceive [them] less favorably."<sup>283</sup> Because remote appearance lacks the gravitas of presence in a courtroom, it also often features casual and at times indecorous behavior by defendants, which could further prejudice the court's view of the defendant and the outcome in the case.<sup>284</sup> As practitioners

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<sup>280</sup> Poulin, *supra* note 6, at 1134–35 (noting that when defendants appear on video from jail, the coercive environment may negatively affect their behavior during the proceeding and the court's perceptions of their character); Turner, *supra* note 2 (reviewing social science on the potentially prejudicial effects of remote proceedings). Apart from negative effects on the case outcome, the virtual setting has negative implications for the privacy of participants, as their homes, as well as their cases, are opened up to worldwide scrutiny on the web. See BENNINGER ET AL., *supra* note 6, at 150–52 (citing interviewees' concerns about "too much public access" and the potential for infringing on the privacy of the participants); Sarah Esther Lageson, *The Perils of 'Zoom Justice'*, CRIME REP. (Sept. 1, 2020), <https://thecrimereport.org/2020/09/01/the-perils-of-zoom-justice> [<https://perma.cc/2DF4-6E46>] (explaining how virtual court hearings erode the privacy of participants).

<sup>281</sup> See *supra* notes 226–232, 236–249 and accompanying text.

<sup>282</sup> See, e.g., Bandes & Feigenson, *supra* note 6, at 1294–95, 1302–03 (discussing studies); BENNINGER ET AL., *supra* note 6, at 18 (discussing studies suggesting that poor lighting can lead observers to attribute negative qualities, such as manipulativens and untrustworthiness, to a person appearing on video); Gourdet et al., *supra* note 263, at 5, 7–8 (same); Wendy P. Heath & Bruce D. Grannemann, *How Video Image Size Interacts with Evidence Strength, Defendant Emotion, and the Defendant–Victim Relationship to Alter Perceptions of the Defendant*, 32 BEHAV. SCI. L. 496, 503 (2014) (finding that "an increase in video size resulted in strong evidence appearing stronger and weak evidence appearing weaker" and that "participants assigned shorter sentences to the defendant presented on a large as compared with a small screen"); Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 LAW & POLY 211, 221–22 (2006) (citing research finding that witnesses who testified via closed-circuit television were judged as less believable and less forthcoming than witnesses who testified in person).

<sup>283</sup> BENNINGER ET AL., *supra* note 6, at 19.

<sup>284</sup> See, e.g., Emma Rowden, Anne Wallace & Jane Goodman-Delahunty, *Sentencing by Videolink: Up in the Air?*, 34 CRIM. L.J. 363, 379–80 (2010) (describing characteristics of remote appearances that reduce formality and influence behavior by defendants and judges); see also Banks, *supra* note 243 (recounting examples of remote appearances in which participants breached decorum); Waldon, *supra* note 243 (same); *Bare-Chested Builder Annoys Judge*, *supra* note 243 (reporting that English judge was annoyed at "bare chested builder" defendant appearing at a remote criminal proceeding from his work at a construction site).

and judges surveyed about virtual proceedings noted, and our observations confirmed, it is also “too easy for participants to be distracted during virtual proceedings” and this could affect their ability to participate meaningfully.<sup>285</sup> Furthermore, remote appearances from detention feature a coercive environment that can similarly inhibit defendant participation and negatively affect the court’s perception of the case.<sup>286</sup>

Prior research has also found that defendants are less likely to be engaged and less likely to seek the help of their attorneys when they appear remotely.<sup>287</sup> As some judges and practitioners noted in responses to a recent survey, defendants in virtual criminal proceedings might not fully understand the information presented to them, their rights, and/or what is required of them . . . [and] would be unwilling or unable to ask clarifying questions.”<sup>288</sup> Likewise, the remote format often makes it more difficult for attorneys and defendants to communicate confidentially during hearings, as it requires a specific request to be placed in a breakout room, rather than a whispered remark across the table.<sup>289</sup> In this respect, too, our observations suggest a cause for concern, as defendants very rarely sought to speak to their attorneys privately during the hearings.<sup>290</sup>

Finally, some studies suggest that defendants in remote criminal proceedings may suffer worse outcomes than those appearing in person.<sup>291</sup> Research of bail hearings conducted via closed-circuit television in Cook

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<sup>285</sup> BENNINGER ET AL., *supra* note 6, at 157–58; CLARKE & SMITH, *supra* note 6, at 12; *see also supra* notes 218–233, 236–242, 245–252 and accompanying text (noting a range of distractions we observed in remote proceedings).

<sup>286</sup> *See* Poulin, *supra* note 6, at 1134–35; *see also* BENNINGER ET AL., *supra* note 6, at 105–06 (reporting defense attorneys’ concerns about ability to have confidential communications with clients because of concerns that conversations may be overheard by other detainees or correctional officers).

<sup>287</sup> MCKAY, *supra* note 6, at 108–12; Eagly, *supra* note 215, at 938, 978; FIELDING ET AL., *supra* note 6, at 69–71; Rebecca K. Helm, *Pleading Guilty Online: Enhanced Vulnerability and Access to Justice*, 2021 MLRFORUM 1, 3 (2021), <https://www.modernlawreview.co.uk/helm-pleading/> [<https://perma.cc/QB74-S9UK>]; Poulin, *supra* note 6, at 1140–41; TERRY ET AL., *supra* note 6, at 23.

<sup>288</sup> CLARKE & SMITH, *supra* note 6, at 12; *see also* MCKAY, *supra* note 6, at 108–12 (finding that video format tends to reduce the comprehension of legal proceedings by detainee participants); BENNINGER ET AL., *supra* note 6, at 84 (reporting concerns among surveyed judges and attorneys that defendants would be more likely to fail to comprehend the proceedings in a virtual rather than in-person format); Helm, *supra* note 287, at 2–3 (noting that vulnerable defendants are especially likely to have difficulty understanding online proceedings and communicating with attorneys remotely).

<sup>289</sup> *Vazquez Diaz v. Commonwealth*, 487 Mass. 336, 355 (2021) (observing that “[a]ttorney-client communication during a Zoom hearing is more restrictive than during an in-person hearing”); BENNINGER ET AL., *supra* note 6, at 107–08, 115–16.

<sup>290</sup> *See supra* note 214 and accompanying text.

<sup>291</sup> This point draws on Turner, *supra* note 2, at 220–21.

County, Illinois found that “average bond amounts rose substantially following the implementation of [the closed-circuit television procedure].”<sup>292</sup> Likewise, studies of videoconferencing proceedings in England found that defendants who appeared via video were more likely to plead guilty than those who appeared in person and were more likely to receive custodial sentences than defendants appearing in person.<sup>293</sup>

Recognizing such concerns about the remote format, the Advisory Committee on the Federal Rules of Criminal Procedure has proposed a very limited use of virtual criminal proceedings, even in the context of emergencies. As the Committee explained with respect to plea hearings in particular, the defendant’s presence in person is essential to ensuring the fairness of these proceedings during which much is at stake: “The physical presence of the defendant together in the courtroom with the judge and counsel is a critical part of any plea or sentencing proceeding. Other than trial itself, in no other context does the communication between the judge and the defendant consistently carry such profound consequences.”<sup>294</sup> The Committee therefore limited the use of remote plea hearings to emergencies and only with stringent procedural safeguards.<sup>295</sup>

The Advisory Committee’s decision to limit remote plea hearings to emergencies is the correct one, and states should follow it. As I have argued elsewhere, the remote format can work well for non-adversarial, non-evidentiary hearings such as status conferences and hearings on questions of

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<sup>292</sup> Diamond et al., *supra* note 6, at 897. Certain features of the videoconference program in Cook County—the low quality of the sound and image and the limited time given to defense attorneys to consult with clients before the video hearing—likely contributed to the negative effects that the program had on bail decisions. *Id.* at 884–85, 898–99. A more recent study from England found no negative impact of video technology on bail decisions; in fact, defendants who appeared on video were more likely to obtain bail than those who appeared in person. FIELDING ET AL., *supra* note 6, at 102–03.

<sup>293</sup> Helm, *supra* note 287, at 1–2 (citing studies); FIELDING ET AL., *supra* note 6, at 104; TERRY ET AL., *supra* note 6, at 24–25, 42–43. The authors acknowledged, however, that they may not have controlled for defendant characteristics that could have influenced the outcome. TERRY ET AL., *supra* note 6, at vi.

<sup>294</sup> ADVISORY COMM. ON CRIM. RULES, MEETING AGENDA, Nov. 2, 2020, at 137. As the draft note to the proposed rule further explains, “The substitution of ‘request’ for ‘consent’ was deliberate, as an additional protection against undue pressure to waive physical presence.” *Id.* In addition to requiring a written request by the defendant, the proposed rule requires a finding by the court “that any further delay in that particular case would cause serious harm to the interests of justice.” *Id.* at 138.

<sup>295</sup> *Id.* at 137.

law.<sup>296</sup> In those settings, the benefits of convenience and efficiency likely outweigh the costs of the virtual format. But courts and legislatures should be cautious about expanding online proceedings to hearings where testimonial evidence or the credibility of defendant is evaluated, including plea hearings.<sup>297</sup>

If some states do choose to allow virtual plea hearings on a regular basis, however, courts must take special measures to ensure fairness in the process. First, judges should not proceed with a virtual plea hearing until they ensure that the defendant is making a voluntary and informed choice to waive the protections of in-person proceedings.<sup>298</sup> Most jurisdictions that have statutes regulating videoconference pleas take this approach.<sup>299</sup> A few have required it or recommended it as best practice even during the pandemic.<sup>300</sup> And recently proposed federal rules for remote criminal proceedings during emergencies would codify this approach going forward.<sup>301</sup> For plea and sentencing hearings, the proposed emergency federal rule is even stricter and requires that the defendant *request* the use of video *affirmatively and in writing*.<sup>302</sup> This rule can serve as a model for states that permit the use of remote plea hearings as it reduces the risk that defendants would be pressured to agree to the remote format. Requiring an express waiver of the right to appear in person recognizes the important interests at stake during plea proceedings and the concerns that video appearance may prejudice the fairness of these proceedings.<sup>303</sup>

In implementing this approach, judges could begin remote plea hearings by asking the defendant whether she has discussed the advantages and disadvantages of proceeding remotely with her counsel.<sup>304</sup> If the defendant

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<sup>296</sup> Turner, *supra* note 2, at 267–68.

<sup>297</sup> *Id.* at 267.

<sup>298</sup> For further discussion, see *id.* at 216–22, 246–57, 267.

<sup>299</sup> See *supra* notes 157–158 and accompanying text.

<sup>300</sup> See *supra* notes 174–175 and accompanying text; see also Com. v. Curran, Order, No. SJC-13093 (Sept. 29, 2021 Mass.).

<sup>301</sup> See Draft FED. R. CRIM. P. 62 (d)(3)(B), in ADVISORY COMM. ON CRIM. RULES, MEETING AGENDA, Nov. 2, 2020, at 143.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 150.

<sup>304</sup> For a discussion of a waiver procedure for remote plea hearings, see *State v. Soto*, 817 N.W.2d 848, 860 (Wis. 2012):

When videoconferencing is proposed for a plea hearing at which it is anticipated that judgment will be pronounced, the judge should enter into a colloquy with the defendant that explores the effectiveness of the videoconferencing then being employed. In that regard, the judge shall ascertain whether the defendant and his attorney, if represented by counsel, are able to see, speak to and hear the judge and that the judge can see, speak to

responds yes, the court could then ask whether the defendant would like to proceed remotely.<sup>305</sup> If defendant again agrees, the court could then follow up by asking whether the defendant is making the decision of his or her own free will, or whether anyone pressured the defendant to do so.<sup>306</sup> Such questions are similar to those asked when a court examines the validity of a guilty plea, yet they are fewer and, as our observations suggest, can be asked and answered in a couple of minutes.<sup>307</sup>

After obtaining the defendant's consent to the remote format, judges should also take an additional minute to tell defendants about their right to consult privately with counsel during the proceeding. While the Sixth Amendment does not expressly require such a reminder, the reminder can be seen as a "best practice" to ensure full protection of the right to counsel.<sup>308</sup>

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and hear the defendant and counsel. The judge shall also ascertain, either by personal colloquy or by some other means, whether the defendant knowingly, intelligently, and voluntarily consents to the use of videoconferencing. In so doing, questions should be asked to suggest to the defendant that he has the option of refusing to employ videoconferencing for a plea hearing at which judgment will be pronounced.

*See also Curran*, Order, No. SJC-13093 (laying out procedure for obtaining a voluntary and informed waiver of the right to an in-person trial and instructing judges, *inter alia*, to "ensure that the defendant has had an opportunity to discuss the decision to proceed with a virtual bench trial with trial counsel."). Some judges may choose to go further and actually mention some of the potential disadvantages of the remote format. Such admonitions would be similar to warnings given when defendants waive their right to counsel or the right to a jury trial. We did not see any judges give such admonitions in any of the proceedings we observed, however.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> Our observations reveal that felony plea hearings in which the court discussed the defendant's consent to remote proceedings lasted on average two minutes longer than hearings in which it did not.

<sup>308</sup> *See* OHIO R. CRIM. P. 43(A)(2)(d) (2008); *see also* ARIZ. CODE JUD. ADMIN. § 5-208 (2010) ("Prior to the start of proceedings, and if defendant is represented by an attorney who is not present at the remote custodial site, the court shall inform the defendant of the available means of confidential communications with defense counsel."); Draft FED. R. CRIM. P. 62(d)(2)(B), *in* ADVISORY COMM. ON CRIM. RULES, MEETING AGENDA, Nov. 2, 2020, at 143 (conditioning videoconferencing upon the court's finding that "the defendant will have an adequate opportunity to consult confidentially with counsel before and during the proceeding"); Order Upon Defendant's Motion to Continue Sentencing, *State v. Thomas*, No. 1905019003, 2021 WL 1053853 ¶ 31 n.31 (Del. Super. Ct. Mar. 19, 2021) (granted Mar. 19, 2021) (noting in dictum that concern about compliance with the right to counsel during a virtual sentencing proceeding "could be rectified by allowing private attorney-client consultation through the use of the . . . 'breakout room' feature along with a simple admonition by the sentencing judge prior to the hearing that either counsel or the defendant could request private consultation with each other at any time by either a verbal or a physical cue to the sentencing judge"); *Curran*, Order, No. SJC-13093 (ordering that before permitting a virtual trial to proceed, "the judge shall explain to the defendant the procedure to be followed during the trial, including how to communicate with counsel.").

Studies have shown that defendants appearing remotely tend to be more detached from the proceedings and to refrain from seeking the aid of counsel,<sup>309</sup> so proactive measures by the court are necessary to ensure that the right to counsel is adequately protected.<sup>310</sup> In preparation for the hearing, defense attorneys should also tell their clients about the right to consult privately during the remote proceedings.

In addition to telling defendants about the ability to confer privately with counsel during a remote proceeding, judges should take measures to ensure that defendants are receiving adequate defense representation in the remote process. As a number of Texas judges did in the plea hearings we observed, judges conducting virtual plea proceedings should ask defendants whether they have had time to discuss their plea with counsel and whether they are satisfied with the representation they have received.<sup>311</sup> Particularly because the remote setting often reduces the opportunity of effective communication between the defendant and his counsel,<sup>312</sup> such preventive measures are important in verifying that defendants are adequately represented. More broadly, given that judges are relying so heavily on counsel to ensure that guilty pleas are fair and valid, courts and legislatures must take steps to provide a robust system of criminal defense.<sup>313</sup>

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<sup>309</sup> See *supra* notes 287–290 and accompanying text.

<sup>310</sup> *Vazquez Diaz v. Commonwealth*, 487 Mass. 336, 355–56 (2021):

Attorney-client communication during a Zoom hearing is more restrictive than during an in-person hearing and requires both the attorney and the judge to take care that the technology is functioning properly and that a defendant has the opportunity to use the private breakout room with counsel if he or she requests to do so. Inquiries should be made regularly of all parties to ensure that there is clear audio and video transmission, but particularly of the defendant, to ensure that he or she has the opportunity to consult with counsel.

See also BENNINGER ET AL., *supra* note 6, at 84 (noting that some of the judges interviewed were attentive to potential lack of comprehension of virtual hearings by defendants and cited to one judge who encourages defendants to speak with their attorneys “at the first sign of hesitation”).

<sup>311</sup> See *supra* notes 83–85 and accompanying text (noting plea hearings where this occurred).

<sup>312</sup> Poulin, *supra* note 6; Turner, *supra* note 2; see also Thea Johnson, *Crisis and Coercive Pleas*, 110 J. CRIM. L. & CRIMINOLOGY ONLINE 1 (2020) (discussing broadly the challenges remote settings can impose on the relationship between counsel and client).

<sup>313</sup> See, e.g., Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 100, 114 (2013) (discussing the importance of competent defense representation at the plea bargaining stage); Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901, 941 (2017) (discussing the importance of directing resources toward “holistic model of defense,” which counsels clients on the various collateral consequences of guilty pleas); Vida B. Johnson, *A Plea for Funds: Using Padilla, Lafler, and Frye to Increase Public Defender Resources*, 51 AM. CRIM. L. REV. 403, 406 (2014) (“If lawyers for indigent defendants are not provided up-front with the resources necessary for effective plea-bargaining, subsequent litigation regarding inadequate plea advice costs both judges and lawyers even more valuable resources in the weeks, months, and years after convictions.”).

When it comes to addressing the difficulties with counsel-client communications in remote proceedings, in non-pandemic times, it might also be helpful to have the defendant appear alongside counsel from the attorney's office. Appearing from the same place would allow the defendant and counsel to conduct confidential communications more easily during a virtual hearing. The attorney's office is also more likely to have the technology and setting necessary for the defendant to appear without significant glitches, distorting lighting, or distractions. Yet this approach significantly reduces the advantages of remote proceedings for defendants, as they would still have to travel and take time off work or caregiving responsibilities to attend the hearing.<sup>314</sup> Moreover, if the prosecutor appears at the hearing from the courtroom,<sup>315</sup> this can disadvantage the defense in the eyes of the judge.<sup>316</sup> Social science research suggests that physical distance may influence the interactions between different participants in the hearing: “[W]hen groups working on a common problem are in separate locations, linked by videoconferencing technology, alliances form among those who are in the same physical location.”<sup>317</sup>

In addition to protecting the right to counsel, courts and policymakers must take preventive measures to reduce the frequency and effects of technological disruptions in remote proceedings. They could do so by expanding access to the technology necessary to participate effectively in remote hearings—for example, by lending wi-fi hotspots and court-issued tablets to participants in the hearings<sup>318</sup> and by installing remote hearing kiosks and devices in public buildings such as libraries.<sup>319</sup>

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<sup>314</sup> See *supra* note 264–265 and accompanying text.

<sup>315</sup> Prosecutors typically have offices in or near the courthouse, so appearing in person is not as inconvenient for them as it is for defendants and defense attorneys.

<sup>316</sup> Poulin, *supra* note 6, at 1131–32.

<sup>317</sup> *Id.* at 1132.

<sup>318</sup> Cf. Lapinski, Hirschhorn, & Blue, *supra* note 232 (arguing that remote jury selection will result in “[e]ither individuals without access to the appropriate hardware are excluded” or counties being forced to provide “tablets, computers, and/or Wi-Fi hotspots” to each prospective juror).

<sup>319</sup> See Angela Morris, *Now Trending: ‘Zoom Kiosks’ to Breach Digital Divide Between Public and Remote Courts*, LAW.COM: TEX. LAW. (May 29, 2020, 3:11 PM), <https://www.law.com/texaslawyer/2020/05/29/now-trending-zoom-kiosks-to-breach-digital-divide-between-public-and-remote-courts/?slreturn=20200713230501> [<https://perma.cc/V9HF-6LQL>] (discussing some states’ implementation of public video conferencing kiosks for use by the general public for virtual court hearings). After the pandemic is over, as noted earlier, lawyers can also have clients appear remotely from the lawyer’s office to reduce the risk that a poor connection

Courts can also take steps to reduce the effects of technological malfunctions. As manuals for judges on conducting remote hearings have suggested, judges should regularly check to ensure that all participants in a remote hearing are able to hear, see, and participate fully.<sup>320</sup> If participants are disconnected briefly, judges can repeat portions of the hearing that were disrupted or, if a more significant disruption occurs, the hearing can be restarted or rescheduled.

As our observations revealed, a significant concern with remote proceedings is the informality of the setting and the presence of distractions. Both of these features can potentially prejudice the outcome of the case. While the informal setting adds to the convenience of the procedure—participants can appear from almost anywhere—it raises concerns about the effects that it has on judges’ perceptions of defendants, as well as about interruptions that harm the fairness of the proceeding.<sup>321</sup> To reduce the biasing effect of appearing remotely, courts could provide “common virtual backgrounds for all participants to eliminate both visual distractions and disparities among witnesses and parties . . . .”<sup>322</sup> Defense attorneys should also be encouraged to address the importance of the setting with their clients.<sup>323</sup>

Beyond addressing the unique challenges of remote proceedings, courts should also use some of the time saved from the virtual setting to strengthen procedural safeguards in the plea process. As we observed and research of in-person plea hearings has corroborated, plea hearings tend to be brief and

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or inadequate technology disrupts the client’s access to the hearing. But again, this reduces the convenience and efficiency of remote proceedings for defendants; it also introduces the risk that the defense will be disadvantaged if the prosecution, but not defense counsel, is present in the courtroom with the judge. *See* Poulin, *supra* note 6, at 1131–32.

<sup>320</sup> *See, e.g.*, CAL. COMM’N ON ACCESS TO JUST., REMOTE HEARINGS AND ACCESS TO JUSTICE DURING COVID-19 AND BEYOND 17–18 (2020), <https://www.calatj.org/publication/remote-hearings-and-access-to-justice-during-covid-19-and-beyond-2020/> [<https://perma.cc/DG9C-P29P>] (discussing ways for judges to ensure fair remote hearings and best practices for court proceedings on Zoom); NAT’L CTR. STATE CTS., CONDUCTING FAIR AND JUST REMOTE HEARINGS: A BENCH GUIDE FOR JUDGES, [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0025/51784/Remote-Hearing-Bench-Guide.pdf](https://www.ncsc.org/__data/assets/pdf_file/0025/51784/Remote-Hearing-Bench-Guide.pdf) [<https://perma.cc/M2X8-7WKZ>] (discussing conduct judges should undertake during remote hearings).

<sup>321</sup> *See supra* notes 243, 282–285, 291–293 and accompanying text.

<sup>322</sup> Bandes & Feigenson, *supra* note 6, at 1308.

<sup>323</sup> *See, e.g.*, LEGAL AID SOC’Y D.C., BEST PRACTICES FOR ATTORNEYS REPRESENTING CLIENTS AT REMOTE OR VIRTUAL HEARINGS, <https://wclawyers.org/wp-content/uploads/2020/04/Best-Practices-for-Attorneys-Handling-Virtual-Hearings.6-8-20-c2.pdf> [<https://perma.cc/T7DZ-2BMC>] (encouraging clients to consider the setting from which they appear, any prejudicial images that might be captured, and any distractions that might interfere with their effective participation).

superficial.<sup>324</sup> Judges should use any extra time freed up by the remote format to conduct a more detailed and thorough inquiry into the validity of the guilty plea and the fairness of the plea agreement.<sup>325</sup> To ensure that rules requiring thorough plea inquiries are effective, courts could develop forms that lay out the specific questions to be asked and admonishments to be given.<sup>326</sup>

Consider one example of how more thorough inquiry by judges and greater attention to the adequacy of representation could help remedy some of the procedural deficiencies of remote plea proceedings. During a plea hearing that occurred in felony court in Wayne County, Michigan, the presiding judge asked the defendant if she had had an opportunity to speak to her lawyer.<sup>327</sup> The defendant responded that she had done so “for a moment.”<sup>328</sup> The judge then asked if she needed more time to speak to him, and she said yes, so he sent the defendant and her attorney to a breakout room.<sup>329</sup> The judge was not required to ask this question under the current rules for plea hearings or remote hearings. Yet he apparently recognized the frequent deficiencies in defense consultation when hearings are conducted remotely and took the initiative to inquire into the opportunity for consultation and to give the opportunity to the defendant to talk with counsel. The same judge was thorough in conducting the plea colloquy, probing into the factual basis for the guilty plea and explaining the various implications of the decision to plead guilty.<sup>330</sup> The judge’s meticulous approach did prolong the hearing by close to ten minutes beyond the average duration of plea hearings, but it added much needed procedural safeguards to bolster the fairness and integrity of plea proceedings.

Contrast this approach with those taken in two misdemeanor plea hearings, both in Texas. In the first case, in a Hill County Court of Law, when the court was giving the admonitions about the consequences of the guilty plea, the defendant indicated that he did not understand the

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<sup>324</sup> See *supra* Part I.B.

<sup>325</sup> Cf. Johnson, *supra* note 312, at 18 (discussing the critical role that judges can play in ensuring fairness during a plea bargain, particularly in the context of the coronavirus pandemic).

<sup>326</sup> See *supra* Part I.B.4. (providing insights from observations made of remote plea hearings).

<sup>327</sup> Felony (Reduced to Misdemeanor) Plea Hearing, State v. D.S., Dec. 21, 2020, Third Circuit Court, Wayne County.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

immigration consequences of the conviction, which was for evading arrest, and he asked for clarification.<sup>331</sup> The judge allowed the defense attorney to explain the immigration consequences to her client during the hearing, but did not place the attorney and the defendant in a breakout room or even mention the possibility of allowing them to consult privately. The attorney likewise failed to ask for the opportunity to confer confidentially with her client—a failing that may have inhibited the client from asking certain questions and one that the court failed to correct.

In another misdemeanor plea hearing, this time in Bexar County, the defendant pleaded no contest, and as part of the plea admonitions, the judge asked the defendant whether she understood he could still find her guilty.<sup>332</sup> The defendant was confused about this question, yet the judge did not clarify—nor did he advise the defendant that she could consult privately with counsel. Instead, he kept asking the same question several times until the defendant relented and said she understood.

In both of the above plea hearings, defendants expressed confusion and would have benefited from further clarification by the judge or from a confidential consultation with counsel. In an in-person hearing, the attorney and client could have had such confidential communications more readily. Recognizing the hindrances that the remote setting presents to such communications and the importance of a fully informed guilty plea, the court should have mentioned the “breakout room” possibility to the defendants and asked them if they wished to take advantage of it. Moreover, as the hearing from Wayne County showed, a more thorough plea colloquy, attentive to the unique concerns about fairness in the remote setting, could help ensure that virtual guilty pleas are informed and voluntary and protect due process in remote plea proceedings.

#### CONCLUSION

Our observations of remote plea hearings in Texas and Michigan suggest that many judges conduct only brief and superficial inquiries into the validity of guilty pleas. As social science research has shown—and our observations generally corroborated—the virtual format presents additional risks to the fairness of the plea process, including the disengagement from the process by defendants, the difficulty of counsel and defendant to communicate privately,

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<sup>331</sup> Misdemeanor Plea Hearing, *State v. J.H.*, Jan. 6, 2021, County Court at Law, Hill County, TX.

<sup>332</sup> Misdemeanor Plea Hearing, *State v. L.P.*, Jan. 14, 2021, County Court at Law, Bexar County, TX.

and the potentially prejudicial effects of inadequate technology, poor connections, and informal settings.

Because of the unique risks to fairness introduced by the remote format, states should not use remote plea hearings on a regular basis outside emergencies. But if states do continue to rely on remote plea hearings after the pandemic, they must bolster procedural safeguards in the proceedings. Judges should review remote pleas and plea agreements more closely, verify that defendants are making an informed and voluntary choice to proceed remotely, take measures to ensure that defendants are adequately represented in the remote plea process, and address the potentially prejudicial effects of the remote setting. These measures can help protect fairness in the plea process and ensure that virtual guilty pleas remain constitutionally valid.

## APPENDIX

Table 1: *Observations by State, Case Type, and Hearing Type*

	<b>Texas All</b>	<b>Texas Felonies</b>	<b>Texas Misd.</b>	<b>Mich. All</b>	<b>Mich. Felonies</b>	<b>Mich. Misd.</b>
<b>Virtual Criminal Proceedings</b>	183	127	56	143	82	61
<b>Virtual Plea Hearings</b>	170	116	54	124	65	59

Table 2: *Judges and Counties Represented in Observations*

	<b>Judges</b>	<b>Counties / Jud. Dist. All</b>	<b>Rural Counties/ Jud. Dist.</b>	<b>Metro Counties/ Jud. Dist.</b>
<b>Texas</b>	64	35 Jud. Dist.	15 Jud. Dist.	20 Jud. Dist.
<b>Michigan</b>	48	25 counties	13 counties	12 counties

Table 3: *Judicial Review of Validity of Virtual Guilty Pleas*

	<b>Texas All</b>	<b>Texas Felonies</b>	<b>Texas Misd.</b>	<b>Mich. All</b>	<b>Mich. Felonies</b>	<b>Mich. Misd.</b>
<b>Reviewed Voluntariness</b>	88%	97%	69%	88%	95%	80%
<b>Reviewed Knowledge/ Provided Admonitions</b>	91%	98%	76%	97%	98%	95%
<b>Reviewed Factual Basis<sup>333</sup></b>	22%	28%	9%	93%	95%	90%
<b>Average Duration of Plea Hearing</b>	8.88 mins.	10.19 mins.	6.24 mins.	9.65 mins.	10.82 mins.	8.37 mins.

Table 4: *Virtual Plea Process Features*

	<b>Texas All</b>	<b>Texas Felonies</b>	<b>Texas Misd.</b>	<b>Mich. All</b>	<b>Mich. Felonies</b>	<b>Mich. Misd.</b>
<b>Obtained Defendant Consent to Virtual Format</b>	32%	28%	43%	27%	35%	17%
<b>Informed Defendant of Right to Consult Counsel Privately</b>	4%	4%	2%	5%	6%	3%

<sup>333</sup> This does not include instances where the court merely mentioned that the parties have entered factual stipulations, which is the norm in Texas and all that is required under the Rules. *See supra* Part I.