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Remaking courts after COVID

Anna G. Cominsky '05

OPINION

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By ANNA G. COMINSKY
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A large television stands in for criminal defendants in the arraignment part at Manhattan Criminal Court in March. (Alec Tabak/for New York Daily News)

Every day, New York's criminal courts decide the fate of some of our most vulnerable residents. We know the outcomes produced are the product of a deeply unjust system that for far too long has disadvantaged the poor and people of color.

As the supervising attorney of New York Law School's Criminal Defense Clinic, I have seen how these structural inequalities have been exacerbated by the COVID-19 pandemic.

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We must take the lessons from the pandemic to create a smarter, fairer and more nimble court system when we return to normal. This must include a greater emphasis on pre-trial diversion programs, more flexibility in determining when accused individuals must actually appear in court and keeping certain proceedings virtual even when social distancing ends.

The inability of the criminal courts to safely convene grand juries and hold criminal trials has left men and women, innocent until proven guilty, to languish behind bars waiting for their day in court. This is a travesty of justice; we already know that just a few days in jail can [increase the likelihood of rearrest due to loss of housing and employment](#). Now, any time spent in jail [drastically increases](#) the potential that an individual will get COVID.

In response, some prosecutors have been more willing to resolve cases with pre-trial diversion programs — such as mental health or drug treatment programs — which help people without ensnaring them in the criminal legal system.

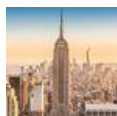
But use of these strategies should not depend on extraordinary pandemic conditions. Judges, prosecutors and defenders must all work together to supply more opportunities for diversion programs. The criminal legal system has always relied on prosecution, conviction and

punishment. All along, prosecutors have had the power to divert a case, and it's time for them to use it.

It's also been extraordinarily difficult for defense attorneys to provide clients with the full support and guidance needed during virtual appearances. Court moves quickly and can be confusing, which can cause questions to occur in the middle of an appearance. Pre-pandemic, defense attorneys addressed their clients' in-court concerns or questions privately and off the record, usually by whispering to each other, all while preserving confidentiality.

This has become nearly impossible during a virtual appearance. By requiring the accused to appear at every virtual court appearance, oftentimes when their presence is not even needed, the courts are needlessly exposing the accused to unscripted moments that can hurt their case. In one court appearance, an individual, whose face was obscured by jail cell bars, started to speak about his case with his defense attorney while waiting for the court to be ready — all on the record and in the presence of the prosecutor.

In many instances, these are risks that can be avoided. It is not necessary for individuals to appear virtually at court appearances where the case will only be adjourned.



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Furthermore, having clients actually show up to virtual proceedings can be challenging, as many do not have the technological capability to do so. We have had clients, unable to get access to a smartphone or computer, face arrest warrants because they cannot virtually appear in court. This needlessly punishes the poor and is unjust.

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These issues should give us pause. Why have we made individuals come to court for every appearance for so long — even when their case is not being disposed of — often in a location that is nowhere close to their home or job? Many of my clients have had to choose between coming to court and losing their job or keeping their job and risking a bench warrant. For even a simple misdemeanor offense, an individual could be forced to come to court seven, eight or nine times before the case is resolved.

The pandemic has made clear that rather than forcing individuals to leave their jobs or families when they are already trying to get back on their feet, we should only require their appearance in court when it is truly necessary. There is no public benefit to making people sit in a courtroom for hours waiting for a two-minute status update where their participation is not required.

And while the most significant and consequential parts of any criminal case must be done in person, many other proceedings can permanently be moved online. Quick status conference hearings often only require the attorneys and could be done over video without requiring the accused to appear.

The old way of doing business in New York criminal courts needs to change. The pandemic gives us the opportunity to create a more equitable court system that truly prioritizes equal justice.

Cominsky is a visiting associate professor of law, supervising attorney for the Criminal Defense Clinic, and managing attorney of NYLS Legal Services Inc. at New York Law School.

