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Justin Sevier

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PROCEDURAL JUSTICE IN COVID-19-ERA CIVIL TRIALS

*Justin Sevier**

The COVID-19 pandemic has altered the lives of millions of people worldwide. American courts have not been immune to the hardships created by COVID-19, and legal authorities have been placed in the difficult position of determining how to provide justice to civil litigants while keeping participants in the legal system safe from the coronavirus.

Initially, many courts decided to suspend civil trials until the virus was contained or until adequate mitigation measures became available. As the pandemic dragged on, however, several courts turned to innovative solutions to continue resolving civil disputes. Some courts have opted for “sterilized” in-person trials, in which courts allow for sufficient space to practice social-distancing, require face coverings, and include plexiglass barriers in the courtroom, among other innovations. A select few courts have opted for a bolder solution: to hold jury trials entirely over Zoom videoconferencing software.

Most of the early commentary on these procedural innovations has focused on the implications for the accuracy and quality of decision making that arises from them: For example, the degree to which jurors pay attention to proceedings on Zoom or the extent to which a masked, in-court witness’s demeanor can be evaluated. This Article takes a different approach to these pandemic-era procedural innovations by examining the extent to which the public (1) legitimizes the tribunals that employ them; and (2) perceives that these tribunals treat litigants fairly.

Adequately understanding the extent to which jurors legitimize these COVID-19-era innovations requires understanding the ways in which they differ from normal civil trials. To that end, this Article employs construal level theory, a modern psychological theory that examines the effects of distance on people’s perceptions of their social surroundings—either by attending court masked, separated from others, or through plexiglass barriers; or by attending court on one’s computer miles away from the courthouse.

To that end, this Article is a call for empirical research on public perceptions of procedural justice in COVID-19-era civil trials. This Ar-

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ticle examines how popular conceptions of procedural justice may be moderated by perceptions of psychological distance. It then suggests several avenues through which researchers can study the feasibility of COVID-19-era procedural innovations as they impact perceptions of legal legitimacy throughout the pandemic and beyond.

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I. INTRODUCTION: THREE CIVIL PLAINTIFFS

A. *Phillip White*

Vineland, New Jersey, resident Phillip White had been leaning against a fence when officers from the local police department responded to a report of a disturbance at the 100 block of West Grape Street around 11:00 in the morning on March 31, 2015.¹ White was allegedly high on phencyclidine, commonly known as PCP, and apparently had been attempting to recover property from an area homeowner.² Eyewitnesses reported that White had been shouting at the homeowner to return the property before he eventually calmed down, apologized, and walked over to the fence.³

When the officers approached White at the fence, he began hyperventilating and, according to the officers, began pounding on their vehicle that contained their K-9 police dog.⁴ The officers alleged that White became uncooperative, resulting in a struggle in which White was forcefully taken to the pavement.⁵ Although disputed by several eyewitnesses to the encounter, the officers claimed that White attempted to grab the holster of one of the officers, which resulted in the officers repeatedly striking White in the face and releasing the police dog from their patrol car.⁶ White sustained injuries in the melee and was arrested.⁷ He was placed in an ambulance, where he then suffered a heart attack.⁸ He was pronounced dead on arrival at the local hospital.⁹

Further investigation revealed that one of the officers involved in the altercation had faced seventeen prior excessive-force complaints (and another twenty-nine complaints that have been filed since the incident with White),¹⁰ in a department that had investigated 185 of

1. Don E. Woods, *Cops Cleared After Suspect Died in Their Custody, N.J. Grand Jury Rules*, NJ.COM (Jan. 16, 2019, 9:58 PM), https://www.nj.com/cumberland/2016/06/cops_cleared_after_suspect_died_in_their_custody_n.html; Joseph P. Smith, *Vineland, Police Sued for \$10M by Family of Phillip White*, THE DAILY J. (Nov. 7, 2016, 6:15 PM), <https://www.thedailyjournal.com/story/news/2016/11/07/new-jersey-vineland-federal-district-court-phillip-white-lawsuit-march-2015-death/93450332/>.

2. Woods, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. Smith, *supra* note 1.

7. Woods, *supra* note 1.

8. *Id.*

9. *Id.*; Smith, *supra* note 1.

10. Tracey Tully, *Judges Juggle Over 2,700 Cases Each as Families Wait for Day in Court*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/2021/03/17/nyregion/federal-court-nj-judges.html>.

190 recent excessive force complaints against its officers and found that no violations had ever occurred.¹¹ After a grand jury declined to indict the officers involved in the altercation, White's family commenced a federal civil rights lawsuit against the officers and the city of Vineland, seeking over \$10 million in compensatory and punitive damages.¹²

The lawsuit was filed in November 2016 and remains unresolved at the time of this writing.¹³ In a stinging rebuke of the officers' motion for summary judgment, Judge Joshua D. Wolson called their attempt to quash the lawsuit a "bold display of chutzpah" insofar as the case involved "[m]ore than a dozen potential witnesses, inconclusive video footage and dueling experts," among other factors weighing in favor of a jury trial.¹⁴ Because of the COVID-19 pandemic, however, in-person civil jury trials were suspended in New Jersey federal courts from March 16, 2020, through at least September 1, 2021, with criminal cases prioritized upon reopening.¹⁵ Moreover, because of additional staffing shortages on the District of New Jersey bench, the White family's lawsuit was reassigned to a federal court in Pennsylvania, where the family hopes to eventually resolve the case.¹⁶ When asked for comment by a reporter with respect to the status of the family's lawsuit, their attorney noted that because the family is required to stay in contact with the Vineland Police Department until the case is resolved, "it rubs on a wound that we haven't let heal."¹⁷

B. Cheryl Staple

Desmond Staple, an attorney who specialized in insurance and healthcare litigation, was found unresponsive in his vehicle near the center aisle of a Walmart parking lot just outside of Tampa, Florida, in

11. Jim Walsh, *Witness Challenged Over Account of Vineland Man's Arrest*, THE DAILY J. (May 3, 2021, 10:10 AM), <https://www.thedailyjournal.com/story/news/2021/05/03/phillip-white-vineland-police-death-lawsuit/4904261001/>.

12. Cyril Josh Barker, *Police Officers Not Indicted in Phillip White Death*, AMSTERDAM NEWS (June 23, 2016, 1:56 PM), <http://amsterdamnews.com/news/2016/jun/23/police-officers-not-indicted-philip-white-death/>; Smith, *supra* note 1.

13. Tully, *supra* note 10.

14. *Id.*

15. *See In Re: Court Operations Under the Exigent Circumstances Created by COVID-19* (Standing Order 20-02, Mar. 16, 2020); *see also In Re: Court Operations Under the Exigent Circumstances Created by COVID-19* (Fourth Extension of Standing Order 2020-12) (May 19, 2021).

16. The district court has tentatively scheduled a trial date for October 3, 2022. Scheduling Order at 2, *White v. City of Vineland*, No. 1:16-cv-08308-JDW-KMW (D.N.J. Jan. 24, 2022).

17. Tully, *supra* note 10.

March of 2016.¹⁸ The medical examiner attributed his death to the fifty-six grams of aspirin and acetaminophen found in his bloodstream, akin to having ingested 112 pills.¹⁹ In the year before his death, Desmond and his wife Cheryl had been paying premiums to Northwestern Mutual on three term life policies and one whole life policy with combined benefits of approximately \$4 million.²⁰ When Cheryl Staple attempted to collect the death benefits, however, Northwestern Mutual denied her claim.²¹

Northwestern Mutual alleged that Desmond Staple had died by suicide, and under the terms of the policies, if an insured commits suicide within the first year of coverage, then beneficiaries are entitled only to a return of the premiums with interest.²² Cheryl Staple, however, contended that her husband died as a result of an accidental overdose, and she sued the insurance company in December of 2017.²³ Following lengthy discovery with no resolution to the case, Staple and Northwestern Mutual prepared for trial.²⁴

Unlike Phillip White's family and the Vineland Police Department, Cheryl Staple and Northwestern Mutual did get their day in federal court, but with a twist: Neither of them were physically present in the courthouse for the trial.²⁵ Instead, the binding civil jury trial was held entirely over the Middle District of Florida's Zoom videoconferencing software.²⁶

The trial lasted five days and included two practice runs.²⁷ Each juror logged into the trial from her home; heard testimony from several fact witnesses and experts regarding Desmond Staple's final days before his death; and evaluated what one reporter described as heart-breaking surveillance footage, dueling medical examiner reports, and

18. John Hilton, *Northwestern Mutual Wins \$4M Zoom Trial after Jury Rules Suicide*, INSURANCENEWSNET.COM (Feb. 2, 2021), <https://insurancenewsnet.com/innarticle/northwestern-mutual-wins-4m-zoom-trial-after-jury-rules-suicide>; Raychel Lean, *A Lawyer's Death and \$4M Policy: Inside Florida's First Federal Remote Civil Jury Trial*, LAW.COM (Feb. 18, 2021, 2:41 PM), <https://www.law.com/dailybusinessreview/2021/02/18/a-lawyers-death-and-4m-policy-inside-floridas-first-federal-remote-civil-jury-trial/>.

19. Lean, *supra* note 18.

20. Hilton, *supra* note 18.

21. *Id.*; Lean, *supra* note 18.

22. Lean, *supra* note 18.

23. *Id.*

24. The discovery period lasted nearly three years. See Docket Report, *Staple v. Northwestern Mutual Life Insurance Co.*, No. 8:17-cv-03066-MSS-TGW (Dec. 21, 2017), retrieved Jan. 14, 2022 (via PACER).

25. Lean, *supra* note 18.

26. *Id.*

27. *Id.*

text messages that had been admitted into evidence.²⁸ After the five-day trial, the jury deliberated for thirty-two minutes before returning a verdict for Northwestern Mutual.²⁹

When reporters asked whether the verdict would have been different in an in-person proceeding, Cheryl Staple's attorney noted that answering the question would be "pure speculation," but expressed surprise that the jury ignored what he contended was persuasive evidence of an accidental overdose and that the jury deliberated for only a half hour.³⁰ He concluded that he "[does] not believe our judicial system is prepared for Zoom trials, until more information about how juries may respond to this new environment is known."³¹

C. *George Willette*

In August of 2019, George Willette filed a medical malpractice suit against his doctor and a Medford, Oregon hospital for what he claimed was negligent treatment of a diabetic condition, resulting in the loss of the plaintiff's limbs.³² After completing discovery and with neither party offering a settlement, the case proceeded to trial in the fall of 2020.³³

The week-long, in-person trial was scheduled for early November 2020.³⁴ The proceedings, however, did not take place as they normally would in the Jackson County Courthouse.³⁵ Instead, the case was tried in the auditorium of Central Medford High School, where court administrators could enact better safety protocols to mitigate the spread of COVID-19 while reducing the court's civil case backlog.³⁶ The dimly-lit auditorium allowed for substantial spacing for the judge, litigants, bailiffs, witnesses, and the fifty-nine jurors who were summoned for voir dire.³⁷ Court personnel frequently sanitized chairs,

28. *Id.*; Hilton, *supra* note 18.

29. Lean, *supra* note 18.

30. *Id.*

31. *Id.*

32. See generally Complaint, Willette v. Providence Health and Services Or., No. 19CV37545, 2020 WL 7773565 (Or. Cir. Nov. 24, 2020).

33. Ambar Rodriguez, *Jackson County Circuit Court Hosts its First Post-COVID-19 In-Person Civil Jury Trial*, KTVL NEWS 10 (Nov. 5, 2020), <https://ktvl.com/news/coronavirus/jackson-county-host-its-first-post-covid-19-in-person-civil-jury-trial>; see also Statement from George Willette's attorney in response to inquiries (May 19, 2021) [hereinafter Statement from George Willette's attorney] (on file with the author) (describing the Willette dispute as a "zero offer case").

34. Rodriguez, *supra* note 33; see also Statement from George Willette's attorney, *supra* note 33 (noting that the trial began on Monday, November 3, 2020, and concluded on Monday, November 10, 2020).

35. Rodriguez, *supra* note 33.

36. *Id.*

37. Statement from George Willette's attorney, *supra* note 33.

equipment, and other surfaces, and the witness stand and counsel tables included plexiglass partitions.³⁸ All participants wore facial coverings.³⁹

Once the twelve-person jury was selected, jurors were allowed to spread out as far as they desired in the auditorium.⁴⁰ The judge and his clerks sat on the stage, while the litigants and their attorneys were seated below the stage in front of the jurors, some of whom were up to 100 feet away, examining exhibits on two ill-fitted LED monitors on opposite ends of the stage.⁴¹ After hearing from several in-person witnesses and two witnesses via videoconferencing software (which malfunctioned several times on the second day of trial), the jury rendered its verdict for the defendant hospital.⁴² In a statement, the attorney for George Willette expressed reluctance to try a legal case “in a high school auditorium, or a fair grounds, or a hotel ballroom, or a bull fighting ring” in the future and expressed a preference for Zoom instead.⁴³ The presiding judge, however, enthusiastically told reporters, “[w]e’ve made history.”⁴⁴

D. *The Tie that Binds*

George Willette, Cheryl Staple, and Phillip White’s family initiated very different civil claims—a medical malpractice suit, a breach of contract action, and a federal constitutional tort suit, respectively—but with an important commonality. Each action is set against the backdrop of the deadliest global pandemic in over a century, which currently has killed nearly 874,000 Americans and has infected over eighty-three times that amount.⁴⁵ Issues of access to the civil justice system—including the expense of discovery and lengthy wait times from the filing of the complaint until trial—have long concerned scholars and policymakers interested in the efficiency of the civil

38. *Jennifer Oetter Secures Victory in First Civil Jury Trial in Oregon Since the Pandemic Began*, LEWIS BRISBOIS (Nov. 17, 2020), <https://lewisbrisbois.com/newsroom/news/jennifer-oetter-secures-victory-in-first-civil-jury-trial-in-oregon-since-the-pandemic> [hereinafter *Jennifer Oetter Secures Victory*] (noting that witnesses “sat in a witness box with a plexiglass partition” and that “[t]here was a plexiglass divider between” defense counsel, her client, and her media specialist).

39. *Jennifer Oetter Secures Victory*, *supra* note 38.

40. Statement from George Willette’s attorney, *supra* note 33 (referencing attorney statement).

41. *Id.*

42. *Id.*

43. *Id.*

44. Rodriguez, *supra* note 33.

45. See *COVID Data Tracker*, CDC, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited Jan. 27, 2022).

courts and in legal institutional design more generally.⁴⁶ As I discuss further in this Article, the public health measures that have been taken to mitigate the spread of the COVID-19 pandemic have the potential to exacerbate these concerns.

State and federal courts routinely use their local rules to innovate civil and criminal jury trial procedures, and this appears to be true during the pandemic.⁴⁷ Specifically, federal and state courts have chosen three paths through which to effectuate civil justice in a time of COVID-19: (1) wait out the pandemic and return to in-person civil trials when it is safe to do so, even if that may delay trials for months or years; (2) hold civil jury trials in person without delay, but with extensive precautions, including temperature checks of participants, masks, social distancing, and plexiglass barriers, among others; or (3) hold civil trials virtually over Zoom or other group videoconferencing software, in which the presiding judge, jurors, and parties attend the proceedings from their homes without the need for in-person precautions against the virus.⁴⁸

Much of the early research and commentary examining these pandemic-era procedural innovations has focused on the degree to which, for example, the wearing of masks and the presence of plexiglass barriers affect perceptions of witness credibility.⁴⁹ Implicit in this line of inquiry is a concern that inaccurate decisions will result not only in miscarriages of justice with respect to individual litigants, but also in a discrediting of the justice system among the public.⁵⁰ This is important

46. See, e.g., NAT'L CTR. FOR STATE COURTS, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 2 (2016), https://www.ncsc.org/__data/assets/pdf_file/0029/19289/call-to-action_achieving-civil-justice-for-all.pdf. The National Center for State Courts has described these important concerns this way:

Americans deserve a civil legal process that can fairly and promptly resolve disputes for everyone—rich or poor, individuals or businesses, in matters large or small. Yet our civil justice system often fails to meet this standard. Runaway costs, delays, and complexity are undermining public confidence and denying people the justice they seek.

Id. at 2.

47. E.g., B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1996) (discussing reforms to local court rules in Arizona); see also Justin Sevier, *The Unintended Consequences of Local Rules*, 21 CORNELL J. L. & PUB. POL'Y 291, 301–03 (2011) (discussing local court rules in the context of a psychology study examining the effects of jury notetaking).

48. See *infra* Part IV.B.

49. E.g., Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 160–61 (2020).

50. For a discussion of the role that decisional accuracy plays in legitimizing public perceptions of the legal system, see Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALBANY L. REV. 1095, 1127 (2013-2014) (“Rather, truth and substantive justice have parallel influences on perceptions of legitimacy, with truth having a stronger direct influence.”).

research that deserves further study. This Article, however, examines perceptions of justice in COVID-19-era courts from a different perspective: the effects that these procedural changes may have on the public's view that the justice system treats people fairly.

Justice scholars are only beginning to examine the effects that these differing methods for handling civil jury trials will have on participants and the public with respect to their willingness to legitimize the courts. If, as some commentators have suggested, some of these pandemic-induced procedural changes may become more permanent fixtures of civil litigation into the future, empirical legitimacy research will be critical.⁵¹ To the extent that the public believes that a court's decisions are legitimate exercises of power and authority, the public will be more willing to comply with the court's edicts.⁵² This can include small-scale compliance, such as declining to be disruptive or uncooperative during the proceedings, but can also include larger-scale behaviors, such as a party's willingness to pay civil judgments or restitution orders, or a party's (or a member of the public's) unwillingness to resort to "self-help" outside the legal system.⁵³

A bedrock principle in psychology states that participants care about the quality of the process by which courts adjudicate cases—as well as the interpersonal treatment to which parties and witnesses are subjected as that process is implemented—as much and sometimes more than they care about the substantive outcome of the dispute.⁵⁴ That is, people are remarkably sensitive to *procedural* justice in addition to their perceptions of the *substantive* justice produced by the courts.⁵⁵ Indeed, recent research suggests that the public's perceptions of the procedural and interactional justice that a legal tribunal provides to litigants are the strongest predictors of the public's willingness to legitimize the tribunal and comply with its directives.⁵⁶

51. See, e.g., Ryan Handlarski, *Zoom Trials Are Here to Stay, and That Is a Good Thing*, CANADIAN LAWYER (Oct. 1, 2021), <https://www.canadianlawyermag.com/news/opinion/zoom-trials-are-here-to-stay-and-that-is-a-good-thing/360383>; see also Doug Austin, *Are Virtual Court Proceedings Here to Stay?*, JD SUPRA (June 24, 2021), <https://www.jdsupra.com/legalnews/are-virtual-court-proceedings-here-to-3320909/>.

52. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (discussing the conditions under which the public is likely to comply with legal directives and concluding that increased compliance is associated with increased perceptions of procedural justice and institutional legitimacy).

53. See generally *id.*

54. See Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 132–38 (2011-2012).

55. *Id.*

56. Tyler & Sevier, *supra* note 50, at 1129.

Researchers know far less about how pandemic-era procedural reforms will affect the public's perceptions of the procedural justice afforded by the courts. Obtaining a deeper understanding of this issue requires researchers to consider the ways in which pandemic-era trials differ psychologically from trials during ordinary times. To the extent that civil trials may now sometimes proceed over videoconferencing software, litigants are physically removed from the courthouse. To the extent that trials may proceed in person but with plexiglass barriers, physical spacing, and masks, litigants might experience the trial as *psychologically* more distant as well. One psychological phenomenon that may therefore provide insight into the ways that participants subjectively experience COVID-19-era civil trials is construal level theory. This modern psychological theory reflects the idea of embodied cognition: that is, that aspects of our physical environment manifest themselves in our psychological experiences.⁵⁷ More specifically, construal level theory posits that the physical experience of distance can create a corresponding psychological experience of distance across time and space.⁵⁸ To the extent that pandemic-era trials feel psychologically distant, the intersection of procedural justice and construal level theory may provide important insights into the perceived legitimacy of the civil justice system during the pandemic.

This Article is a call for additional research on the popular legitimacy of civil trial procedures in the COVID-19 era. To that end, it provides a non-exhaustive overview of some of the psychological theories that may be useful. Part II discusses empirical models of institutional legitimacy more generally, and specifically examines the role of decisional accuracy, distributive justice, and (perhaps most importantly) procedural justice in attaining popular legitimacy in service of legal compliance.⁵⁹ Part III examines the unexplored ways in which perceptions of psychological distance and construal level theory might illuminate our understanding of how the public perceives processes to be fair.⁶⁰ Part IV applies these principles to COVID-19-era procedural innovations. It first provides a brief description of how the procedures that govern civil trials have evolved over the course of the pandemic. It then examines principles of procedural justice—with an eye toward how those perceptions might be modified by perceptions of psychological distance—to determine the extent to which the public may be

57. Yaacov Trope & Nira Liberman, *Construal-Level Theory of Psychological Distance*, 117 *PSYCHOL. REV.* 440, 440 (2010).

58. *Id.* at 456.

59. *See infra* Part II.

60. *See infra* Part III.

willing to legitimize the legal tribunals that employ these procedures and comply with their directives.⁶¹ Part V concludes the Article.⁶²

II. THE LEGITIMIZING ROLE OF PROCEDURAL JUSTICE IN THE COURTS

Perceived legitimacy is understood as a condition precedent to compliance with legal authorities, attributable not to a fear of punishment, but instead to perceptions that the decisionmaker has the right to exercise power.⁶³ There is no shortage of legal scholarship on the perceived legitimacy of high-profile governmental actors, such as the U.S. Supreme Court.⁶⁴ There is far less research, however, examining the perceived legitimacy of lower-level courts, which the public is far more likely to encounter. This Part discusses the research to date on the legitimacy of these lower-level courts and discusses a recent empirical model supporting the primacy of perceptions of procedural justice in increasing the popular legitimacy of these institutions.

A. Defining Legitimacy

Diverse theories of institutional legitimacy abound.⁶⁵ Although they differ with respect to several important tenets of the construct, and with respect to its cognitive and behavioral prerequisites, these theories converge on the idea that legitimate institutions are those that the public views as properly holding and exercising power.⁶⁶ The term refers not just to the institutions themselves, but also to the actors within those institutions and the orders and edicts that they produce.⁶⁷

Sociologist Mark Suchman has argued that organizational legitimacy occurs when an institution enjoys public approval even when its

61. See *infra* Part IV

62. See *infra* Part V.

63. See generally TYLER, *supra* note 52.

64. See, e.g., Richard L. Pacelle, Jr., *The Supreme Court's Immense Power May Pose a Danger to its Legitimacy*, THE CONVERSATION (Sept. 28, 2021, 3:04 PM), <https://theconversation.com/the-supreme-courts-immense-power-may-pose-a-danger-to-its-legitimacy-168600>; John F. Harris, *The Supreme Court is Begging For a Legitimacy Crisis*, POLITICO (Oct. 29, 2020, 4:30 AM), <https://www.politico.com/news/magazine/2020/10/29/supreme-court-begging-for-legitimacy-crisis-433573>; Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 (2019) (remarking that “it is striking how many commentators—including prominent constitutional scholars, a former Attorney General, and current members of Congress—have recently questioned the legitimacy of the United States Supreme Court”).

65. For a review of classic theories of legitimacy, see Morris Zelditch, Jr., *Theories of Legitimacy*, in THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS 33, 33–53 (Jost & Major eds., 2001).

66. See Justin Sevier, *Legitimizing Character Evidence*, 68 EMORY L. J. 441, 456–57 (2019).

67. *Id.*

actions deviate from individual interests.⁶⁸ He further argues that institutional legitimacy contains three subcomponents: (1) pragmatic legitimacy, which focuses on the self-interest of those who evaluate the institution; (2) moral legitimacy, which depends on the degree to which the institution follows accepted behavioral norms and procedures; and (3) cognitive legitimacy, in which the entity is perceived as necessary or inevitable to certain societal functions.⁶⁹ If these components of legitimacy are satisfied, governed people confer status and acceptance onto their governors' institutions based on a belief that the institutional actions constitute an appropriate use of power.⁷⁰

Social psychologist Tom Tyler has added to this understanding by operationalizing perceived legal legitimacy along four dimensions empirically: (1) the public's perceived obligation to obey the courts; (2) the public's trust and confidence in the courts; (3) attitudes about whether the courts themselves follow the law; and (4) the belief that legal authorities have the same normative values as the public.⁷¹ It follows that legal institutions that score highly along these dimensions enjoy the greatest degree of popular legitimacy.

B. *Components of Legal Legitimacy*

Tyler further argues that, however it is operationalized, institutional legitimacy with respect to the courts stems from three distinct but related functions: (1) the ability of courts to reach accurate decisions by uncovering the facts underlying a dispute; (2) the ability to punish fairly, both in terms of criminal sentencing and analogous civil damages awards and equitable relief; and (3) the extent to which the courts have used fair processes—and have treated people fairly in implementing those processes—to resolve a dispute.⁷² These terms can be described as decision accuracy, distributive justice, and procedural justice, and they explain a substantial amount of the variance in the public's willingness to legitimize the courts.⁷³ I describe each of them briefly below, with an emphasis on procedural justice.

68. Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 *ACAD. MGMT. REV.* 571, 574 (1995).

69. *See id.* at 577–85.

70. *Id.* at 574 (defining legitimacy as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions”).

71. Tyler & Sevier, *supra* note 50, at 1117–18.

72. *See generally id.*

73. *See generally id.*

1. *Decision Accuracy and Distributive Justice*

Very rarely will the public know with complete confidence exactly what transpired in a dispute that comes to be adjudicated in court, even in disputes in which “conclusive” video evidence is produced. Trials are, by nature, reconstructive exercises that exemplify the concept of decision making under varying degrees of uncertainty.⁷⁴ In this context, decision accuracy refers to the perception among the public that courts are skilled at uncovering the important facts underlying a dispute, interpreting those facts correctly, and applying those facts to the relevant law.⁷⁵

Justice scholars have raised thoughtful questions regarding whether decision accuracy is meaningfully distinct from the concept of distributive (substantive) justice.⁷⁶ Substantive justice focuses on the perceived fairness of social outcomes—particularly in terms of societal rewards, costs, and penalties.⁷⁷ These perceptions are, in turn, affected by the behavioral expectations and distributive norms of the social group.⁷⁸ To the extent that criminal and civil laws are enacted, they are (in theory if not always in practice) a reflection of societal norms, and a transgression against those norms is met with a response that maintains social order.⁷⁹ Thus, in the context of the courts, substantive justice is concerned primarily with outcomes of legal disputes as they relate to “punishments”: primarily, the appropriateness of sentencing in criminal cases, but likely also the extent of compensatory or punitive damages awarded in civil trials.⁸⁰

Initially, it may appear that decision accuracy and substantive justice are overlapping constructs, or that decision accuracy is a condition precedent to perceptions of substantive justice. Yet, empirical research suggests that the concepts are distinct, and that one does not always follow from the other. In a recent article reporting the results from a national survey, Tyler found that decision accuracy items and substantive justice items composed distinct factors that independently explain the variance in perceptions of legitimacy.⁸¹ Moreover, in a recent study, I found that, with important caveats, the public tends to

74. *See id.* at 1100 (“It is unusual for fact finders to know the truth. Defendants deny guilt, and witnesses and evidence are contradictory and confusing. Hence, truth is typically uncertain.”).

75. *Id.*

76. *See* Tyler & Sevier, *supra* note 50, at 1098–1100.

77. *E.g.*, Morton Deutsch, *Equity, Equality, and Need: What Determines Which Value Will Be Used as the Basis of Distributive Justice?*, 31 *J. SOC. ISSUES* 137, 137–39 (1975).

78. *Id.*; *see also* Tyler & Sevier, *supra* note 50, at 1098–1100.

79. Tyler & Sevier, *supra* note 50, at 1099.

80. *Id.* at 1098–1100 (discussing the role of punishment in establishing substantive justice).

81. *Id.* at 1125–26.

associate the guilt or liability phase of a trial with efforts to attain truth more so than substantive justice, whereas I found the opposite with respect to the sentencing or damages phase of a trial: the public perceived those phases as more concerned with fair outcomes than with determining an “accurate” sentence or damage award.⁸² And as a theoretical matter, Tyler has persuasively suggested that perceptions of substantive justice need not be premised on perceptions of decision accuracy, for example, in criminal convictions of “scapegoats who may have at best a marginal relationship to the wrongdoing in question.”⁸³ These findings suggest that decision accuracy and substantive justice are separate constructs with independent effects on perceptions of institutional legitimacy.

2. *Procedural Justice*

Social science research on the public’s perceptions of the legitimacy of the courts initially focused on the substantive outcomes that the courts produce.⁸⁴ Later research, however, suggested that the public’s attitudes toward legal tribunals are more complex; they also depend on the *process* by which those decisions are reached.⁸⁵ This phenomenon, termed procedural justice, is distinct from procedural due process or other non-empirical, normative procedural theories, and posits that people’s perceptions of the justice afforded to them in a social transaction are shaped in part by their subjective evaluations of the fairness of the procedures used to allocate resources.⁸⁶ The phenomenon appears to be present in individuals as early as age five—either because it is hard-wired or the result of early social learning⁸⁷—and it exists in an array of social contexts, including interactions with the police, with arbitrators and mediators, and within the workplace.⁸⁸

82. Justin Sevier, *A [Relational] Theory of Procedure*, 104 MINN. L. REV. 1987, 2031 (2020).

83. Tyler & Sevier, *supra* note 50, at 1100.

84. For a review of distributive justice research, see generally John T. Jost & Aaron C. Kay, *Social Justice: History, Theory, and Research*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY (Susan T. Fiske et al. eds., 5th ed. 2010).

85. See generally JOHN W. THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975) (introducing an early theoretical and empirical conception of procedural justice); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 128 (1988).

86. E.g., Tom Tyler & David Markell, *The Public Regulation of Land-Use Decisions: Criteria for Evaluating Alternative Procedures*, 7 J. EMPIRICAL LEGAL STUD. 538, 541 (2010); Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 72 (1985).

87. Patricia Grocke et al., *Procedural Justice in Children: Preschoolers Accept Unequal Resource Distributions If the Procedure Provides Equal Opportunities*, 140 J. EXPERIMENTAL CHILD PSYCHOL. 197, 197–98, 200, 209 (2015).

88. See Hollander-Blumoff, *supra* note 54, at 133.

In the legal context, researchers have provided several reasons for why litigants are sensitive to the procedures that legal institutions use to resolve disputes, but the prevailing explanation links procedures to one's social identity.⁸⁹ Specifically, the perceived fairness or unfairness of a legal procedure sends implicit, relational signals to litigants that have downstream effects on self-esteem and appraisals of self-worth, which are strongly and positively correlated.⁹⁰

An influential theory for explaining the effects of the decision-making process on an institution's perceived legitimacy lies in Tyler's group value model.⁹¹ The group value model predicts that four factors will influence people's perceptions of their self-identity as a result of their interaction with a legal tribunal.⁹² Two of these factors relate to judgments about the fairness of the procedures themselves: the degree to which participants feel as if they have been heard during the proceedings and the presence of a neutral forum.⁹³ The remaining factors relate not to the procedures directly but instead to the quality of the interpersonal treatment that litigants receive as they submit to those procedures: the degree to which the judge appears trustworthy and the degree of dignity and respect that the judge affords the parties.⁹⁴

C. *Empirical Legitimacy Model: The Outsized Role of Procedural Justice*

Although decision accuracy, distributive justice, and procedural justice each have been linked to perceptions of institutional legitimacy,⁹⁵ researchers have only just begun examining the relative weight that the public gives these constructs, and until recently, no one had proposed a comprehensive model for understanding the relationship among them. Prior research, however, has suggested that procedural justice may play an outsized role among the three constructs.⁹⁶ For example, studies have suggested that people are more willing to accept an unfavorable legal ruling if they are given a chance to speak directly to the tribunal, even when they are told explicitly that the tribunal will not consider what they say in making its ultimate deci-

89. See Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830, 830-32 (1989).

90. See *id.*

91. *Id.* at 830-31.

92. *Id.* at 830-32.

93. Tyler & Sevier, *supra* note 50, at 1107.

94. Tom R. Tyler & E. Allen Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 115, 142 (1992).

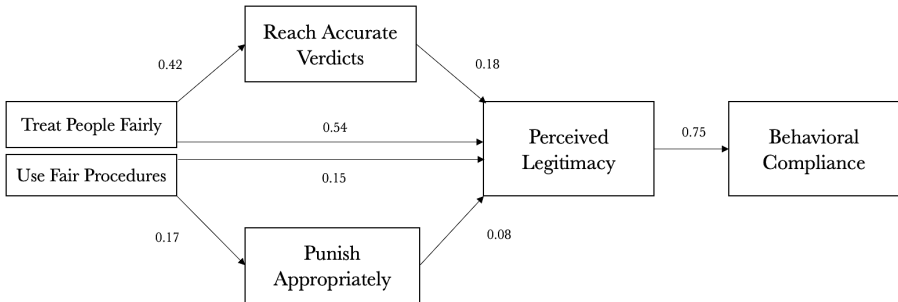
95. See generally Tyler & Sevier, *supra* note 50 (discussing these concepts in detail).

96. *Id.* at 1100.

sion.⁹⁷ Apparently the mere act of allowing participants to speak increases their perceptions of procedural justice, which directly impacts their willingness to legitimize the institution.

Against this background, in 2014, Tyler and I conducted a representative, national survey examining the relationship between the public's attitudes regarding the extent to which courts establish truth, the frequency with which judicial decisions reflect substantive justice, the fairness of the procedures that resolve the disputes, and participants' attitudes toward the legitimacy of the courts.⁹⁸ The results are summarized in the path analysis illustrated in Figure 1.

Figure 1. Empirical Model of the Legitimacy of the Courts⁹⁹



Consistent with the psychological literature, the empirical model reflects a strong association between perceptions of legitimacy and the public's willingness to comply with legal rules. It also demonstrates that decision accuracy, substantive justice, and procedural justice each have an important role to play in fostering the public's perceptions of the courts as legitimate. Perhaps counterintuitively, decision accuracy appears to exercise its influence on popular legitimacy independent of the role of substantive justice, providing additional support for the proposition that these are conceptually distinct constructs that are not inextricably linked to one another.

But the most important finding in our study involves the role of procedural justice in fostering perceptions of legitimacy in the courts.

97. Tyler & Lind, *supra* note 94, at 149.

98. See generally Tyler & Sevier, *supra* note 50. We invited 2,561 respondents—randomly chosen from a larger ongoing panel of U.S. residents maintained by Knowledge Networks—to participate in our study. We received responses from 1,603 participants, for a response rate of 62.5%. *Id.* at 1118.

99. A version of this model originally appeared in Tyler & Sevier, *supra* note 50, at 1137. This path analysis treats the two dimensions of procedural justice—the fairness of the procedure itself and the fairness of the manner in which it is implemented interpersonally—as separate constructs. All coefficients are standardized and significant at $p < .05$. Paths not constructed in the model were non-significant (all $ps > .05$).

Our regression analysis indicates that the primary judgment shaping the popular legitimacy of the courts is the procedural justice of the tribunals' actions.¹⁰⁰ This is the case whether we treated procedural justice as one construct or if we broke it down into its constituent dimensions: fair procedures and fair treatment.¹⁰¹ Decision accuracy and substantive punishment also exhibited effects on legitimacy, but these effects were far weaker when each was included in the comprehensive model.¹⁰² Moreover, procedural justice exhibited its effects in two ways: (1) through a strong, direct effect on legitimacy perceptions; and (2) through indirect pathways, in which the dimension of fair procedures influenced perceptions of substantive justice, which exerted its influence on legitimacy perceptions; and in which the dimension of fair treatment influenced perceptions of decision accuracy, which exerted its effects on legitimacy.¹⁰³

This model ultimately suggests that because the relational signals inherent in the process through which a legal decision is reached are so important to an individual's social identity, the tribunal's decision-making process is often stronger than the case outcome *itself* in determining the degree to which the public confers legitimacy onto the courts.¹⁰⁴ To the extent that these relational signals are communicated by the procedure, people are significantly more willing to confer legitimacy onto the decision-making body, are more willing to respect that body and abide by its decisions, and have more confidence in that body to make decisions that are distributively and procedurally just.¹⁰⁵

III. THE UNEXPLORED ROLE OF PSYCHOLOGICAL DISTANCE

Analyzing the extent to which litigants and the public believe that pandemic-era civil jury trials are procedurally just, and therefore legitimate, requires more than simply analyzing the four facets of procedural justice. It also requires researchers to examine the meaningful ways in which pandemic-era jury trials differ from how trials proceed during ordinary times. One dimension in which pandemic-era trials deviate from traditional jury trials is the degree of distance experienced by litigants. In trials by Zoom, participants are separated from

100. *Id.* at 1125.

101. *Id.* at 1125–26, 1132.

102. *Id.*

103. *Id.*

104. Hollander-Blumoff, *supra* note 54, at 137 (noting that “[t]he findings from over three decades of research on the psychology of procedural justice research stand in sharp contrast to the continuing insistence of law and economics scholars that individuals are most interested, in any given setting, in maximizing their economic outcomes”).

105. *See generally* Tyler & Sevier, *supra* note 50.

the courthouse and other participants by physical distance. Participants in “sanitized,” in-person trials also experience some degree of physical distance, but the presence of several COVID-19 mitigation protocols may create an additional layer psychologically. Researchers have examined the concept of psychological distance in several non-legal contexts.¹⁰⁶ This section explains this concept and examines how it may impact judgments of procedural justice.

A. *Construal Level Theory Defined*

When people think about distance, they most commonly think of physical separation along a spatial plane.¹⁰⁷ This universal understanding of physical distance serves as a bridge toward more abstract notions of “distance” because humans tend to analogize higher-order psychological and philosophical concepts to phenomena in the physical world.¹⁰⁸ This process is a form of embodied cognition, in which physical cues from one’s environment manifest themselves in one’s internal states and thoughts.¹⁰⁹ For example, in a classic study on embodied cognition, psychology professor John Bargh and colleagues found that research participants who briefly held hot coffee while riding in an elevator with a third party behaved more “warm[ly]” toward the third party than did participants who instead held iced coffee.¹¹⁰

The concept of “psychological distance” is a primary component of construal level theory, which states that individuals ascribe different social meaning to psychologically close and distant objects in their environment.¹¹¹ Psychological distance is a broad phenomenon that represents four distinct dimensions, including spatial distance (physical space), temporal distance (time), social distance (interpersonal relations), and hypothetical distance (imagining whether certain events are likely or unlikely).¹¹² Construal level theorists contend that thinking about the past or future, a remote location, someone else’s perspective in a social situation, or counterfactual alternatives to a social

106. See, e.g., Lawrence E. Williams & John A. Bargh, *Keeping One’s Distance: The Influence of Spatial Distance Cues on Affect and Evaluation*, 19 *PSYCHOL. SCI.* 302, 302–03 (2008).

107. *Id.* at 302–03.

108. *Id.*

109. Emily Balcetis & David Dunning, *Cognitive Dissonance and the Perception of Natural Environments*, 18 *PSYCHOL. SCI.* 917, 921 (2007).

110. Lawrence E. Williams & John A. Bargh, *Experiencing Physical Warmth Promotes Interpersonal Warmth*, 322 *SCI.* 606, 607 (2008).

111. See Trope & Liberman, *supra* note 57, at 442; see generally W. Beckerman, *Distance and the Pattern of Inter-European Trade*, 38 *REV. ECON. & STATS.* 31 (1956).

112. Trope & Liberman, *supra* note 57, at 440–41, 445–48.

situation are all different forms of the same underlying embodied cognitive process.¹¹³

Psychological distance is relevant to decision making and impression formation because people process information in systematically different ways depending on how they perceive the social space between themselves and some target in their environment.¹¹⁴ Specifically, construal level theory predicts that humans form high-level, abstract representations of psychologically distal objects and form low-level, concrete representations (called exemplars) of psychologically proximal objects.¹¹⁵ For example, depending on the context in which it is relevant, a cellular telephone can be represented concretely as a “cell phone” (a low-level construal) or more abstractly as a “communication device” (a high-level construal), and similarly, a soda can be represented as a “Diet Coke” (a low-level construal) or a “drink” (a high-level construal).¹¹⁶ Therefore, where psychological distance is heightened, environmental targets are processed in a manner that preserves the target’s essential properties at the expense of unimportant details,¹¹⁷ and vice versa where psychological distance between the person and the target is minimized.¹¹⁸

B. Psychological Distance and Procedural Justice

Perceptions of procedural justice are ultimately judgments about social relationships. And the psychological distance between an observer and the object of the observer’s attention is often rife with social meaning. For example, choosing a seat farther away from another person, or waiting a significant amount of time to return that person’s telephone call, are perceived by others as reflecting social distance.¹¹⁹ As discussed in more detail below, researchers have only recently begun to explore the relationship between perceptions of psychological distance and procedural justice, but the small body of research to date suggests that the psychological proximity or distality of a legal tribunal to both its participants and to the public systematically affects their procedural justice judgments, which in turn affects their perceptions

113. *Id.* at 440–41, 443.

114. *Id.* at 440.

115. *Id.* at 441.

116. *Id.* at 441, 449.

117. *Id.* at 441–42, 448 (noting that “[b]ecause abstract representations necessarily impose one of many alternative interpretations, and because irrelevant or inconsistent details are omitted or assimilated to it, these representations tend to be simpler, less ambiguous, more coherent, more schematic, and more prototypical than concrete representations”).

118. *Id.* at 448.

119. *Id.* at 445.

of the court's legitimacy and their willingness to comply with its directives.¹²⁰

The clearest finding from this body of research is that increasing the psychological space between an actor and an environmental target decreases the “bond strength” between them—particularly as it relates to feelings of familiarity, similarity, and cohesiveness—while it simultaneously decreases the degree to which the actor places trust and confidence in the target.¹²¹ Researchers have demonstrated these distance effects on bonding and trust in a variety of psychological contexts. In early studies in the workplace, researchers found that the extent to which employee workspaces are more diffuse—for example, spread out within a floor or spread between floors—workers experience lowered perceptions of bonding and trust.¹²² In older research that may not be replicated in today's changing, more inclusive workplaces, researchers also found that the increased heterogeneity of the workplace in terms of demographics and societal attitudes—which they described as experiential and social distance—may also produce these effects.¹²³

Similar effects have been exhibited with respect to consumer behavior. Several studies strongly suggest that psychological distance limits perceptions of retailer trustworthiness and benevolence in the online context.¹²⁴ Further, in a series of studies, marketing professor Yuan-Shuh Lii and colleagues examined the effects of psychological distance between service providers and consumers in the event of a service failure.¹²⁵ Lii and colleagues found that consumers who interacted with the service provider in-person rather than in an online context (whom they hypothesized would be both physically and socially more distant from the service provider), reported greater satisfaction with the pro-

120. See *infra* notes 121–26 and accompanying text.

121. Jason A. Colquitt et al., *Justice in Teams: Antecedents and Consequences of Procedural Justice Climate*, 55 PERSONNEL PSYCHOL. 83, 103 (2002); Yuan-Shuh Lii et al., *Balancing the Scales: Recovering from Service Failures Depends on the Psychological Distance of Consumers*, 32 SERV. INDUSTRIES J. 1775, 1775–78 (2012).

122. Elisabeth Norman et al., *The Distance between Us: Using Construal Level Theory to Understand Interpersonal Distance in a Digital Age*, 3 FRONTIERS DIGITAL HUMAN. 1, 2–3 (2016).

123. For a review, see Colquitt et al., *supra* note 121, at 93–94, 103–04.

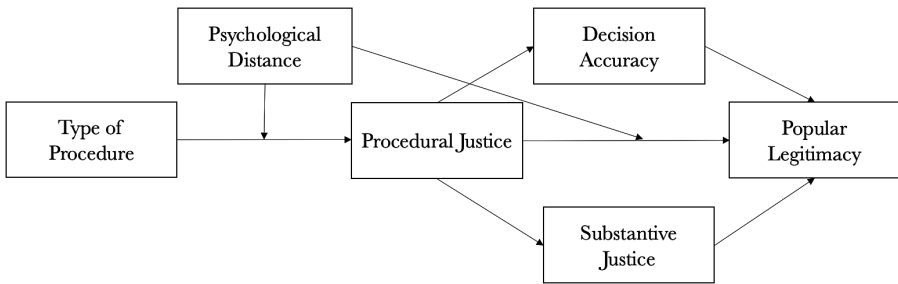
124. Steven M. Edwards et al., *Does Place Matter When Shopping Online? Perceptions of Similarity and Familiarity as Indicators of Psychological Distance*, 10 J. INTERACTIVE ADVERT. 35, 46 (2009).

125. See generally Yuan-Shuh Lii et al., *The Challenges of Long-Distance Relationships: The Effects of Psychological Distance Between Service Provider and Consumer on the Efforts to Recover from Service Failure*, 43 J. APPLIED SOC. PSYCHOL. 1121 (2013).

vider along with greater feelings of distributive, procedural, and interactional justice with respect to the process.¹²⁶

Although the body of research examining the effects of psychological distance on perceptions of fairness is small, it has clear implications for procedural justice scholars and researchers interested in the legitimacy of legal institutions. Perceptions of a target actor's trustworthiness are a crucial component of the interactional facet of procedural justice, whereas the degree to which people are willing to place their trust in that actor is a critical component of popular legitimacy.¹²⁷ The context in which these findings emerged are, of course, quite different from legal proceedings, where the public interacts with those who hold direct power over them instead of coworkers or businesses. But the pathway is one that deserves exploration, insofar as these principles may be generalizable to legal contexts. To this end, Figure 2 provides an updated but simplified model of how psychological distance might shape popular perceptions of legal legitimacy.¹²⁸

Figure 2. *Theorized Effects of Psychological Distance on Legal Legitimacy*



IV. THE LEGITIMACY OF CIVIL DISPUTES IN THE COVID-19 ERA

This Part explains some of the most common and controversial procedural innovations in state and federal civil jury trials that have resulted from the COVID-19 pandemic. It then explores, with an eye toward the moderating effects of psychological distance, the degree to which these innovations might increase or decrease public perceptions of the procedural justice afforded by the civil courts as well as the

126. *Id.* at 1121, 1124, 1128.

127. *See supra* notes 121–26 and accompanying text.

128. The path model is a simplified conceptual representation that treats procedural justice and legitimacy holistically (instead of breaking them into their components). It also focuses on the effects of legal procedures on perceptions of procedural justice, independent of any effects that they may have on decision accuracy or substantive justice.

downstream effects those perceptions may have on the public's willingness to legitimize these tribunals.

A. *Civil Jury Trials in a Pre-COVID-19 Era (and the Arrival of COVID-19)*

Traditionally, the American civil justice system has enjoyed a substantial degree of popular legitimacy, measured both in public opinion surveys and in controlled experiments.¹²⁹ This is attributable substantially to the public's view that American trials place a premium on processes that enhance perceptions of procedural justice.¹³⁰ Specifically, American civil disputes are resolved through the adversary system, which allows participants to present dueling evidence and arguments to a neutral factfinder, and which the public consistently rates highly with respect to the degree of participant "voice" in the proceedings, the presence of a neutral and trustworthy factfinder, and the presence of respectful interpersonal treatment, which are critical components of procedural justice.¹³¹

This heightened legitimacy is conferred not only by litigants but also by members of the general public, many of whom have never engaged directly with the courts.¹³² There are several theories for why this is true, but it is likely attributable, in part, to the fact that American legal proceedings are generally open to the public, increasing the public's perceptions of the courts' transparency, trustworthiness, and neutrality.¹³³ In criminal cases, this facet of American judicial decision making is enshrined in the Sixth Amendment of the U.S. Constitution (incorporated against the States in the Fourteenth Amendment) and is

129. See Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCHOL., PUB. POL'Y, & L. 78, 89 (2014) ("The results of our in-depth look at legitimacy support the general finding of most superficial public opinion polls which indicate that American legal authorities enjoy moderately favorable popular legitimacy.").

130. *Id.*

131. Indeed, dispute resolution systems that decrease the ability of participants to present their own arguments and evidence and instead centralize that power within the factfinder tend to rate higher with respect to their ability to correctly find the facts but lower with respect to the procedural justice that they afford litigants. See Justin Sevier, *The Truth-Justice Tradeoff: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems*, 20 PSYCHOL., PUB. POL'Y, & L. 212, 213, 219 (2014).

132. See Tyler & Jackson, *supra* note 129, at 82, 84 (reporting the results of a national study that they conducted with a representative sample of 1,603 participants, only some of whom reported direct experience with legal authorities).

133. See, e.g., *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 663 (D.C. Cir. 2017) ("The right of public access is a fundamental element to the rule of law, important to maintaining the integrity and legitimacy of an independent Judicial Branch."); see generally Tyler & Jackson, *supra* note 129 (examining this issue empirically).

suggested by the First Amendment, which courts have interpreted to provide a qualified right of public access to legal proceedings.¹³⁴

This Sixth Amendment protection, of course, does not apply to federal civil cases, but the void has been filled by the Federal Rules of Civil Procedure. Rule 77(b) states that “[e]very trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom.”¹³⁵ And with respect to witness testimony, Rule 43(a) similarly states that “[a]t trial, the witnesses’ testimony must be taken in open court,” although it provides flexibility by also recognizing that “in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.”¹³⁶

In late 2019, however, public health experts discovered a novel and highly contagious coronavirus, named SARS-CoV-2.¹³⁷ The virus spread quickly across the globe and reached pandemic status in March of 2020.¹³⁸ At the time of this writing, it has sickened roughly 360 million people worldwide, leading to approximately 5.62 million deaths.¹³⁹ Of those cases and deaths, the virus has infected roughly 73 million people in the United States, of which nearly 874,000 Americans have died.¹⁴⁰ Because of the highly contagious nature of the virus and the seriousness of the symptoms in many infected individuals, many state and local governments mandated business and government closures, prohibited large gatherings by individuals, or issued mask-wearing mandates in an effort to contain the virus and mitigate its spread.¹⁴¹ Against this backdrop, trial court administrators faced diffi-

134. See U.S. CONST. amends. I, VI.

135. FED. R. CIV. P. 77(b).

136. FED. R. CIV. P. 43(a).

137. See, e.g., Scott LaFee, *Novel Coronavirus Circulated Undetected Months before First COVID-19 Cases in Wuhan, China*, UC SAN DIEGO HEALTH (Mar. 18, 2021), <https://health.ucsd.edu/news/releases/Pages/2021-03-18-novel-coronavirus-circulated-undetected-months-before-first-covid-19-cases-in-wuhan-china.aspx> (noting that “[c]ases of COVID-19 were first reported in late-December 2019 in Wuhan” and reporting that the virus may have emerged in October 2019). SARS-CoV-2 causes the acute respiratory disease named COVID-19. See Ben Hu et al., *Characteristics of SARS-CoV-2 and COVID-19*, 19 NATURE REV. MICROBIOLOGY 141, 141 (2021), <https://www.nature.com/articles/s41579-020-00459-7>.

138. See *Celebrating the One Billion Vaccine Milestone*, WHO, [https://www.who.int/india/emergencies/coronavirus-disease-\(covid-19\)#:~:text=ON%2011%20March%202020%2C,to%20save%20people%20lives](https://www.who.int/india/emergencies/coronavirus-disease-(covid-19)#:~:text=ON%2011%20March%202020%2C,to%20save%20people%20lives) (last visited Jan. 17, 2022) (“On 11 March 2020, WHO declared Novel Coronavirus Disease (COVID-19) outbreak as a pandemic . . .”).

139. See *WHO Coronavirus (COVID-19) Dashboard*, WHO, <https://covid19.who.int/> (last visited Jan. 27, 2022).

140. . *COVID Data Tracker*, CDC, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited Jan. 27, 2022).

141. See *Local Government Responses to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTEDIA, [https://ballotpedia.org/Local_government_responses_to_the_coronavirus_\(COVID-](https://ballotpedia.org/Local_government_responses_to_the_coronavirus_(COVID-19))

cult decisions regarding how trials would be held—if they were to be held at all—in an era of COVID-19.

B. *Civil Jury Trials in the COVID-19 Era*

In March of 2020, the National Center for State Courts, in collaboration with the Conference of Chief Justices and Conference of State Court Administrators, created a “Rapid Response Team,” which was tasked with creating “a roadmap to help state courts move forward during the pandemic—and after it ends . . . [to identify] and develop[] innovations and new practices that will strengthen courts moving forward.”¹⁴² The Rapid Response Team’s website contains comprehensive links to various state court COVID-19 websites, virtual hearing resources, updates on statewide jury trial restrictions, and representative state court emergency orders.¹⁴³ The resources tell largely the same story. The state courts’ initial response to the COVID-19 pandemic was largely the same as their response to the 1918 Spanish Flu Pandemic a century ago: to suspend jury trials until the pandemic poses less of a threat to public health.¹⁴⁴ And it was roughly the same story in the federal courts. The official website for the U.S. Courts contains a database of orders by jurisdiction both at the appellate court and district court level, and those orders indicate that the initial response from most federal courts was to hold jury trials in abeyance.¹⁴⁵

With respect to criminal trials, however, important constitutional concerns militate against suspending jury trials in perpetuity. For non-petty offenses, the U.S. Constitution’s Sixth Amendment requires that

19)_pandemic_2020 (last visited Jan. 17, 2022) (listing local government responses by geographic area).

142. See *Coronavirus and the Courts*, NAT’L CTR. FOR STATE COURTS, <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Jan. 17, 2022).

143. *Id.*

144. See *id.* (hosting individual state court orders responding to the pandemic); William Raftery, *Preparing Courts for a Pandemic*, 104 JUDICATURE 2, 2 (2020), <https://judicature.duke.edu/articles/preparing-courts-for-a-pandemic/> (noting that the 1918 Spanish flu “forced state courts to close for weeks on end”); Stephen Pate, *Law in a Time of Pandemic: How Texas Courts and Lawyers Responded to the Pandemic of 1918-1920*, TEX. BAR BLOG (Apr. 20, 2020), <https://blog.texasbar.com/2020/04/articles/coronavirus/law-in-a-time-of-pandemic-how-texas-courts-and-lawyers-responded-to-the-pandemic-of-1918-1920/> (discussing Texas courts’ responses to the 1918 Spanish flu pandemic in detail).

145. See generally *Court Orders and Updates during COVID-19 Pandemic*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic> (last visited Jan. 17, 2022) (listing and providing links to individual court orders by jurisdiction). For one example, see, e.g., *In Re: Court Operations Under the Exigent Circumstances Created by COVID-19 and Related Coronavirus* (General Order 3910-02, Mar. 17, 2020) (continuing all civil and criminal jury trials for an initial thirty-day period).

“the accused shall enjoy the right to a *speedy* and *public* trial, by an impartial *jury*.”¹⁴⁶ This right has been incorporated to the states through the Fourteenth Amendment’s Due Process Clause, and many states impose by statute the maximum number of days for which a criminal defendant can be held without a trial.¹⁴⁷ Moreover, other sections of the Sixth Amendment, including the Confrontation Clause, provide the accused the right to confront her accusers in open court, further complicating decisions to suspend jury trials indefinitely.¹⁴⁸

But perhaps equally important—particularly with respect to civil trials that are not subject to constitutional mandates regarding the time and manner in which they operate—is the practical reality that courts maintain heavy docket backlogs when disputes are not resolved. For example, at the time of this writing, in one California federal district where civil disputes typically outnumber criminal cases, there are approximately 1,138 criminal cases pending but 15,514 civil cases awaiting trial, and the figures in some state courts are even more staggering.¹⁴⁹ These practical concerns with respect to citizens’ access to justice, along with constitutional concerns in criminal cases, likely acted in tandem to incentivize courts to begin scheduling trials for adjudication. The looming question was the extent to which these trials would resemble “normal” trials and, if they deviated materially, the extent to which the public would be willing to legitimize them.

1. COVID-19-Era Innovations

Perhaps the biggest change during the COVID-19 era, as it relates to jury trial scheduling, is that most disputes on the docket are criminal matters, which many courts have prioritized in response to statutory and constitutional concerns.¹⁵⁰ But at least some jurisdictions

146. U.S. CONST. amend. VI (emphasis added). At least one federal judge in California has dismissed charges on these grounds. His verdict was overturned on appeal by the Ninth Circuit. See Maura Dolan, *U.S. Court Upholds COVID-19 Delays in Criminal Trials, Citing Half a Million Lives Lost*, L.A. TIMES (Apr. 23, 2021, 7:48 PM), <https://www.latimes.com/california/story/2021-04-23/appeals-court-upholds-pandemic-delays-criminal-trials>.

147. Federal courts use a four-factor balancing test rather than a bright line rule. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (holding that in assessing violations of the Sixth Amendment right to a speedy trial, courts should assess (1) whether the defendant protested during the delay; (2) the length of the delay; (3) the reason for the delay; and (4) the prejudice of the delay to the defendant’s ability to receive a fair trial).

148. U.S. CONST. amend. VI.

149. Michael Finnegan & Maura Dolan, *Coronavirus Shutdown of Jury Trials Upends California’s Federal Courts*, L.A. TIMES (Apr. 12, 2021), <https://www.latimes.com/california/story/2021-04-12/coronavirus-federal-court-jury-trials-shutdown-california>.

150. See, e.g., Superior Court of the State of California for the County of Los Angeles, Administrative Order of the Presiding Judge Re COVID-19 Pandemic (Sept. 10, 2020) (“[T]he Court finds good cause to continue any and all civil jury trials until January 2021. In addition,

have also begun scheduling civil trials for adjudication.¹⁵¹ Court administrators have taken different approaches with respect to the procedural features that these civil trials possess, but they largely fall within two camps: (1) in-person jury trials that adhere to various Centers for Disease Control and Prevention-suggested precautions to mitigate the spread of COVID-19; or, less often, (2) virtual trials that capitalize on group videoconferencing technology that allow disputes to be resolved without the participants coming into physical contact with one another. Each path has significant benefits and drawbacks.

a. In-Person Jury Trials

As of January 2022, nearly all federal and state courts have either reopened to some degree or plan to reopen soon.¹⁵² There was, perhaps by necessity, a patchwork quality to these reopenings; some states never officially closed their courthouse doors, others have reopened their doors to all proceedings, others have left the decision to the discretion of local administrators, others are prioritizing only criminal trials, and still others require courthouses that wish to reopen to submit a detailed plan for state-level approval with respect to the measures that those courthouses will take to mitigate the spread of COVID-19.¹⁵³

pursuant to Penal Code section 1050, the Court will prioritize available jurors and jury trials to criminal cases.”); see also Ronald D. White, *What Happens When COVID Shuts Civil Courts?*, L.A. TIMES (Sept. 11, 2020, 3:03 PM), <https://www.latimes.com/business/story/2020-09-11/covid-shuts-courts-mediation-arbitration-boom> (discussing the effects of prioritizing criminal cases on civil litigants); Tully, *supra* note 10 (stating that, compared to civil cases, criminal cases “are governed by speedy trial rules that require timely action, particularly when a defendant is imprisoned”); Finnegan & Dolan, *supra* note 149 (noting that trials generally must start within seventy days after criminal defendants invoke their speedy trial rights, and that “criminal trials will have top priority . . . starting with defendants in custody,” in the view of one federal district court judge).

151. See, e.g., Haley Lerner, *Jury Selection via Zoom: First Miami-Dade Case is a Glimpse of Court in the Coronavirus Era*, MIAMI HERALD (July 15, 2020), <https://www.miamiherald.com/news/coronavirus/article244218482.html> (discussing the state’s first in-person, socially distanced civil trial since pandemic-mandated closures); see also *Presiding Judge Eric C. Taylor Announces New Civil Jury Trial Ramp-Up Plan to Preserve Jurors, Promote Social Distancing*, SUPERIOR COURT OF CAL., CTY. OF L.A. (Apr. 1, 2021), <https://www.lacourt.org/newsmedia/uploads/1420214113325121NTACivilJuryTrials.pdf> (discussing the early stages of plans to reinstate in-person civil jury trials).

152. For an up-to-date, state-by-state breakdown of COVID-19 protocols, see generally *Court Operations During COVID-19: 50-State Resources*, JUSTIA, <https://www.justia.com/covid-19/50-state-covid-19-resources/court-operations-during-covid-19-50-state-resources/> (last visited Jan. 18, 2022). For federal courts, see generally COVID-19 JUDICIAL TASK FORCE, CONDUCTING JURY TRIALS AND CONVENING GRAND JURIES DURING THE PANDEMIC (2020), https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf.

153. See generally *Court Operations During COVID-19: 50-State Resources*, *supra* note 152; COVID-19 JUDICIAL TASK FORCE, *supra* note 152.

In courthouses that have reopened their doors, “[j]ustice in a pandemic environment will have a very different look and feel,” according to an August 2020 press release issued on the United States Federal Courts website.¹⁵⁴ That statement appears prescient. There is also a patchwork quality—tailored to local conditions—to the extent to which individual courthouses have prepared for in-person trials and the methods they are using to stop the spread of the virus.

The most common innovations involve sanitizing the courtrooms, requiring that in-person participants wear masks, and creating physical distance between in-person participants.¹⁵⁵ The implementation of masking rules, however, has been met with controversy; news reports indicate that courts have differed, in response to objections from counsel, regarding the appropriateness of having witnesses testify without a mask.¹⁵⁶

Most courts have implemented some form of social distancing policy, although the execution varies substantially by jurisdiction. Jurisdictions that can afford to do so have installed plexiglass barriers around areas where participants speak—for example, in front of the judge, the witness box, and counsel’s lectern—and between participants who cannot maintain sufficient distance from one another.¹⁵⁷ These courts place plexiglass barriers between clients and counsel at the defense table and the plaintiff’s (or prosecutor’s) table, as well as between jurors, if they are required to sit in the jury box.¹⁵⁸ Other

154. *As Courts Restore Operations, COVID-19 Creates a New Normal*, U.S. COURTS (Aug. 20, 2020), <https://www.uscourts.gov/news/2020/08/20/courts-restore-operations-covid-19-creates-new-normal>.

155. *Id.*; see also Katie Mettler, *Sanitizer, Face Shields and a Plexiglass Maze: What Jury Trials Look Like in a Pandemic*, WASH. POST (Sept. 18, 2020), https://www.washingtonpost.com/local/legal-issues/sanitizer-face-shields-and-a-plexiglass-maze-what-jury-trials-look-like-in-a-pandemic/2020/09/18/0ed75970-f8fc-11ea-89e3-4b9efa36dc64_story.html (“The attorneys were their own cleanup crews, responsible for sanitizing everything they touched.”).

156. See, e.g., Matt Hamilton, *Workers in L.A.’s Courts Are Dying of COVID-19 as In-Person Hearings, Trials Continue*, L.A. TIMES (Feb. 5, 2021), <https://www.latimes.com/california/story/2021-02-05/covid-complicates-in-person-trials-la-courthouses> [hereinafter Hamilton, *Workers in L.A.’s Courts*] (reporting on an incident in which a California Superior Court judge, responding to a defense attorney’s objection, allowed a police officer to testify without a mask, to the consternation of one of the interpreters in the courtroom; the interpreter lodged a complaint against the judge). Some courts have moved witnesses to another room to testify remotely without their masks, in an effort to balance the jury’s need to gauge the credibility of witnesses, as well as the criminal defendant’s right to confront witnesses, against the threat posed to public health by allowing witnesses to testify mask-less. Other courts have allowed witnesses to testify with face shields so that witnesses may stay in the room. *Id.*; see also Nicole Hong & Jan Ransom, *Only 9 Trials in 9 Months: Virus Wreaks Havoc on N.Y.C. Courts*, N. Y. TIMES (Dec. 2, 2020) (reporting on, among other trials, a state court drug trial in which “a police officer testified while wearing a see-through mask and face shield”).

157. See Mettler, *supra* note 155.

158. *Id.*

courts have removed the gallery from the courthouse and have moved jurors into socially-distanced seats (or have instead moved jurors into pre-assigned seats in the gallery).¹⁵⁹ Because courts vary with respect to their size, smaller courts have been compelled to do what some courts did during the Spanish Flu Pandemic of 1918 and have moved proceedings to an outside venue, or to a larger venue in the area, including high school gymnasiums and ballrooms.¹⁶⁰

Although implemented less frequently, other courts have required digital temperature checks upon entry, have allowed attorneys to wear headsets to communicate with clients,¹⁶¹ have nearby prepaid parking lots to discourage participants and court personnel from using public transportation, and have modified the court's air circulation system for increased filtration.¹⁶² Photographs of some of these innovations appear in Figure 3.¹⁶³

Figure 3. Photographs of COVID-19-Era Precautions for In-Person Proceedings



159. *Id.*

160. Ann E. Marimov & Justin Jouvenal, *Courts Dramatically Rethink the Jury Trial in the Era of the Coronavirus*, WASH. POST (July 31, 2020), https://www.washingtonpost.com/local/legal-issues/jury-trials-coronavirus/2020/07/31/8c1fd784-c604-11ea-8ffe-372be8d82298_story.html.

161. *See As Courts Restore Operations, COVID-19 Creates a New Normal*, *supra* note 154.

162. *Id.*

163. Mettler, *supra* note 155 (top left image); *As Courts Restore Operations, COVID-19 Creates a New Normal*, *supra* note 154 (top middle image); Marimov & Jouvenal, *supra* note 160 (top right image); Mettler, *supra* note 155 (bottom left image); Rebecca Rosenberg, *A Peak Inside NYC's First Socially Distanced Jury Trial Since COVID-19 Shutdown*, N.Y. POST (Oct. 29, 2020, 5:04 PM), <https://nypost.com/2020/10/29/a-peak-inside-the-citys-first-jury-trial-since-covid-19-shutdown/>; *As Courts Restore Operations, COVID-19 Creates a New Normal*, *supra* note 154 (bottom right image).

b. *Virtual Civil Trials*

In many courts, the decision to prioritize criminal jury trials has left civil plaintiffs and defendants in legal limbo as understaffed courts begin to sift through their backlogs.¹⁶⁴ A few states—upon the agreement of the parties and sometimes in conjunction with a judge’s finding—have allowed for bench trials to resume over group videoconferencing software such as Zoom, a virtual communication staple during the pandemic.¹⁶⁵ An even smaller number of states, and a handful of federal district courts, have gone further by allowing civil jury trials to be held over Zoom, either as a nonbinding proceeding designed to facilitate settlement or as a binding trial.¹⁶⁶

Whether a full virtual civil trial—in which the judge, the parties, their attorneys, the bailiff, the court reporter, the witnesses, and the jurors would all be present on Zoom—would survive constitutional scrutiny is an open question,¹⁶⁷ in contrast to virtual criminal trials, where commentators appear dubious of their constitutionality.¹⁶⁸ One federal judge noted to reporters that the librarians for the U.S. Court of Appeals for the Ninth Circuit examined the issue, and chiefly because the Sixth Amendment’s Confrontation Clause does not apply to civil cases, she felt comfortable proceeding with virtual civil trials.¹⁶⁹ Against that background, the Judicial Conference, which serves as the national policymaking body for the federal courts, issued guidance providing for media and public teleconference access to federal civil court proceedings.¹⁷⁰

164. White, *supra* note 150.

165. See *As Pandemic Lingers, Courts Lean into Virtual Technology*, U.S. COURTS (Feb. 18, 2021), <https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology#:~:text=A%20screenshot%20shows%20a%20recent,conducted%20by%20Judge%20Mary%20S.&text=since%20the%20pandemic%20first%20closed,the%20use%20of%20electronic%20communications>.

166. See, e.g., Nate Raymond, *Texas Tries a Pandemic First: A Jury Trial by Zoom*, REUTERS (May 18, 2020, 6:19 AM), <https://www.reuters.com/article/us-health-coronavirus-courts-texas/texas-tries-a-pandemic-first-a-jury-trial-by-zoom-idUSKBN22U1FE>.

167. See *As Pandemic Lingers, Courts Lean into Virtual Technology*, *supra* note 165 (recounting an interview with a federal judge who noted that there was “literally . . . no precedent in the federal Judiciary” on the issue of virtual trials and “only . . . a few futuristic articles by legal scholars”).

168. See, e.g., Phillip C. Hamilton, *The Practical and Constitutional Issues with Virtual Trials in Criminal Cases*, ABA (Feb. 26, 2021), <https://www.americanbar.org/groups/litigation/committees/criminal/articles/2021/spring2021-practical-and-constitutional-issues-with-virtual-jury-trials-in-criminal-cases/> [hereinafter Hamilton, *The Practical and Constitutional Issues*].

169. *As Pandemic Lingers, Courts Lean into Virtual Technology*, *supra* note 165.

170. *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. COURTS (Mar. 31, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

It is unclear exactly how many civil jury trials have been conducted virtually, although it appears that they have been conducted in federal courts in the Western District of Washington and the Middle District of Florida, along with a non-binding trial that was conducted in state court in Austin, Texas.¹⁷¹ Outcomes from these proceedings include two verdicts for plaintiffs in amounts of \$1 million, a verdict for the defendant, and a settlement in another case after the eighth day of virtual trial.¹⁷² Figure 4 shows the publicly available videoconference feed from two of those trials.¹⁷³

Figure 4. Screenshots of Virtual Civil Proceedings in State and Federal Court



Jurors in these proceedings have not spoken on the record about their experience, but an attorney for the losing party in a civil trial in the Middle District of Florida suggested that he was not favorably inclined toward the medium.¹⁷⁴ Nonetheless, three federal judges who spoke to reporters about their experiences with virtual jury trials spoke positively.¹⁷⁵ Although they noted some technical glitches—for example, a windstorm temporarily knocked out one juror’s internet connection—the judges equated those glitches to routine delays that occur in in-person proceedings.¹⁷⁶ And they praised several aspects of the virtual trial, including the ability of the jury to see witnesses’ faces more clearly on Zoom than they would in the courtroom, as well as jurors’ ability to see and read exhibits more clearly.¹⁷⁷ Judge Mary Scriven further stated that the jurors to whom she spoke after the con-

171. See *As Pandemic Lingers, Courts Lean into Virtual Technology*, *supra* note 165; Raymond, *supra* note 166.

172. *As Pandemic Lingers, Courts Lean into Virtual Technology*, *supra* note 165.

173. Marimow & Jouvenal, *supra* note 160 (left image); *As Pandemic Lingers, Courts Lean into Virtual Technology*, *supra* note 165 (right image).

174. Lean, *supra* note 18.

175. *As Pandemic Lingers, Courts Lean into Virtual Technology*, *supra* note 165.

176. *Id.*

177. *Id.*

clusion of a Zoom trial in the Middle District of Florida spoke positively to her about the experience.¹⁷⁸

Whether the use of virtual civil trials will increase during the pandemic and beyond is an open question. Commentators have suggested that although virtual civil trials are a rarity, they may be needed even after the United States has reached herd immunity with respect to COVID-19 as a way to work through case backlogs without sacrificing public access to trials.¹⁷⁹ At the time of this writing, it has been reported that at least five other federal civil trials have been scheduled, including in the Middle District of Minnesota, the District of Kansas, and the District of Rhode Island.¹⁸⁰ A “how-to” seminar on virtual civil trials, hosted by the Western District of Washington, has attracted more than 900 participants from more than sixty federal district courts.¹⁸¹

C. *Implications For Pandemic-Era Civil Jury Trials*

The majority of commentary examining the downstream effects of pandemic-era trial innovations has centered on criminal jury trials, often with a laser-like focus on constitutional speedy trial guarantees and the Sixth Amendment’s Confrontation Clause.¹⁸² But it is not obvious that the policy considerations that underlie these constitutional mandates should apply only to criminal defendants. The subjective experience of fair treatment—and the subsequent willingness of litigants to legitimize the courts and comply with their edicts—does not turn on whether an action is civil or criminal or if the litigant is a civil plaintiff, a victim in a criminal action, or a civil or criminal defendant.¹⁸³ Civil litigants care about their cases as much as criminal litigants do, which includes the timely adjudication of their dispute and the right to challenge the opposing party in court. Moreover, empirical evidence suggests that procedural justice might play an outsized role with civil plaintiffs precisely because, compared to victims testifying in a government-brought criminal action, they control the litiga-

178. *Id.*

179. See, e.g., *More U.S. Courts Plan Virtual Jury Trials to Move Civil Cases*, BLOOMBERG LAW (Feb. 10, 2021, 10:57 AM), <https://news.bloomberglaw.com/us-law-week/more-u-s-courts-plan-virtual-jury-trials-to-move-civil-cases>.

180. See *As Pandemic Lingers, Courts Lean into Virtual Technology*, *supra* note 165.

181. *Id.*

182. See, e.g., Hamilton, *The Practical and Constitutional Issues*, *supra* note 168.

183. See Hollander-Blumoff, *supra* note 54, at 133 (discussing the range of settings demonstrating procedural justice effects).

tion more directly and arguably have a greater stake in the dispute, both economically and psychologically.¹⁸⁴

Examining the role of COVID-19-era innovations in the civil courts presents a unique set of issues at the intersection of the perceptions of psychological distance and procedural justice that these courts produce. This section will examine these potential effects in the context of (1) sanitized, in-person civil trials, in which the negative effects of psychological distance on perceptions of procedural justice might be counteracted by other important relational signals that courts send litigants; and (2) in virtual trials, where it is unclear whether these negative distancing effects occur at all. By examining the competing psychological stories that the current research produces, this Article can serve as a research agenda for exploring these important issues empirically.

1. *In-Person Jury Trials*

In-person civil jury trials resemble their pre-pandemic counterparts in a myriad of ways. Participants are personally in the courtroom or in a similar venue that can accommodate increased spatial needs, and the features of the adversary system are still present and recognizable: participants give opening statements, examine witnesses, and submit evidence mostly in the same ways that they do in trials during ordinary times.¹⁸⁵ Thus, the effects of these modified in-person trials on perceptions of procedural justice should (in theory) be minimal, insofar as spatial familiarity breeds trust, a core component of procedural justice.¹⁸⁶ But other components of in-person civil trials, including increased social distancing, the wearing of masks or other face shields, and even the placement of witnesses and individual jurors within the room, may have understudied effects on public perceptions of fair treatment, also a critical component of procedural justice.

184. See, e.g., E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 L. & SOC'Y. REV. 953, 955–56 (1990).

185. See, e.g., *Jennifer Oetter Secures Victory*, *supra* note 38 (recounting an in-person civil jury trial in a high school auditorium and noting the presence of the jury, the examination of witnesses, the presence of experts, the viewing of exhibits, and the hearings of motions, consistent with traditional adversarial proceedings); Statement from George Willette's attorney, *supra* note 33 (noting the use of trial exhibits).

186. Michael D. Baer et al., *Trusting the "Look and Feel": Situational Normality, Situational Aesthetics, and the Perceived Trustworthiness of Organizations*, 61 ACAD. MGMT. J. 1718, 1718 (2018).

a. *Masks*

Psychologists have studied the social effects of mask-wearing over the past several decades, since at least the time of Ku Klux Klan-perpetrated violence in the early-to-mid 1900s.¹⁸⁷ Most of the research, however, has focused on the anonymizing and deindividuating effects of mask-wearing: the extent to which an individual experiences a loss of a sense of self and the subsequent effects on impulse control and disinhibition.¹⁸⁸ Other researchers have focused on the role that masks play in social rituals, noting how they can conceal the wearer's emotions and, in some circumstances, lead to groupthink and antisocial behavior.¹⁸⁹

Modern psychological research in response to the COVID-19 pandemic, however, has examined the effect of mask usage in more intimate social contexts with intriguing results. In the most relevant recent study, published in *JAMA Surgery*, researchers conducted a randomized clinical trial of 200 medical patients and manipulated whether the patients' surgeons wore clear masks or standard covered masks during consultations.¹⁹⁰ Researchers then asked patients for their feedback on various aspects of the interaction.¹⁹¹ To a statistically significant degree, patients found that doctors who wore clear masks provided clearer explanations to them about their diagnosis, demonstrated more empathy for their situation, and fostered a greater degree of trust.¹⁹² Participants cited having a clear visualization of the face as their primary reason for preferring clear masks to their covered counterparts.¹⁹³

These findings have intriguing applications to pandemic-era civil trials. Courts have increasingly wrestled with the question of whether to allow witnesses to testify without wearing a mask or to allow witnesses to wear face shields or testify unmasked from another room.¹⁹⁴ These

187. Rosie Leizrowice, *How Masks Change Us: On Anonymity, Road Rage & Rituals*, ROSIE LEIZROWICE BLOG (Apr. 13, 2018), <https://rosieleizrowice.medium.com/how-masks-change-us-on-anonymity-road-rage-rituals-9398f587e454>.

188. See, e.g., Andrew Silke, *Deindividuation, Anonymity and Violence: Findings from Northern Ireland*, 143 J. SOC. PSYCH. 493, 493–94 (2003).

189. *Id.*; see also Claus-Christian Carbon, *Wearing Face Masks Strongly Confuses Counterparts in Reading Emotions*, 11 FRONTIERS IN PSYCHOL. 1, 1 (2020).

190. See generally Ian M. Kratzke et al., *Effect of Clear vs Standard Covered Masks on Communication with Patients During Surgical Clinic Encounters: A Randomized Clinical Trial*, 156 JAMA SURGERY 372 (2021).

191. *Id.* at 373.

192. *Id.* at 374–76.

193. *Id.*

194. See Hamilton, *Workers in L.A.'s Courts*, *supra* note 156; see also Hong & Ransom, *supra* note 156.

findings suggest that people believe that seeing a target actor's full face provides additional informational value, which could affect impressions of the tribunal's decision accuracy. But more importantly, the wearing of a mask appears to create a level of psychological distance, to the extent that it acts as a barrier between an individual and a target actor in the environment, and may decrease perceptions of empathy and trustworthiness, important components of procedural justice.

On the other hand, there are reasons to wonder whether these findings would necessarily replicate in the courtroom. The relationship between a sick patient and her surgeon is an intensely personal one, which is likely to be qualitatively different from the more formal, less personal relationship between a litigant and the court that hears her case. Moreover, given the highly contagious nature of COVID-19, requiring participants to wear masks during the proceedings might itself send an interpersonal, relational signal to litigants that the court cares about their health and well-being, which may actually increase perceptions of procedural justice. Researchers would do well to replicate this study in varying contexts, including legal contexts, to determine whether the findings are externally generalizable.

b. Physical Barriers

The presence of plexiglass barriers in the courtroom, which many courts have installed for in-person civil and criminal trials, poses similar puzzles with respect to their effects on procedural justice. Perceptually, their maze-like aesthetic may create an illusion of distance, especially coupled with the fact that jurors are often spread out into the gallery, spaced at least six feet apart from one another, and relatively far away from the litigants' tables. These concerns may be exacerbated in the growing number of jurisdictions that are seconding large high school auditoriums or public event spaces to hold trials.¹⁹⁵

The inconveniences that plexiglass barriers impose between attorneys and their clients may also be a cause for concern with respect to perceptions of procedural justice. One of the core components of fair process involves the parties feeling as if they have been heard by the tribunal—and especially that they have been heard by the agent who represents their voice: their legal counsel.¹⁹⁶ In many courtrooms,

195. See, e.g., Rodriguez, *supra* note 33.

196. Robert J. Bies & Debra L. Shapiro, *Voice and Justification: Their Influence on Procedural Fairness Judgments*, 31 *ACADEM. MGMT. J.* 676, 676 (1988) ("One of the consistent findings of [procedural fairness] research has been that people perceive voice procedures as fairer than mute procedures . . . even when a decision is unfavorable to them.") (citations omitted).

plexiglass barriers have been erected between parties at the litigants' tables, potentially disrupting the ease of whispered communications between client and counsel.¹⁹⁷ Perhaps anticipating this practical concern, if not the larger legitimacy-related concern, some courts have allowed parties to speak to their counsel through the use of headsets and other low-volume communicative devices.¹⁹⁸ It remains unclear as an empirical matter whether these solutions will solve the potential dignitary harms that difficulty communicating with counsel may produce, but they are worthy of further study.

As with masks, it is not entirely clear that physical barriers will unequivocally harm litigants' perceptions of procedural justice. These perceptions turn on interpersonal treatment: feeling as if one has been treated with dignity and respect. In that sense, although the sterilized trial setting might decrease litigants' perceptions of being treated with dignity and respect—to the extent that the process feels increasingly impersonal—litigants might also see the presence of plexiglass barriers as comforting and might credit the courts for providing them with that sense of comfort.¹⁹⁹ Indeed, to the extent that courts are candid with respect to the connection between their mitigation measures and their concern for litigants' health, psychology research suggests that litigants' perceptions of fair process and fair treatment may increase.²⁰⁰

2. *Virtual Jury Trials*

Virtual civil jury trials present a different puzzle for procedural justice researchers. Like their in-person counterpart, Zoom and WebEx trials include largely the same adversarial procedures that are the hallmark of the American justice system. But unlike in-person trials, these procedures are, by necessity, administered in a manner that looks quite different, which may affect the trust and fair treatment components of procedural justice that litigants experience.

Here, there are potentially two pathways through which psychological distance may exert its effects on perceptions of procedural justice. First, most participants—including the litigants, the judge, the attorneys, the witnesses, the juries, and the court employees—are distant from the courtroom as a matter of physical space. Second, to the ex-

197. See *As Courts Restore Operations, COVID-19 Creates a New Normal*, *supra* note 154.

198. *Id.*

199. Zara Abrams, *Building a Safe Space in the Pandemic*, AM. PSYCH. ASS'N (Oct. 27, 2020), <https://www.apa.org/topics/covid-19/pandemic-safe-space>.

200. See, e.g., Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 500, 506 (2015).

tent that Zoom trials are unfamiliar and novel, it is possible that they create increased psychological space as well. But, as I discuss below, although increases in psychological distance appear to lead to lower levels of interpersonal trust, there are theoretical reasons to wonder whether virtual trials actually *do* create perceptions of psychological space. Direct empirical evidence is lacking, but findings from other domains, as well as anecdotal accounts of virtual social encounters during the pandemic outside the courtroom, may prove instructive in refining researchers' thinking as they examine this issue empirically.

a. The Informality Problem

At the institutional level, the trust component of procedural justice is derived in part from the normality and predictability of interactions between an actor and a social institution.²⁰¹ This predictability, in turn, is derived from “taken-for-granted understandings” and expectations about appropriate behaviors exhibited by actors within the social system.²⁰² The understandings between actors and institutions can be represented by abstract principles and concrete examples and often include expectations about the identities, categories, modes of communication, and codes of conduct with respect to those interacting with the institution.²⁰³ Empirical studies suggest that to the extent that the institutional behavior violates these shared expectations, or is otherwise incongruent with a set of shared principles, perceptions of the institution's trustworthiness may be eroded.²⁰⁴ This tendency may, in turn, be exacerbated if the medium through which the violation of expectations occurs *itself* creates psychological distance between the actor and the institution.

Scholars have written thoughtful articles about the expressive function of courtroom design and what the layout and décor of the courtroom communicate to participants in the legal system about the nature of participatory justice.²⁰⁵ Individual courthouses and courtrooms invariably differ, sometimes markedly so, with respect to features, including their size, age, and aesthetic. The ornate high-ceilinged, marble hallways of many federal courthouses are not always present in their state- and county-court counterparts. Nonetheless,

201. Kai Lambertz & Devasheesh P. Bhave, *Employee Perceptions of Organisational Legitimacy as Impersonal Bases of Organisational Trustworthiness and Trust*, 7 J. TRUST RES. 129, 129–32 (2017).

202. *Id.* at 129.

203. *Id.* at 132.

204. *Id.*

205. See, e.g., Linda Mulcahy, *Architects of Justice: The Politics of Courtroom Design*, 16 SOC. & LEGAL STUD. 383, 383–87 (2007).

courtrooms almost universally share certain features, with the judge typically presiding on a raised platform, the parties facing the judge from a distance, the testifying witness and the jury relatively close to the judge's side, and spectators seated farther away in the gallery. The formality to this aesthetic mirrors the formality of the proceedings themselves, and legal scholars have argued that the formality inherent in increasingly partitioned, hierarchically segmented modern courtrooms conveys the seriousness of legal proceedings and the power of the presiding judge.²⁰⁶

If these scholars have correctly articulated the signals that the public receives from the very design of the nation's courthouses, then distant Zoom trials may upend those norms in a way that threatens the public's perceptions of procedural justice. Although—in the few civil Zoom trial images that are publicly available—the presiding judge wears a robe and appears to conduct the proceedings pursuant to adversarial norms, the judge is not elevated physically from other participants, and the participants are not segmented in the manner in which they would be in an in-person proceeding.²⁰⁷ Moreover, with the occasional exception (in which jurors have appeared on Zoom with a standardized backdrop behind them), jurors have appeared on Zoom in spaces ranging from more formal locations, like their dining rooms, to less formal locations, including their bedrooms.²⁰⁸ To the extent that litigants notice these subtle differences from in-person trials—consciously or subconsciously—and to the extent that any lack of formality may violate litigants' expectations, they may come to see these trials as more psychologically distant. If so, their trust in the tribunal, feelings of having been respected and heard, and the procedural justice that they believe they have been afforded may be compromised.²⁰⁹

206. Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 *YALE J. L. & HUMAN.* 311, 316, 330–31 (2012).

207. See, e.g., *As Pandemic Lingers, Courts Lean into Virtual Technology*, *supra* note 165 (displaying a screenshot of a virtual civil jury trial in the Middle District of Florida, with Judge Mary Scriven presiding over Zoom in her judicial robes).

208. See *id.* (including a screenshot of the virtual trial with heterogeneous juror backgrounds); see also Marimow & Jouvenal, *supra* note 160 (including a screenshot of a non-binding civil trial in which the jurors appear in front of standardized backgrounds). Although it is beyond the scope of this Article, it is worth noting that it may prove more difficult for judges to regulate the degree to which jurors pay attention to the proceedings during a trial conducted on Zoom. Apart from its effects on litigants' perceptions of the tribunal's decision accuracy, this may cause litigants to believe that they are not being truly heard and respected by the tribunal.

209. It might be the case, however, that Zoom proceedings, despite consisting of participants who are further away from each other spatially, produce *greater* feelings of familiarity, trust, and procedural justice among participants. I address this intriguing possibility in the next Part.

There are, however, at least two issues to consider before assuming that virtual trials will lead to decreased perceptions of procedural justice. First, the argument assumes that the public has a clear reference point—and therefore, clear expectations—of what one’s “day in court” would look like. Most members of the public, however, may not ever step foot inside a courtroom, and so the degree to which they hold any such expectations—and the degree to which they expect their day in court to conform strictly to those expectations—is an open question. Nonetheless, it is worth noting the sheer volume of popular media available for consumption that includes fictional representations of the courtroom, as well as “true crime” shows that provide access to footage from actual trials. It is not obvious that these fictional representations create meaningful expectations in the real world—as the research on the so-called CSI Effect appears to indicate²¹⁰—but the possibility deserves further study.

Second, as with in-person trials, Zoom trials may produce countervailing relational signals to litigants. For example, in a Zoom trial, litigants, witnesses, and jurors are spared the inconvenience of traveling to the district courthouse for the trial and are spared from routine screening procedures and other potential annoyances. Regardless of the ultimate outcome, participants might appreciate the court’s willingness to hold the trial virtually as a cost-saving measure for its participants in a way that signals respect for participants’ time and resources. Moreover, the very fact that a Zoom trial is occurring at all, instead of requiring participants to wait an uncertain amount of time before the dispute is resolved or requiring participants to meet at the courthouse and risk exposure to COVID-19, might also send positive relational signals to litigants.

b. The Spatial Problem

As a matter of physical distance, the effects of virtual trials on perceptions of procedural justice are straightforward. Because virtual trials allow for substantially increased physical space between litigants and the tribunal compared to in-person trials, several aspects of procedural justice—including feelings of trust and beliefs that litigants have been heard—should decrease dramatically when trials are conducted online. Some recent findings in non-legal contexts appear, to some degree, to support this hypothesis.

210. Kimberlianne Podlas, *The CSI Effect: Exposing the Media Myth*, 16 FORDHAM INTELL. PROP., MEDIA & ENT. L. J. 429, 431 (2006).

For example, some state prison systems, citing budgetary and safety concerns, have chosen to employ remote video visitation sessions in place of in-person visitation of inmates.²¹¹ Criminologists Grant Duwe and Susan McNeeley examined, in one such jurisdiction, the effects of the shift toward virtual visitation on several aspects of prisoner well-being and behavior.²¹² The researchers compared over 800 participants who experienced virtual visitation sessions against a matched sample from the general prison population and found that, although video visitation was associated with select positive behavioral outcomes, it did not improve key behavioral and well-being metrics, such as violent recidivism outcome rates.²¹³ The data comports with anecdotal accounts in the popular press and qualitative interviews that suggest that participants find virtual visitations distancing and isolating, in part because of the inability to see each other's full body, the poor quality of the video feed, and the lack of eye contact on account of the placement of the camera.²¹⁴

But there are several reasons to question whether holding virtual civil trials would have the same interpersonal effects. It may be that although participants in Zoom trials are physically farther away from one another, the trials are experienced as closer psychologically compared to sanitized trials with more anonymizing, formalistic features. If so, then Zoom trials may actually *increase* perceptions of procedural justice.

One instructive non-legal context that researchers might consider exploring involves online law school teaching during the pandemic. Like the courtroom, the law school classroom has similar formalistic features, with the instructor at a podium at the front of the room engaging in Socratic dialogue with students, not unlike how a judge might interact with legal counsel. In a recent article in *The New Yorker*, Professor Jeannie Suk Gersen discussed her impressions of the interpersonal experience that teaching on Zoom provided to both

211. See, e.g., *Dropped Connections: The Barriers to Communication Created by Video Visitation*, HARV. C.R.-C.L. L. REV. (Mar. 15, 2018), <https://harvardcrcl.org/dropped-connections-the-barriers-to-communication-created-by-video-visitation/> (discussing video visitation in prisons and noting that “the benefits cited are lower security costs to the correctional facility and the convenience of video visitation”).

212. Grant Duwe & Susan McNeeley, *Just As Good As the Real Thing? The Effects of Prison Video Visitation on Recidivism*, 67 CRIME & DELINQ. 475, 476 (2021).

213. *Id.* at 475.

214. See, e.g., *Prison Visits Crucial, but Miles and Money Separate Families*, THE TIMES-PICTA-YUNE (Jan. 10, 2017, 7:00 PM), https://www.nola.com/news/crime_police/article_25d54766-782e-5f6a-8a0c-23eb288c0cc9.html.

her and her students.²¹⁵ She noted the egalitarian aesthetic of Zoom, insofar as the hierarchical geography of the law school classroom is replaced by “Brady Bunch”-esque, equally-sized squares in which participants appear, often in close-up.²¹⁶ Suk Gersen commented specifically on the intimacy of online teaching, in part because of Zoom’s ability to capture students’ facial expressions more closely and clearly than the participants would be able to see in the classroom, while also noting the comparative ease with which students participated in the Socratic dialogue, attributing the difference to students’ greater familiarity with communicating via videoconferencing software.²¹⁷ These potentially humanizing elements of Zoom, including the ability to see participants’ bedrooms and an occasional relative or pet milling about in the background, allowed her class to have a more personal feel, which she noted was reflected in various points of discussion throughout the semester.²¹⁸ Suk Gersen’s anecdotal account appears consistent with emerging psychological findings, which suggest that “hyperaccessibility” of digital media may reduce felt distance between social actors separated by geographical space, provided that there is enough “conceptual” similarity between the online activity and its in-person counterpart.²¹⁹

Although the courtroom is similar to the law school classroom in many respects, it is not a perfect analogy. Law school professors serve a mentoring role for law students that is not present in the courtroom setting, and the sometimes-adversarial nature of the Socratic dialogue in law school instruction pales in comparison to the “rough and tumble” of the adversary system during civil litigation. But cognitive psychologists might nonetheless find it useful to examine which of these features of videoconferencing—structural and psychological—are the most salient to potential litigants. Particularly, in light of research that suggests that perceptions of psychological distance and procedural justice in online interactions may be subject to generational and cultural moderators,²²⁰ this line of research might prove particularly fruitful in

215. See generally Jeannie Suk Gersen, *Finding Real Life in Teaching Law Online*, THE NEW YORKER (Apr. 23, 2020), <https://www.newyorker.com/culture/personal-history/finding-real-life-in-teaching-law-online>.

216. *Id.*

217. . *Id.*

218. *Id.*

219. Norman et al., *supra* note 122, at 1–2.

220. See, e.g., Ophillia Ledimo, *An Assessment of Organisational Justice Perceptions across Three Generational Cohorts*, 4 J. GOVERNANCE & REG. 69, 74–77 (2015). The results suggest that millennials appear more attuned to the formal processes of procedural justice, while older generations are more attuned to interactional aspects of procedural justice. *Id.*

providing a framework for understanding procedural justice in virtual trials.

V. FUTURE DIRECTIONS AND CONCLUSIONS

With the arrival of COVID-19 vaccines in early 2021, the public health threat posed by the pandemic appears to be slowly ebbing, and with it, the necessity of the procedural innovations introduced during the height of the public health crisis. But there is reason to believe that at least some of these innovations—with respect to at least some virtual hearings—may outlive the pandemic for reasons of both administrative convenience and cost. Policymakers would do well to remember the strong explanatory power that fair procedures and fair treatment have with respect to the public's willingness to legitimize the courts and follow their directives. Researchers, for their part, would do well to confront what procedural justice might look like, and how it might evolve, in an increasingly digital age in an increasingly distant global economy.

Currently, there are conflicting psychological stories that researchers could tell with respect to COVID-19-era procedural innovations that point in competing directions for governing policy. To the extent that increased psychological distance interacts with interpersonal factors—such as trust—to lower perceptions of perceived fairness in social interactions, is this effect mitigated in sanitized, in-person trials by the message the tribunal sends regarding its commitment to litigant safety? In virtual trials, does the videoconferencing software actually create the psychological feeling of distance that threatens perceptions of fairness? These are testable questions that psychologists have the tools to answer. Indeed, the pandemic has created a pseudo-natural experiment in which researchers, to the extent that courts will allow them to do so, could survey participants on traditional dimensions of procedural justice and compare the data with publicly available data from appropriately matched litigants and jurors during normal times.²²¹

This research could then establish a framework for exciting questions about the future of these procedural innovations. For example, although there do not appear to be generational differences in the desire for procedural justice (or with respect to its effects on perceptions of institutional legitimacy), research does suggest that different

221. See, e.g., PAULA L. HANNAFORD-AGOR ET AL., ARE HUNG JURIES A PROBLEM 2 (2002), <https://www.ojp.gov/pdffiles1/nij/grants/199372.pdf> (examining, before the COVID-19 pandemic, empirical procedural justice questions in the context of hung jury cases in a natural experiment paradigm).

generations have different thresholds and conditions under which they perceive procedures to be fair.²²² This may mean that younger generations adapt to and accept some aspects of virtual litigation more readily compared to their older counterparts, and that a “red queen” effect might result from the constant evolution of technology, on one hand, and the increasing technological proficiency of younger generations on the other.²²³

Researchers may also consider the extent to which the stakes of the matter being litigated affect perceptions of psychological distance and procedural justice. Several countries outside of the United States routinely allow citizens to submit smaller claims to courts online, obviating the need for attorneys or the expense of attending court.²²⁴ Although research suggests that the public expects procedures to be fair even in small-stakes interactions,²²⁵ the relative convenience of these methods may send relational signals that increase public perceptions of fair process. This may have increasing relevance for certain low-level disputes—including traffic violations—that the public may be particularly inclined to resolve virtually if provided the opportunity.

* * *

George Willette, Cheryl Staple, and the family of Phillip White brought forth vastly different civil actions during the COVID-19 pandemic. The litigants, however, have at least one thing in common: an expectation that the civil jury system will treat them fairly and will use fair procedures to resolve their claims. These cases took drastically different procedural paths, and it is an open question whether those paths produced “justice” in the eyes of both the litigants who tried the cases, and in the eyes of the public that will decide whether to legitimize the tribunals that heard those cases. Psychologists have an important role to play in assisting policymakers in ensuring that legal tribunals exercise authority over the public in a manner that aligns

222. See generally Ledimo, *supra* note 220.

223. In evolutionary biology, the red queen hypothesis posits that organisms constantly struggle to keep up with one another in the context of evolutionary developments between predator and prey. See Leigh Van Valen, *A New Evolutionary Law*, 1 *EVOLUTIONARY THEORY* 1, 17–21 (1973). The hypothesis is named after a character in Lewis Carroll’s novel, *Through the Looking Glass*, who, in a memorable scene, runs as quickly as she can only to remain in the same place. See LEWIS CARROLL, *THROUGH THE LOOKING GLASS* (1872).

224. See, e.g., REMOTE COURTS WORLDWIDE, <https://remotecourts.org/> (last visited Jan. 18, 2022) (containing databases and articles on the approaches to online justice in various countries).

225. See, e.g., Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 *LAW & SOC’Y. REV.* 483, 503–04 (1988).

with both the substantive and procedural values of the citizenry. In doing so, these policymakers will strengthen the popular legitimacy of the courts as technology and cultural understandings of justice continue to evolve.

