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## Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom

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## **Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom**

SUSAN A. BANDES AND NEAL FEIGENSON†

### ABSTRACT

Faith in the legitimating power of the live hearing or trial performed at the place of justice is at least as old as the *Iliad*. In public courtrooms, litigants appear together, evidence is presented, and decisions are openly and formally pronounced. The bedrock belief in the importance of the courtroom is rooted in common law, constitutional guarantees, and venerated tradition, as well as in folk knowledge. Courtrooms are widely believed to imbue adjudication with “a mystique of authenticity and legitimacy.” The COVID-19 pandemic, however, by compelling legal systems throughout the world to turn from physical courtrooms to virtual ones, disrupts and calls into question longstanding assumptions about the conditions essential for the delivery of justice. These questions are not merely tangential; they implicate many of the core beliefs undergirding the U.S. system of justice, including the whole notion of “a day in court” as the promise of a synchronous, physically situated event with a live audience. Rather than

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regard virtual courts as just an unfortunate expedient, temporary or not, we use them as an occasion to reflect on the essential goals of the justice system and to re-examine courtroom practices in light of those goals. We draw on social science to help identify what can be justified after the myths are pared away. Focusing on three interrelated aspects of traditional courts—the display and interpretation of demeanor evidence; the courtroom as a physical site of justice; and the presence of the public—we prompt a reassessment of what our legal culture should value most in courtroom adjudication and what we are willing to trade off to achieve it.



## INTRODUCTION

Faith in the legitimating power of the live hearing or trial performed at the place of justice is at least as old as the *Iliad*. Common-law societies have for centuries held it up as an exemplary form of adjudication and even as the “central institution of law as we know it.”<sup>1</sup> In this form of adjudication, evidentiary hearings and trials are live events, conducted in dedicated spaces to which members of the public and the press generally have access,<sup>2</sup> at which litigants appear at the same time and participate; evidence, especially testimony, is presented; and decisions are publicly and formally pronounced. And throughout, participants can observe one other as they variously testify, argue, watch, and listen. The liveness, momentousness, and visibility of hearings and trials are all components of the familiar metaphors of the courtroom as stage and the trial as theater, which remind us that an audience—in the courtroom gallery or watching at home—is always at least notionally part of the performance as well.<sup>3</sup> The whole is greater than

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1. ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 3 (2009) (quoting James Boyd White).

2. These are sometimes conducted remotely via broadcast or livestream, sometimes via media accounts featuring artists' sketches.

3. As we readily acknowledge, much actual dispute resolution does not conform to this model of courtroom adjudication. First, many disputes are not decided on the basis of full, open hearings in traditional courts. The great majority of claims on or sanctions implemented by the government are adjudicated in quasi- or barely public administrative courts. A growing preponderance of claims between private parties are channeled by contract or by the courts into mediation or arbitration. Additionally, more than 95% of all formal civil and criminal cases ultimately settle (on the criminal side, via plea bargains), so that a full trial never occurs. *See, e.g.*, JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* 306–22 (2011). Second, many routine matters in overwhelmed criminal and possibly other courts are disposed of by judges, prosecutors, and public defenders in ways that are at best hasty and bureaucratic. Nevertheless, over 150,000 trials took place every year in federal and state courts before the pandemic and many times that number of evidentiary hearings and other pretrial proceedings, so the model accurately describes a vast amount of adjudication, as well as the ideal generally held by legal professionals and laypeople alike.

the sum of the parts; the trial is credited with helping judges and jurors to transcend their individual interests and “recognize and act upon what is beyond their ordinary selves.”<sup>4</sup> Yet if the trial is an “an act of practical integration that is crucial for the health of our society,”<sup>5</sup> the COVID-19 pandemic, with its unprecedented challenge to the viability of live hearings, leaves us no choice but to disassemble, scrutinize, and demystify the components of the trial in order to find a working solution that won’t irreparably delay or deny justice.

The move to virtual hearings<sup>6</sup> disrupts and calls into question longstanding assumptions about the conditions

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4. Milner S. Ball, *A Little Mistrust Now and Then*, 66 U. CIN. L. REV. 877, 887 (1998) (cited in BURNS, *supra* note 1).

5. BURNS, *supra* note 1.

6. “Virtual hearings” and “virtual courts” encompass a variety of technologies and formats. Throughout this Article, we use these terms to refer to proceedings conducted entirely online via videoconferencing, of which Zoom is currently the most popular platform, *see* Anna-Leigh Firth, *Two platforms dominated in our poll of virtual court operations*, NAT’L JUD. C. (May 13, 2020), <https://www.judges.org/news-and-info/two-platforms-dominated-in-our-poll-of-virtual-court-operations/> (48% of responding judges reported they were using Zoom for virtual proceedings; WebEx second at 25%), where each participant may be physically located anywhere (although judges frequently preside while sitting alone in their courtrooms). These proceedings should be distinguished from those in traditional courtrooms where a single participant, typically a criminal defendant, an applicant for parole or asylum, or a vulnerable witness appears via video-link but everyone else is physically present in the courtroom. They should also be distinguished from the more technologically sophisticated “distributed courtroom,” which:

uses a physical courtroom but allows for multiple parties to appear remotely. Rather than placing remote participants into frames on a single screen, this configuration displays remote participants (or groups) on separate screens arrayed around the physical courtroom. Remote participants similarly have multiple screens, and multiple cameras. . . . [T]his configuration [is referred to] as the “distributed courtroom” in that the monitors are distributed around the courtroom in the “correct” position.

Court of the Future Network, *Gateways to Justice II: Guidelines for Use of Video Links in Justice Hearings* 11 (draft July 31, 2020). We recognize that even more sophisticated and technologically advanced sorts of alternative adjudicatory spaces, such as fully immersive virtual courtrooms, may be developed in the future.

essential for the delivery of justice. The stakes are most apparent in the criminal justice system, where courts must weigh the constitutional rights of the accused, including the rights to speedy trial, confrontation of witnesses, and an open courtroom, against concerns about public health and safety. But the questions raised by the pandemic affect the whole range of legal proceedings and interactions, including civil suits, administrative hearings, and appellate arguments. These questions are not merely tangential; they implicate many of the core beliefs undergirding the U.S. system of justice, including the whole notion of “a day in court” as the promise of a synchronous, physically situated event. When the legal status quo is confronted with an unprecedented challenge of this magnitude, one understandable impulse is to try to create a safer version (masks, plexiglass, social distancing)<sup>7</sup> or, alternatively, an online simulacrum of the practices we know.

But rather than concentrate all our efforts on recreating or returning to a pre-COVID status quo, we should make use of this forced pause to reconsider “what is necessary and what is possible.”<sup>8</sup> In light of an increasingly rich body of science and social science, lessons from the U.S. experience and that of other legal systems, and the sheer necessity of the current crisis, we ought to seize this moment to re-evaluate many arrangements that have long been taken for granted.

The rules that govern and shape the U.S. courtroom experience arise from a complex blend of constitutional and statutory mandates, deeply rooted common-law traditions,

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7. See, e.g., Ann E. Marimow & Justin Jouvenal, *Courts dramatically rethink the jury trial in the era of the coronavirus*, WASH. POST (July 31, 2020, 7:45 AM), [https://www.washingtonpost.com/local/legal-issues/jury-trials-coronavirus/2020/07/31/8c1fd784-c604-11ea-8ffe-372be8d82298\\_story.html](https://www.washingtonpost.com/local/legal-issues/jury-trials-coronavirus/2020/07/31/8c1fd784-c604-11ea-8ffe-372be8d82298_story.html).

8. Bruno Latour made this point in the context of the impact of the pandemic on climate change. Jonathan Watts, *Bruno Latour: This is a global catastrophe that has come from within*, THE GUARDIAN (June 6, 2020, 11:00 AM), <https://www.theguardian.com/world/2020/jun/06/bruno-latour-coronavirus-gaia-hypothesis-climate-crisis>.

beliefs (largely of the untested or unsupported variety) about human behavior, and a surprising amount of mysticism. For example, the centrality of demeanor evidence in the U.S. system is the product of a number of sources: textual guarantees like the Sixth Amendment's Confrontation Clause and the Federal Rules of Civil Procedure, the common-law tradition of an open courtroom and its attendant rituals, the folk-knowledge belief that demeanor is a reliable indicator of credibility, and faith in the "elusive" power of "sense impressions."<sup>9</sup> A similar spectrum of text-based rules, norms and rituals, beliefs about human behavior, and mysticism underlies much of courtroom practice. Courtrooms, in the words of the late legal and literary scholar Robert Ferguson, aim to create "an aura,' a mystique of authenticity and legitimacy."<sup>10</sup> When proceedings are forced onto Zoom, Webex, or other virtual platforms, much if not all of that mystique or aura is likely to be stripped away. Should we mourn it?

Common-law court systems seek to advance a range of values, including inclusivity, dignity, fairness, accuracy, transparency, and the demonstration of state authority. The traditional features of formal adjudication reflect these basic values and attempt to negotiate the tensions among them. We argue for a more explicit debate about the goals of adjudication, whether in physical or virtual courtrooms, so that we can determine how to achieve whatever it is we value most and what we are willing to trade off in pursuit of those goals. This will require demystifying some of the more opaque justifications offered for traditional practices, such as the oft-mentioned "intangible" and "imponderable" benefits of live, face-to-face testimony and the very "mystique" and "aura" of the courtroom itself. We will draw on science and social science to support our evaluations of the folk

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9. Henry S. Sahm, *Demeanor Evidence: Elusive and Intangible Imponderables*, 47 A.B.A. J. 580, 580 (1961); *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952).

10. ROBERT A. FERGUSON, *THE TRIAL IN AMERICAN LIFE* 68 (2007).



psychology and mythology underlying customary beliefs about courtroom adjudication.

We focus on three interrelated aspects of adjudication that seem likely to change dramatically as online hearings and trials become more and more prevalent.<sup>11</sup> Part I will discuss the complex psychological dynamics of the courtroom, focusing on the display and interpretation of demeanor evidence. Part II will discuss the courtroom as a physical site of justice. Part III will discuss the notion of public access to the courtroom by present spectators, the press, and the broader public beyond the courtroom walls. We also offer the beginnings of a normative critique, suggesting how adjudication's values and goals might be reassessed and rebalanced.

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11. As this Article goes to press, many hearings and even a few fully online jury trials have already been conducted. *See, e.g.*, Griffin v. Albanese Enterprise, Inc., No. 16-2019-CA-1555 (Fla. Cir. Ct. August 10, 2020) (Zoom jury trial in civil case).

## I. Demeanor

*The Reigning Paradigm*

Like other common-law systems,<sup>12</sup> the U.S. court system places tremendous faith in the importance of live witness testimony, given in open court.<sup>13</sup> This preference is enshrined in the Sixth Amendment's Confrontation Clause and the Federal Rules of Civil Procedure.<sup>14</sup> Live testimony has, since its inception, been intimately tied to a belief that personal observation is essential to the ability to evaluate demeanor, and to a belief in the importance of demeanor in the assessment of credibility and character. Demeanor evidence "relies heavily on the interpretation of facial expression and body language."<sup>15</sup> Access to witnesses' demeanor is viewed as an aspect of fairness to the accused and as a sign of respect for the accused's dignity: defendants deserve to be able to hear, see, and cross-examine the government's witnesses. It is also an article of faith that access to demeanor helps decision-makers assess witnesses' credibility and thus advances the core value of accurate judgment. As one defense attorney grappling with the use of surgical masks in the courtroom recently stated: "[I]f witnesses or jurors are allowed to wear masks, it could obscure key nonverbal cues during testimony and jury selection. 'We need to be able to see someone's face in order to judge their credibility' . . . ."<sup>16</sup>

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12. See Susan A. Bandes, *Remorse, Demeanor, and the Consequences of Misinterpretation: The Limits of Law as a Window into the Soul*, 3 J.L., RELIGION & ST. 170, 171 (2014) [hereinafter Bandes, *Remorse, Demeanor, and Consequences*]. See also *supra* note 6 and accompanying text.

13. See Mark Bennett, *The Changing Science of Memory and Demeanor—And What It Means for Trial Judges*, 101 JUDICATURE 60, 61 (2017).

14. FED. R. CIV. P. 43 ("At trial, the witnesses' testimony must be taken in open court unless a . . . statute . . . or other rule[] provide[s] otherwise."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

15. Bandes, *Remorse, Demeanor, and Consequences*, *supra* note 12, at 172.

16. Marimow & Jouvenal, *supra* note 7.

These norms and beliefs about the perceived importance of demeanor evidence affect the evaluation of live testimony in multiple contexts. For example, judges evaluate defendants' demeanor when setting bail and at sentencing. They observe the demeanors of parents and children in resolving custody disputes. They do so when deciding whether to deport an asylum seeker. At voir dire, lawyers and judges attend not only to what prospective jurors say in response to questions but to how they say it. Jurors in personal injury cases notice whether the plaintiff appears to be sitting uncomfortably in her chair or struggling to and from the witness stand. Jurors may take the judge's tone of voice and nonverbal behavior as a cue to what the judge thinks, and therefore what they should think, about the witnesses and the evidence.<sup>17</sup> And the press and public observing a trial may rely on witnesses' and parties' demeanors in reaching their own opinions about whether justice is being done.

### *The Critique*

The Anglo-American belief in the power of demeanor evidence as a barometer of credibility, and even a window into "the heart and mind of the offender,"<sup>18</sup> is tenacious and deeply held. Unfortunately, it is also heavily reliant on dubious folk knowledge. As Judge Frank Easterbook observed with his customary penchant for cutting to the chase: "The belief that many people form from watching television and movies—that [sifting honest, persecuted witnesses from those who are feigning] can be done by careful attention to a witness's demeanor—has been tested and rejected by social scientists."<sup>19</sup> And for all its historical

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17. See Peter David Blanck et al., *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985).

18. *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring).

19. *Mitondo v. Mukasey*, 523 F.3d 784, 788 (7th Cir. 2008); see also Judge Posner's opinion in *United States v. Wells*, 154 F.3d 412, 414 (7th Cir. 1998) ("Judges fool themselves if they think they can infer sincerity from rhetoric and

pedigree and the fervent loyalty it commands, in-court evaluation of demeanor is not the only accepted means of adducing evidence. For example, some inquisitorial systems rely much more heavily on dossiers of documentary evidence.<sup>20</sup> Even the pre-pandemic U.S. system has struggled with the issue of precisely how indispensable the usual access to demeanor evidence is, and has on occasion found it outweighed by other values; for example, child sexual assault victims are generally permitted to testify from behind a screen or via videoconference if they would otherwise be too intimidated or traumatized to testify freely (or at all).<sup>21</sup> Those discrete challenges are now dwarfed by a much larger one: the need to find safe ways to conduct trials and hearings during a pandemic. Courts have flocked to the alternative of videoconferencing, but virtual proceedings create distance, disturb or erase sight lines, and in numerous ways wreak havoc with the usual common-law tools for evaluating demeanor. In this sense the pandemic has created a natural experiment through which we can examine which aspects of physical, synchronous presence are necessary to the evaluative process, and which may be optional or even unhelpful. Conversely, the resort to virtual courts prompts the question whether videoconferencing technologies offer any tools that might actually improve the process.<sup>22</sup>

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demeanor.”).

20. The Dutch system is often cited as one that most strongly favors documentary over oral, immediate evidence. *See* Bandes, *Remorse, Demeanor, and Consequences*, *supra* note 12; *see also supra* note 3 and sources cited therein.

21. *See* *Maryland v. Craig*, 497 U.S. 836 (1990); *Coy v. Iowa*, 487 U.S. 1012 (1988).

22. These efforts have already begun. *See, e.g.*, Jenia Turner, *Remote Criminal Justice*, TEXAS TECH L. REV. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3699045](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699045). Turner surveyed a range of criminal law practitioners and judges on their experiences with virtual proceedings thus far. The results, as she summarizes:

paint a complicated picture. They suggest that, on the whole, online proceedings can save time and resources for the participants in criminal cases and can provide broader access to the courts for the public. Yet respondents also noted the dangers of remote justice, particularly in

The pervasive recourse to demeanor evidence, which live, physically co-present hearings and trials makes possible, rests on the general belief that observation of the facial expressions, tones of voice, and postures of others permits us to divine their inner lives (for example, their mental and emotional states), and therefore their credibility and character. The underlying folk psychology rests on two beliefs. The first is that demeanor conveys readily discernible truths that words alone might not disclose. Facial expression and body language, unlike language, are regarded as spontaneous, natural, and non-manipulable.<sup>23</sup> The second belief, less remarked upon in the standard legal literature, is that those truths tell observers something essential about the “deep character” or “condition[] of [the] very soul”<sup>24</sup> of the person whose demeanor they’re observing.

Turning first to the issue of discerning truth, the overwhelming weight of social science research debunks the common-sense belief that demeanor is a reliable cue to credibility. In general, people, including judges, are much less accurate than they think they are when they seek to use witnesses’ demeanor to differentiate truthful from untruthful testimony.<sup>25</sup> But the larger problem is that

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contested or evidentiary hearings and trials. These include the inability of the parties to present evidence and confront witnesses effectively, and the challenges of providing effective legal assistance remotely. Respondents also expressed concern that the court’s perception of defendants may be negatively skewed by technology and that indigent defendants might be disproportionately harmed by the use of remote hearings. Defense attorneys were especially likely to be concerned about the use of the online format and to believe that it tends to harm their clients. Federal judges and prosecutors were also more likely than their state counterparts to be skeptical of the benefits of online criminal proceedings outside the context of the pandemic.

*Id.* (manuscript at 1).

23. See RICHARD WEISMAN, *SHOWING REMORSE: LAW AND THE SOCIAL CONTROL OF EMOTION* 84 (2014).

24. Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO ST. J. CRIM. L. 423, 437 (2007).

25. See, e.g., Jeremy Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV.

although most jurists and scholars focus on “truthfulness” or “credibility” as if they are freestanding, measurable traits, the use of demeanor evidence in practice is much broader. Demeanor is used not merely to determine whether the witness is reliable or honest, but to assess character more broadly. That means demeanor matters in *every* case. Every judgment of liability, guilt, or punishment is in part a moral judgment about the deservingness of the parties, to which their character is always relevant, notwithstanding restrictions on character evidence that rules of evidence impose.<sup>26</sup> And gauging witnesses’ credibility is often bound up with the question of whose story is most believable, which in turn may depend on the fact-finder’s conception of the character of the storyteller. Decision-makers may choose to believe a witness’s story because they think the story she tells is consistent with who they perceive her to be, and they assess her character in part by how she tells the story, which includes her demeanor while telling it.<sup>27</sup> What is believable depends as well as on the assumptions and biases<sup>28</sup> of the fact-finder who is evaluating the witness—whether a story seems believable will depend on whether it resonates with the fact-finder’s experience of the world.<sup>29</sup>

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1157 (1993); Robert Fisher, *The Demeanour Fallacy*, 2014 N.Z. L. REV. 575 (2014); Stephen Porter & Leanne ten Brinke, *Dangerous Decisions: A Theoretical Framework for Understanding How Judges Assess Credibility in the Courtroom*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 114 (2009).

26. See, e.g., FED. R. EVID. 404; see generally ROBERT P. BURNS, A THEORY OF THE TRIAL (1999); Susan A. Bandes, *Remorse and Judging*, in REMORSE IN CRIMINAL JUSTICE: MULTI-DISCIPLINARY PERSPECTIVES (Steven Tudor et al. eds., forthcoming 2020) [hereinafter, Bandes, *Remorse and Judging*].

27. See generally BURNS, *supra* note 26; NEAL FEIGENSON, EXPERIENCING OTHER MINDS IN THE COURTROOM (2016).

28. See, e.g., M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301 (2018); Ronald S. Everett & Barbara C. Nienstedt, *Race, Remorse, and Sentence Reduction: Is Saying You’re Sorry Enough?*, 16 JUST. Q. 99 (1999); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007).

29. See, e.g., Susan A. Bandes, *Video, Popular Culture, and Police Excessive Force: The Elusive Narrative of Over-Policing*, in U. CHI. LEGAL F., LAW AND URBAN INSTITUTIONS TEN YEARS AFTER *THE WIRE* 1, 2 (2018) (recounting the trial

For example, rape complainants may be evaluated on whether their demeanor reflects what the fact-finder regards as the “appropriate” emotional reactions to a rape. For a fact-finder who assumes the sole believable reaction to a rape is intense emotion or even hysteria, complainants whose behavior lacks strong affect will appear less credible.<sup>30</sup> Conversely, one study of judicial reactions to victim impact evidence showed that judges were less likely to believe rape allegations when the complainant’s tone was angry. These victims are “often perceived by judges as out of control and unable to gain perspective on the crime”; one judge observed that “excessive anger ‘can certainly backfire . . . . [S]ometimes victims don’t understand that their hatred of the defendant . . . undermines the credibility of what they are saying . . . .”<sup>31</sup> Judges tended to find that victims who expressed anger were dishonest or untrustworthy. They felt that anger and outrage in the courtroom were the province of the judge, not the complainant.<sup>32</sup> As our culture becomes

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of Police Commander Glenn Evans for assaulting Rickey Williams). Judge Diane Cannon resolved the credibility dispute in favor of Evans, finding that Williams’ testimony of unprovoked assault “was improbable and contrary to human experience” but that Evans’ testimony of unprovoked assault by an unarmed civilian on an armed police officer was more plausible.

30. See Ken Armstrong & T. Christian Miller, *An Unbelievable Story of Rape*, THE MARSHALL PROJECT (Dec. 16, 2015), <https://www.themarshallproject.org/2015/12/16/an-unbelievable-story-of-rape>. In this account (later adapted as a television series called “Unbelievable”), not only was the complainant judged unbelievable based on her lack of affect when reporting the rape; she was charged with filing a false report. One consequence was that her rapist went on to rape at least five other women before he was finally arrested. See also Lawrence G. Calhoun et al., *Victim Emotional Response: Effects on Social Reaction to Victims of Rape*, 20 BRIT. J. SOC. PSYCHOL. 17 (1981) (more emotional rape victim deemed more credible); Franz Willem Winkel & Leendert Koppelaar, *Rape Victims’ Style of Self-Presentation and Secondary Victimization by the Environment: An Experiment*, 6 J. INTERPERS. VIOLENCE 29 (1991) (more emotional presentation led rape victim to be perceived as more credible and cautious and less responsible for the event).

31. MARY LAY SCHUSTER & AMY PROPEN, VICTIM ADVOCACY IN THE COURTROOM: PERSUASIVE PRACTICES IN DOMESTIC VIOLENCE AND CHILD PROTECTION CASES 67–68 (2011).

32. *Id.*

more sophisticated about the psychology of sexual assault, judges and policymakers are (albeit all too gradually) coming to understand that these sorts of reactions to rape victims are based on unsupported folk knowledge and harmful stereotypes about what victims “ought” to feel.

The potentially dire consequences of the belief that demeanor is a window into the soul can also be seen quite starkly in capital trials, in which jurors place enormous weight on their perceptions of the defendant’s visible remorse in determining whether to impose a death sentence. Most capital defendants do not testify, so the evaluation is often based entirely on their facial expressions and body language while they sit silently at the counsel table watching the evidence unfold. As Scott Sundby reports the findings of the Capital Jury Project:

Jurors scrutinized the defendant throughout the course of the trial, and they were quick to recall details about demeanor, ranging from . . . attire to . . . facial expressions. . . .

. . . .

. . . [Mostly] jurors . . . deduce[d] remorselessness from the . . . defendant’s lack of emotion during the trial, even as the prosecution introduced . . . horrific . . . [evidence]. . . .

. . . [The defendant’s perceived] boredom [or indifference made jurors angry]. . . . [Some saw them] as cocky and arrogant[,] . . . indicat[ing] . . . [they] lacked . . . human compassion . . . .<sup>33</sup>

Consider, for instance, the capital sentencing hearing of Dzhokhar Tsarnaev,<sup>34</sup> whose body language, including his beard-fiddling and his tendency to lean back in his chair, was perceived as arrogant and inappropriately informal.

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33. Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1551, 1562–64 (1998) (footnotes omitted).

34. See Katharine Q. Seelye, *Dzhokhar Tsarnaev Given Death Penalty in Boston Marathon Bombing*, N.Y. TIMES (May 15, 2015), <https://www.nytimes.com/2015/05/16/us/dzhokhar-tsarnaev-death-sentence.html>. *But see* United States v. Tsarnaev, 968 F.3d 24 (1st Cir. 2020) (vacating death sentence for inadequate voir dire regarding prejudicial pretrial publicity).



Although there is no evidence that remorse can be accurately assessed via facial expressions, jurors tend to believe they are well equipped to make just such an evaluation in a matter of life or death.<sup>35</sup> Nor are judges and the media exempt from these beliefs.<sup>36</sup> Indeed, studies show that judges and other fact-finders employ cues to complex states like remorse in an inconsistent or even contradictory manner, so that one judge may rely on a given behavior as indicative of remorse while another believes the same behavior indicates lack of remorse.<sup>37</sup>

To further complicate matters, legal decision-makers' assessments of demeanor evidence and their use of it in reaching judgments about others' credibility and character are subject to several cognitive-emotional biases. These include the fundamental attribution error (the tendency to ascribe the behavior of others to their inherent character, while ascribing one's own behavior to situational factors);<sup>38</sup> naïve realism (people's belief that they see the world as it is, underestimating or ignoring the effect of their own cultural, racial, and other biases on their perceptions and judgments);<sup>39</sup> conversely, an egocentric bias according to which people place undue weight on their own conscious

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35. See Susan A. Bandes, *Remorse and Criminal Justice*, 8 EMOTION REV. 14 (2016).

36. See generally Bandes, *Remorse and Judging*, *supra* note 26.

37. See, e.g., Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133, 155–59, 159 n.209 (2015) (finding that some judges believed direct eye contact was a sign of remorse, while others believed that lack of eye contact and a demure gaze downward were signs of remorse).

38. See Hanan, *supra* note 28; see also Daniel T. Gilbert, *Ordinary Personology*, in HANDBOOK OF SOC. PSYCHOL. 89, 130–31 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 4th ed. 1998); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 122–27 (1980).

39. E.g., Thomas D. Gilovich & Dale W. Griffin, *Judgment and Decision Making*, in HANDBOOK OF SOC. PSYCHOL. 542, 565–74 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 5th ed. 2010); Robert J. Robinson et. al., *Actual Versus Assumed Differences in Construal: "Naïve Realism" in Intergroup Perception and Conflict*, 68 J. OF PERSONALITY AND SOC. PSYCHOL. 404, 404 (1995).

emotional responses in gauging others' emotional states;<sup>40</sup> and a variety of other biases that complicate the ability to read the emotional states of others.

Some of these habits of thought strike at the heart of the values of fairness, equality, and dignity. Reading demeanor across racial lines is particularly fraught. This is in part an artifact of selective empathy—the difficulty we all have attending to and interpreting cues from members of other cultural, racial, or ethnic groups.<sup>41</sup> In other words, empathy is negatively affected by difference.<sup>42</sup> The problem is greatly exacerbated when the subject is black, in part because of the pernicious, tenacious perception of a linkage among blackness, criminality, and dangerousness.<sup>43</sup> This linkage also translates into perceptions that black defendants are less likely to be remorseful.<sup>44</sup> In addition, offenders' juvenile

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40. See Kate Rossmanith, *Affect and the Judicial Assessment of Offenders: Feeling and Judging Remorse*, 21 BODY & SOC. 167, 171–72 (2015) (explaining how a judge may believe she knows the defendant is sincerely remorseful if the judge is moved or affected by the defendant's performance).

41. See, e.g., Everett & Nienstedt, *supra* note 28, at 118.

42. Bandes, *Remorse, Demeanor, and Consequences*, *supra* note 12, at 178.

43. See, e.g., Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006). More generally, there is substantial evidence that juries simply attach a greater value to the lives of white victims and their families than to black victims and their families. See Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof, and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L. J. 1003, 1037–40 (2014); David R. Karp & Jerrett B. Warshaw, *Their Day in Court: The Role of Murder Victims' Families in Capital Juror Decision Making*, in WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 275, 284 (James R. Acker & David R. Karp eds., 2006). The extent to which this association varies based on the race of the evaluator (i.e. in situations where evaluator and subject are both black) is complex and likely context-dependent.

44. See William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 257–58 (2001) (finding that viewing the same black defendant, white decision makers saw arrogance and coldness, whereas black decision makers saw remorse).

status<sup>45</sup> and mental or emotional disabilities<sup>46</sup> can confound the evaluation of demeanor.<sup>47</sup>

All of these problems in the perception, interpretation, and application of demeanor evidence raise serious concerns about whether demeanor evidence on the whole impairs the accuracy as well as the fairness of legal decision-making. Although our legal system is unlikely to jettison demeanor evidence entirely, perhaps judges and policymakers can be persuaded that it is not the gold standard for gauging credibility and character that it's commonly thought to be. Once its mystical aura is pierced, and social science is brought into the equation, demeanor evidence turns out to need much improvement. This brings us to the question of whether virtual court proceedings will simply replicate these problems, exacerbate them, or possibly provide an opportunity for reform.

#### *Demeanor Evidence and Videoconferencing*

Relying on demeanor in online proceedings is likely to create additional difficulties because evaluating demeanor online is very different from evaluating it in the traditional courtroom. Pre-pandemic experience with partly virtual hearings—for example, parole or asylum hearings in which the applicant appears via videoconference—suggests that witnesses and litigants will be evaluated more negatively in virtual courts than in in-person hearings or trials. Several studies, for instance, support the view that it's harder for decision-makers to empathize with those testifying on screen, at least in the immigration, bail, and parole

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45. See Martha Grace Duncan, “*So Young and So Untender*”: *Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469 (2002).

46. See, e.g., Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 595 n.115 (2008).

47. See generally Bandes, *Remorse, Demeanor, and Consequences*, *supra* note 12, at 185–87.

contexts.<sup>48</sup>

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48. See, e.g., Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 900–01 (2010); see Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933 (2015). Criminal defendants who appear via video-link at arraignment, bail hearing, or sentencing offer a salient example. These defendants may speak from jail via poor internet connections to a judge who may be only a static-laden image on a small screen, and who may not even be looking at the screen image of the defendant. See, e.g., PENELOPE GIBBS, DEFENDANTS ON VIDEO—CONVEYOR BELT JUSTICE OR A REVOLUTION IN ACCESS? 8 (Transform Just. 2017). Their sense of isolation and alienation from the courtroom may be exacerbated by the absence of their lawyers from their side, e.g., Edie Fortuna Cimino et al., *Charm City Televised & Dehumanized: How CCTV Bail Reviews Violate Due Process*, 44 U. BALT. L.F. 57, 77–87 (2014), as well as the meanness of their physical surroundings in the video room in the jailhouse and the sounds of the noises of jail. Carolyn McKay, *Video Links from Prison: Court ‘Appearance’ within Carceral Space*, 14 LAW, CULTURE, & HUMAN. 242, 252–54, 258, 260 (2018); see also CAMILLE GOURDET ET AL., COURT APPEARANCES IN CRIMINAL PROCEEDINGS THROUGH TELEPRESENCE 8 (Priority Crim. Just. Needs Initiative 2020). Juvenile or mentally challenged defendants may find it especially difficult to understand what’s going on. E.g., Gerald G. Ashdown & Michael A. Menzel, *The Convenience of the Guillotine: Video Proceedings in Federal Prosecutions*, 80 DENVER U. L. REV. 63, 81, 84 (2002); GIBBS, *supra*. While the image quality may be better in current iterations of videoconferencing software than it was in the remote appearances studied by the many researchers cited above, and while defendants may not be uniquely stigmatized in fully virtual courtrooms because all parties, rather than only the defendant, are appearing on the screen (although the defendants will still be the only ones on Zoom clothed in prison outfits and seen behind locked doors—quite stigmatizing), the comparison to the traditional courtroom makes plain the importance of one thing that’s missing on Zoom: the physical co-presence of defendant and judge. We discuss this further below.

This body of research raises fascinating questions about whether the effect of video technology itself on decision-makers’ empathy may be confounded with other features of the mediated interaction, such as the unprepossessing or even downright stigmatizing views of remote defendants to which the camera typically provides access, and whether the outcome may be qualified by decision-makers’ pre-existing stores of empathy toward the witness or litigant. The research to date does not provide a clear answer to the latter question. Only one study has manipulated video vs. live appearance as an independent variable and measured empathy as a dependent variable; it found that mock jurors did not feel less empathy for a child witness who testified via CCTV vs. one testifying live. See Holly K. Orcutt et al., *Detecting Deception in Children’s Testimony: Factfinders’ Abilities to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 LAW & HUM. BEHAV. 339 (2001). On the other hand, several studies measuring responses that could be construed as loose proxies for empathy (e.g., likeability) have found that persons are regarded more favorably when encountered live vs. via a screen. E.g., Sara Landström et al., *Witnesses Appearing Live Versus on Video: Effects on Observers’ Perception, Veracity Assessments and Memory*, 19 APPLIED COGNITIVE

Perceptual and social psychological research offers many possible reasons for this effect. The most obvious is the reduction in eye contact. Virtual court guidelines recommend that participants look at the camera when speaking, but even people with extensive videoconferencing experience will often look at the screen display instead, because they want to see how their words are being received and because the images of others' faces are more visually interesting than the green camera light on their laptop or other camera. When they look at the screen instead of the camera, they will not appear to be looking at the viewer. Viewers may then construe this apparent lack of eye contact, or the frequent shifting of the eyes away from direct contact and back again, as a sign that the speaker is being uncertain or even dishonest.<sup>49</sup> And while witnesses will be looking at the interface to determine which participants are looking carefully *at them* as they speak, the small size of others' images and the lack of mutual alignment of gaze may make this difficult to determine. As a result, witnesses may lose

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PSYCHOL. 913 (2005); DAVID TAIT ET AL., TOWARDS A DISTRIBUTED COURTROOM (2017). On the effects of the remote participants' environment on their own and others' perceptions of video-mediated adjudication, see, for example, EMMA ROWDEN ET AL., GATEWAYS TO JUSTICE: DESIGN AND OPERATIONAL GUIDELINES FOR REMOTE PARTICIPATION IN COURT PROCEEDINGS (2013).

49. *E.g.*, Ernst Bekkering & J.P. Shim, *Trust in Videoconferencing*, 49 COMM. ACM 103 (2006); Gordon D. Hemsley & Anthony N. Doob, *The Effect of Looking Behavior on Perceptions of a Communicator's Credibility*, 8 J. APPLIED SOC. PSYCHOL. 136 (1978); Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 J.L. & POL'Y 211 (2006). Relatedly, from the perspective of perceivers, because the videoconferencing interface does not accurately recreate a common spatial environment which co-participants occupy, participants cannot reliably track each others' gazes or understand the contextual meaning of their gestures, a problem which has been shown to decrease trust in intergroup videoconferenced communications. DAVID NGUYEN & JOHN CANNY, MULTIVIEW: IMPROVING TRUST IN GROUP VIDEO CONFERENCING THROUGH SPATIAL FAITHFULNESS, 1465 (SIGCHI Conf. Hum. Factors in Computing Sys. Proc. Apr. 28–May 3, 2007) [hereinafter NGUYEN & CANNY, MULTIVIEW]. Videoconferencing systems that correct for distortions or absence of gaze information, such as Nguyen and Canny's Multiview system or the "distributed courtroom" system which David Tait and colleagues have tested, can reduce or avoid these negative effects. TAIT ET AL., *supra* note 48.

access to the sorts of feedback they would ordinarily receive in the physical courtroom.<sup>50</sup> This ongoing sense of uncertainty about whether they are truly being paid attention to and understood may be reflected in witnesses' demeanor while testifying, which decision-makers may then construe as a lack of confidence<sup>51</sup> or lack of interactivity,<sup>52</sup> either of which may be misread to indicate diminished credibility. "Understanding the [nonverbal] language of eyes enables perceivers to attribute mental states to others,"<sup>53</sup> and it is easier for viewers to do this when the other person gazes directly at them. For instance, viewers have more difficulty rapidly identifying others' emotional expressions when those others avert their gaze.<sup>54</sup> In face-to-face interactions, "the level of emotionality in the encounter [can] be regulated by the amount of mutual gaze the participants permit[] each other,"<sup>55</sup> but if there is little mutual gaze to begin with or, more to the point, if no one can be sure when mutual gaze is occurring, people will struggle to deploy their emotional intelligence to assess the situation.

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50. *But see* Ian Ballon, *How Working From Home May Change Federal Court Litigation for the Better*, NAT'L L.J., (Aug. 4, 2020), <https://www.law.com/nationallawjournal/2020/08/04/how-working-from-home-may-change-federal-court-litigation-for-the-better/> (arguing that "Zoom and similar technologies . . . allow you to see how your own facial expressions appear to the judge—and adjust them accordingly"). Seasoned litigators may well be more able than anxious laypeople to take advantage of this function.

51. *E.g.*, Neil Brewer & Anne Burke, *Effects of Testimonial Inconsistencies and Eyewitness Confidence on Mock-Juror Judgments*, 26 LAW & HUM. BEHAV. 353 (2002); Elizabeth R. Tenney et al., *Calibration Trumps Confidence as a Basis for Witness Credibility*, 18 PSYCHOL. SCI. 46 (2007).

52. Judee K. Burgoon et al., *The Role of Conversational Involvement in Deceptive Interpersonal Interactions*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 669, 682 (1999).

53. C. Neil Macrae et al., *Are You Looking at Me? Eye Gaze and Person Perception*, 13 PSYCHOL. SCI. 460, 463 (2002).

54. *See* Markus Bindemann et al., *How do eye gaze and facial expression interact?*, 16 VISUAL COGNITION 708 (2008).

55. Adam Kendon, *Some Functions of Gaze-Direction in Social Interactions*, 26 ACTA PSYCHOLOGICA 22, 58 (1967).

Witnesses in proceedings on Zoom are also likely to testify differently than they would in physical courtrooms for half a dozen other reasons, none of which bode well for judges' and jurors' construals of their demeanor. Witnesses who pause before answering a question due to connectivity issues not obvious to others could be construed as hesitant or uncertain, and hence less credible.<sup>56</sup> Those who fidget excessively due to the unfamiliarity, discomfort, or boredom of sitting for hours in front of their computer screens may be perceived as less credible.<sup>57</sup> Those who would gain reassurance on the stand from seeing supportive friends or family members in the physical courtroom will be deprived of that on Zoom and, as a consequence, may be less confident or forthcoming.<sup>58</sup> Witnesses who see themselves in a window on the interface as they testify<sup>59</sup> may be distracted, increasing their cognitive load,<sup>60</sup> which in turn may

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56. Bekkering & Shim, *supra* note 49.

57. Porter & Ten Brinke, *supra* note 25.

58. See Joe Miller, *7 Great Rules for Bringing Friends to Court*, FAM. L. COACH (June 1, 2015), <https://thefamilylawcoach.com/blog/7-great-rules-for-bringing-friends-to-court/> (persons going to family court are often advised to bring a family member or friend to the courtroom to help them stay calm and focused); Amanda Konradi, *Preparing to Testify: Rape Survivors Negotiating the Criminal Justice Process*, 10 GENDER & SOC'Y 404, 416–18 (discussing how some rape survivors enlist “team members” to attend trial to provide support during testimony); see also Levenson, *supra* note 46, at 593–94 (describing how presence in the courtroom of his brother and co-defendant Erik Menendez drew out Lyle Menendez's emotional apology on stand). However, having friends or family in court may not always benefit the witness. See Miller, *supra* (the presence of friends may stoke anger); Jennifer A. Scarduzio & Sarah J. Tracy, *Sensegiving and Sensebreaking via Emotion Cycles and Emotional Buffering: How Collective Communication Creates Order in the Courtroom*, 29 MGMT. COMM. Q. 331, 343 (2015) (inappropriate behavior); see also Amanda Konradi, *Pulling Strings Doesn't Work in Court: Moving Beyond Puppets in the Relationship Between Prosecutors and Rape Survivors*, 10 J. SOC. DISTRESS & HOMELESS 5, 17 (2001) (some rape survivors feel grief when observing from the witness stand the pain of family members listening to them describe the assault).

59. As they will unless the court disables the self-view function.

60. See Ryan G. Horn & Tara S. Behrend, *Video Killed the Interview Star: Does Picture-in-Picture Affect Interview Performance?*, 3 PERSONNEL ASSESSMENT & DECISIONS 51 (2017).

adversely affect their mood and be reflected in their demeanor. Seeing themselves may also make anxious witnesses feel even more anxious and further impair their performance.<sup>61</sup> Finally, as has often been noted, the casual, familiar environment of the home or office from which remote witnesses will testify, as well as their physical distance from the authority of the court, may lead them, especially those unaccustomed to participating in formal legal proceedings, to dress or behave in ways that would be inappropriate in the physical courtroom<sup>62</sup> (even though they have taken the oath and been reminded by the judge that they are “in court,” and may have been prepared by the lawyer calling them to testify); as a consequence, the judge or jurors may evaluate their attitude and character more negatively.

To be sure, some litigants may behave on Zoom in ways that lead decision-makers to evaluate them more positively. Witnesses who might be intimidated by the formality of the courtroom or the physically co-present judge may testify more confidently and coherently from the comfort of their homes.<sup>63</sup> This would presumably be reflected in their demeanors, which the judge or jurors could then read (or misread) as cues to truthfulness.<sup>64</sup>

Nontestimonial demeanor is also likely to be different on Zoom. As with testifying witnesses, differences between private and courtroom environments may lead nontestifying parties and others to dress inappropriately or display

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61. See Jürgen Wegge, *Communication via Videoconference: Emotional and Cognitive Consequences of Affective Personality Dispositions, Seeing One's Own Picture, and Disturbing Events*, 21 HUMAN-COMPUTER INTERACTION 273 (2006). *But cf.* Ballon, *supra* note 50.

62. See GIBBS, *supra* note 48, at 49.

63. See Orcutt et al., *supra* note 48.

64. See Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 LAW & HUM. BEHAV. 165 (1998).



inappropriate nonverbal behaviors.<sup>65</sup> Participants' facial expressions and postures may also express the strain of attending to an extended videoconferencing session or their occasional frustration with glitches in the technology, either of which others may misconstrue as lack of respect for the proceedings—or perhaps as a disgruntled or hostile response to another participant's words.

Not only will witnesses and parties behave differently in virtual courtrooms in ways that will be reflected in their demeanors; those who are watching and listening will perceive and interpret what they see and hear differently than they would in a physical courtroom. Consider first how the visual and audio information available through the Zoom interface differs from what can be seen and heard in an unmediated, physically co-present encounter. In one respect, videoconferencing may offer better access to demeanor evidence: the close-up image of a testifying witness in speaker view may actually occupy more of the observers' visual field (and perhaps be better lit) than the view they would have in a physical courtroom, allowing them to observe the witness's facial expressions more closely than they would at courtroom viewing distance and angles. As one judge reported after conducting a summary jury trial in a civil matter, the attorneys conducting voir dire were surprised that the online view provided even more information about juror demeanor than they would have had in court. "Online . . . 'you see the whole face, eyebrow twitches, and panel members are way more relaxed' sitting at home, instead of in a courtroom."<sup>66</sup>

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65. See, e.g., Debra Cassens Weiss, *Lawyers are dressing way too casual during Zoom court hearings, judge says*, A.B.A. J. (Apr. 15, 2020, 9:24 AM), <https://www.abajournal.com/news/article/lawyers-are-dressing-way-too-casual-during-zoom-hearings-judge-says> (judge admonishes attorneys for, among other behaviors, appearing for Zoom court while in bed, still under the covers).

66. Marimow & Jouvenal, *supra* note 7 (quoting Judge Emily Miskel). However, as the authors note, the Zoom proceeding sometimes adds a sound that rarely intrudes on in-person trials: the flush of a toilet.

In several other respects, though, Zoom affords much less visual information about others' demeanors. Most images on the interface are small; even speaking witnesses will appear in small frames if the proceedings are shown in gallery view.<sup>67</sup> All other things being equal, smaller images tend to create less emotional impact,<sup>68</sup> so whatever demeanor observers think they discern is likely to have less effect on their judgments. The size of the frame in which each person appears on Zoom, the fact that they will usually be seated for the duration, and their distance from their own cameras ordinarily means that viewers will see only witnesses' and parties' heads and upper bodies. In contrast to the views afforded in physical court, judges and jurors will not have much if any sense of witnesses' and parties' posture or bodily movements other than shifting in their seats, depriving them of cues that people use to read others' demeanor in their

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67. And these images are small not only in relation to the interface but to the viewer's visual field as a whole; most participants will see everything within the frame of what is likely a 17" or smaller computer screen, rather than a larger courtroom screen or in person.

68. Maurizio Codispoti & Andrea de Cesare, *Arousal and Attention: Picture Size and Emotional Reactions*, 44 *PSYCHOPHYSIOLOGY* 680 (2007); Byron Reeves et al., *The Effects of Screen Size and Message Content on Attention and Arousal*, 1 *MEDIA PSYCHOL.* 49 (1999). On the other hand, the small rectangle within which each Zoom participant is framed tends to call attention to that person's demeanor, to the extent anyone is observing it, in a way that would not be true in the un-demarcated spatial surround of the physical courtroom. Inside the frame within the interface, the view of each participant becomes something like a close-up (or medium close-up) shot in a movie, with the implicit message, "Pay attention to the emotions this face is showing!" As Noël Carroll and William Seeley put it: "Indexing [in filmmaking] involves pointing the camera at something, thereby communicating, 'Look here!' Indexing occurs naturally when the camera is brought closer to its subject by means of a cut, zoom, or camera movement." Noël Carroll & William Seeley, *Cognitivism, Psychology, and Neuroscience: Movies as Attentional Engines*, *PSYCHOCINEMATICS: EXPLORING COGNITION AT THE MOVIES* 49, 62 (Arthur P. Shimamura ed., 2013); see also Wendy P. Heath & Bruce D. Grannemann, *How Video Image Size Interacts with Evidence Strength, Defendant Emotion, and the Defendant-Victim Relationship to Alter Perceptions of the Defendant*, 32 *BEHAV. SCI. & L.* 496 (2014) (finding complex interactions among the size of the screen on which a testifying defendant appeared, the level of emotion the defendant displayed, the nature of the case, and the strength of the evidence against the defendant).

everyday lives<sup>69</sup> and that have, for better or worse, been considered important in physical trials (see for example the emphasis in the Tsarnaev sentencing hearing on what one journalist called “his toe-tapping, his beard-fiddling, the way he leans back in his chair with this collar open like he’s a Hollywood studio exec at a pitch meeting”<sup>70</sup>) and that judges find important in assessing offenders’ remorse.<sup>71</sup> Nor, because each participant to the proceeding logs on and becomes visible only when already seated in front of his or her computer, will observers be able to see parties or witnesses walking to and from their positions in the courtroom (or see them in the hallways outside of the physical courtroom)—species of “offstage” behavior to which fact-finders often attach significance.<sup>72</sup> Some participants, notwithstanding published guidance to the contrary, will appear in suboptimal lighting, which will make their facial expressions harder to see, or in cluttered environments, which will complicate the effort to identify the emotional

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69. *E.g.*, Beatrice de Gelder, *Towards the Neurobiology of Emotional Body Language*, 7 NATURE REVIEWS NEUROSCIENCE 242 (2006); Dacher Keltner & Jennifer S. Lerner, *Emotion*, in HANDBOOK OF SOC. PSYCHOL. 317, 321–23 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 5th ed. 2010).

70. Seth Stevenson, *The Implacable Bomber*, SLATE (Mar. 5, 2015, 9:45 PM), <https://slate.com/news-and-politics/2015/03/tsarnaev-trial-dzhokhar-appears-unmoved-by-a-day-of-grisly-testimony.html>.

71. Rossmanith, *supra* note 40, at 170–71. On the relationship between the view that the video camera affords of the other person’s body and empathy for the other person, one study comparing head-only to upper-body views of the other person and both with face-to-face communication found that head-only views resulted in less empathy for the other by some but not all measures. DAVID T. NGUYEN & JOHN CANNY, MORE THAN FACE-TO-FACE: EMPATHY EFFECTS OF VIDEO FRAMING, 423 (SIGCHI Conf. Hum. Factors in Computing Sys. Proc. Apr. 6, 2009). The view of other participants available on Zoom varies depending on their camera angle, how far they sit from the camera, and so on, *see infra* text accompanying notes 78–82, but generally ranges somewhere between these researchers’ head-only and upper-body viewing conditions.

72. Mary R. Rose & Shari Seidman Diamond, *Offstage Behavior: Real Jurors’ Scrutiny of Non-Testimonial Conduct*, 58 DEPAUL L. REV. 311 (2009); Mary R. Rose et al., *Goffman on the Jury: Real Jurors’ Attention to the “Offstage” of Trials*, 34 LAW & HUM. BEHAV. 310 (2010).

valence of their expressions.<sup>73</sup> Videoconferencing may also provide less audio information than in-person courtroom speech does, impairing decision-makers' ability to discern the emotions conveyed by the sound of the voice.<sup>74</sup>

The increased cognitive demands of participating in an extended Zoom proceeding<sup>75</sup> and possibly the lesser drama in a videoconferenced as opposed to a physically co-present trial (we'll return to this point in Part II) may reduce judges' and jurors' ability to pay attention to whatever they take to be demeanor evidence.<sup>76</sup> Their ability to concentrate on a given witness or party may be further impaired by the simultaneous appearance on the interface of other participants (including themselves), offering a constant source of distraction, in an array that may shift, sometimes without notice, as persons are dropped or added. This increased mental effort that judges and jurors must allocate to what they are doing in the virtual courtroom may itself

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73. See James E. Cutting & Kacie L. Armstrong, *Facial Expression, Size, and Clutter: Inferences from Movie Structure to Emotion Judgments and Back*, 78 ATTENTION, PERCEPTION, & PSYCHOPHYSICS 891 (2016).

74. Elizabeth C. Wiggins, *What We Know and What We Need to Know about the Effects of Courtroom Technology*, 12 WM. & MARY BILL RTS. J. 731, 738 (2004) (“[W]hen voice is transmitted through phone lines as with videoconferencing, a middle bandwidth filter is used. This means that low and high frequencies of the voice are cut off. Thus, the content of the voice message is heard and understood, but some information about the emotional state of the speaker, which is carried in the higher frequencies, may be partly excluded. It is precisely this information that may be critical to judgments of the defendant’s remorse and credibility.”).

75. E.g., Kate Murphy, *Why Zoom is Terrible*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html>.

76. Indeed, given the small size of the frames in which everyone appears in gallery view, noted earlier, and the fact that the user’s audio all comes from a single source (the computer’s speakers or the headphones) and thus does not provide the locational cues that natural audio usually does, not to mention the absence of the understood “spatial arrangement of persons and artifacts” in the physical courtroom, Christian Licoppe & Laurence Dumoulin, *The “Curious Case” of an Unspoken Opening Speech Act: A Video-Ethnography of the Use of Video Communication in Courtroom Activities*, 43 RES. ON LANGUAGE & SOC. INTERACTION 211, 219 (2010), it may sometimes be hard, at least for a moment, just to tell who’s speaking.

bias their impressions of witnesses' and parties' demeanors. If they find it hard to watch and listen to a witness due to poor audio quality (which may be due to the speaker's microphone, the user's computer speakers or earphones, or either's internet connection), the lack of synchronicity between video and audio, or simply the strain of attending closely throughout extended proceedings, they may be inclined to misattribute their negative feelings arising from those processing difficulties to the witness himself and to evaluate him less favorably.<sup>77</sup>

Even more troubling, the factors that affect judges' and jurors' construals of witnesses' and parties' demeanors will also vary from one witness or party to another, biasing their relative assessments. To start with a salient example, the apparent sizes of participants' faces may vary enormously depending largely on how far they sit from their cameras. While movie directors know that showing faces in close-ups as opposed to longer shots allows audiences to identify the faces' emotional valence more easily,<sup>78</sup> faces that appear *too* close may seem to be occupying observers' personal space,<sup>79</sup> which observers may regard as inappropriate and annoying or even threatening.<sup>80</sup> Conversely, witnesses whose faces appear much smaller than others may be granted less importance. Varying camera angles may also bias judges' and jurors' evaluations of witnesses and parties. Standard filmmaking texts teach that high angle shots tend to make the person depicted appear smaller or weaker, while low angle shots make the person seem more significant and powerful,<sup>81</sup> and experimental studies have found that faces

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77. This effect is called *cognitive fluency*. See Eryn Newman et al., *Cognitive Fluency in the Courtroom*, in THE ROUTLEDGE INT'L HANDBOOK OF LEGAL AND INVESTIGATIVE PSYCHOL. 102 (Ray Bull & Iris Blandón-Gitlin eds., 2020).

78. Cutting & Armstrong, *supra* note 73.

79. See EDWARD T. HALL, THE HIDDEN DIMENSION (Anchor Books ed., 1969).

80. See John Storck & Lee Sproull, *Through a Glass Darkly: What Do People Learn in Videoconferences?*, 22 HUM. COMM. RES. 197, 200 (1995).

81. ROY THOMPSON & CHRISTOPHER J. BOWEN, GRAMMAR OF THE SHOT 41–43

seen from below are perceived more positively than faces seen from above.<sup>82</sup> Finally, context matters: “[W]hen a person looks at a human face with the goal of perceiving emotion, the perceiver encodes the face in context,”<sup>83</sup> so the various backgrounds that appear behind different witnesses and parties may affect judges’ and jurors’ interpretations of their demeanors differently.

Crucially, judges and jurors may remain unaware of how these features of the videoconferencing medium are influencing their evaluations and decisions. Instead, they will intuitively think that they are perceiving others’ facial expressions, tones of voice, and postures “as they really are.” This is naïve realism.<sup>84</sup> And they will discount or ignore the extent to which the demeanors that witnesses and parties are displaying are due to the situation in which those witnesses and parties find themselves—not just in court but in court on Zoom, talking to their computer screens and aware of other participants only as multiple head-and-upper-torso images in the interface. This is the fundamental attribution error.<sup>85</sup> Both biases will likely be exacerbated in virtual proceedings precisely because of the interposition of the medium between observer and observed.<sup>86</sup>

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(2d ed., 2009).

82. Arvid Kappas et al., *Angle of Regard: The Effect of Vertical Viewing Angle on the Perception of Facial Expressions*, 18 J. NONVERBAL BEHAV. 263 (1994); cf. Bekkering & Shim, *supra* note 49, at 106–07 (finding that subjects recorded from above or from the side are trusted less compared with those looking straight into the camera).

83. Lisa Feldman Barrett & Elizabeth A. Kensinger, *Context is Routinely Encoded During Emotion Perception*, 21 PSYCHOL. SCI. 595, 598 (2010).

84. NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY 9–10 (2009).

85. *See supra* note 38 and accompanying text.

86. Whether judges’ and jurors’ awareness of the effects of the medium on their interpretations of demeanor evidence and their use of it in their judgments will be informed at all by their own increased familiarity with Zoom is an open question. Knowing in a general way how the camera angle and other features of videoconferencing distort appearances is one thing; being mindful of specific biasing effects while paying attention to the hearing or trial and knowing how to adjust one’s thinking to account for those biases is another thing entirely. *See,*

The perception and evaluation of others' demeanor will also be different in virtual court because the phenomenology of virtual environments differs from that of direct, face-to-face experience. Most importantly, the feeling of *co-presence*, the sense of being together with others in the world, is very different. Co-presence does not simply disappear when physical co-location does; indeed, some have argued that online interactions, including online legal proceedings, are capable of producing a psychologically rich sense of co-presence, defined as "the synchronization of mutual attention, emotion, and behavior."<sup>87</sup> However, Zoom makes it very hard to achieve the kind of co-presence that exists in a physical courtroom.<sup>88</sup> In principle, each participant in the videoconferenced proceeding can see and hear everyone else in real time, an essential condition for synchronization and hence co-presence. That synchronous access, however, can be impaired or disrupted: People may be dropped from the session without warning due to connectivity issues, and the audio may be glitchy or lag, upsetting the precise coordination of facial expression and voice that is critical to how we attend to each other's emotional displays in everyday life. Moreover, the difficulty (impossibility, really) of

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*e.g.*, Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117 (1994) (discussing debiasing).

87. Celeste Campos-Castillo & Steven Hitlin, *Copresence: Revisiting a Building Block for Social Interaction Theories*, 31 SOC. THEORY 168, 171 (2013). Sociologist Meredith Rossner, Rossner, *Remote Rituals in a Virtual Court* (2020) (unpublished paper) (on file with authors), has applied this notion of co-presence to the distributed courtroom. *See supra* note 6. For a review of various concepts of *social presence* in networked environments, see Frank Biocca et al., *Toward a More Robust Theory and Measure of Social Presence: Review and Suggested Criteria*, 12 PRESENCE 456 (2003).

88. A majority of respondents to Jenia Turner's survey, *see supra* note 22 at 56, expressed concern about the negative impact of virtual proceedings on credibility determinations, with defense attorneys expressing the greatest degree of concern. One defense attorney evocatively observed that "fact finders must be able to see a witness' reaction to questioning in the flesh, where they can observe body language. And witnesses should not feel the safety of video distancing during questioning. They need to feel confronted, and the eyes of scrutiny upon them."

establishing genuine eye contact (if a speaker appears to be looking at you, that almost certainly means he or she isn't) disrupts the ongoing reciprocation of gaze, which is usually important for feeling engaged with the other person.<sup>89</sup>

This points to one important reason why the diminished sense of co-presence matters to legal judgment: it can impair judges' and jurors' ability to empathize with a witness or party. While empathy may arise in various ways, its paradigmatic source is through physically co-present personal interaction, "an immediately felt correspondence between the kinesthetically perceived intentional movements of [one's own body] . . . and the outwardly perceived movements and positions of an external body . . ." <sup>90</sup> "[Trial] courts provide the primary, or perhaps the sole, opportunity for personal interaction between . . . litigants and the judges who will decide their cases. Empathetic engagement in this context plays an essential role: it both informs the judge and reassures the litigant."<sup>91</sup> But this sort of interaction simply can't be experienced on Zoom. The judge's and jurors' own bodies, of which each is kinesthetically aware, remain in their respective homes or

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89. Norm Friesen, *Telepresence and Tele-absence: A Phenomenology of the (In)visible Alien Online*, 8 PHENOMENOLOGY & PRAC. 17, 23–25 (2014); see also *supra* notes 53–55 and accompanying text. Computer scientist Jaron Lanier said all of this clearly some time ago:

Human interaction has both verbal and nonverbal elements, and videoconferencing seems precisely configured to confound the nonverbal ones. It is impossible to make eye contact properly, for instance, in today's videoconferencing systems, because the camera and the display screen cannot be in the same spot. This usually leads to a deadened and formal affect in interactions, eye contact being a nearly ubiquitous subconscious method of affirming trust.

Jaron Lanier, *Virtually There*, 284 SCI. AM. 66, 68 (2001). Despite improvements in videoconferencing technology in the last twenty years, the observation still holds true.

90. Iso Kern, *Intersubjectivity*, ENCYCLOPEDIA OF PHENOMENOLOGY 355, 357 (Lester Embree et al. eds., 1997) (discussing Edmund Husserl).

91. Susan A. Bandes, *Empathy and Article III: Judge Weinstein, Cases and Controversies*, 64 DEPAUL L. REV. 317, 325 (2015) [hereinafter Bandes, *Empathy and Article III*].



offices; the parties' heads and shoulders appear in little boxes on computer screens. We have already noted the dehumanization or depersonalization of the remote defendant who appears for bail or sentencing via videoconferencing,<sup>92</sup> but the absence of physical co-presence could undermine decision-makers' ability to empathize with any other participant,<sup>93</sup> and even when everyone appears remotely, via the same interface.

### *Concerns and Next Steps*

If our legal culture continues to privilege physical courtrooms for the demeanor evidence they afford, and views virtual courts with suspicion until they can yield equivalent displays, it ought to be on a firmer basis than a mystical faith in the "elusive and incommunicable imponderable" nature of demeanor evidence.<sup>94</sup> As mentioned above, the overwhelming weight of social science research debunks the common-sense belief that demeanor is a reliable cue to credibility. No comparable body of research establishes that demeanor is a flawed guide to others' character, largely because the ground truth of the matter is harder to pin down, but even in the unlikely event courts could assess "deep character," there is a real question whether they ought to be in the business of doing so, and of assigning consequences based on these assessments.<sup>95</sup>

Making demeanor evidence available and enabling decision-makers to take it into account might still be deemed worthwhile because it is believed to serve the core adjudication values of dignity and fairness: as a basic feature of their personhood, litigants deserve to be seen and heard

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92. See *supra* note 48 and accompanying text.

93. See Emma Rowden, *Distributed Courts and Legitimacy: What Do We Lose When We Lose the Courthouse?*, 14 *LAW, CULTURE, & HUMAN.* 263, 271–74 (2018).

94. Bandes, *Remorse, Demeanor, and Consequences*, *supra* note 12, at 172.

95. See Murphy, *supra* note 24, at 437.

by those who will pass judgment on them,<sup>96</sup> and they deserve to have their judge or jurors see, hear, and evaluate in real time the witnesses who provide the evidence on which they will be judged.<sup>97</sup> If demeanor evidence is therefore still valued but its flaws are underscored and even exacerbated on Zoom, then perhaps the experience of virtual courts should hasten the implementation of reforms so that demeanor will be used more judiciously. At least one federal judge, for instance, employs revised jury instructions that make explicit some popular misconceptions about what certain demeanors signify.<sup>98</sup> These could be adapted for use in virtual courtrooms, calling attention to specific ways that the videoconferencing interface may distort perceptions and interpretations of demeanor. In experimental research, cautionary instructions have been found to limit the impact of the camera perspective bias, the otherwise robust effect of the angle from which a suspect's videotaped confession is shot on viewer's judgments of whether the confession was voluntary and whether the suspect is guilty.<sup>99</sup> Similar

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96. See Bandes, *Empathy and Article III*, *supra* note 91.

97. This seems to be the thinking behind the position taken by federal courts that under Fed. R. Crim. P. 43, a criminal defendant must be physically present in the courtroom during his sentencing even if he consents to appear virtually. These courts have reasoned in part that:

“[b]eing physically present in the same room with another has certain intangible and difficult to articulate effects that are wholly absent when communicating by video conference.” . . . .

. . . . A “face-to-face meeting between the defendant and the judge permits the judge to experience ‘those impressions gleaned through . . . any personal confrontation in which one attempts to assess the credibility or to evaluate the true moral fiber of another.’”

United States v. Bethea, 888 F.3d 864, 867 (7th Cir. 2018) (internal citations omitted). Even though the CARES Act allows federal judges to proceed with virtual sentencing under certain conditions, they have generally declined to do so for other than time-served sentences. See, e.g., United States v. Fagan, No. 2:19-cr-123-DBH, 2020 WL 2850225 (D. Me. June 6, 2020).

98. Bennett, *supra* note 13, at 63.

99. See Jennifer K. Elek et al., *Knowing When the Camera Lies: Judicial Instructions Mitigate the Camera Perspective Bias*, 17 LEGAL & CRIMINOLOGICAL PSYCHOL. 123, 124, 129–31 (2012).

instructions, assuming they are adequately supported by additional, ecologically valid research, could speak to the biases introduced or exacerbated when witnesses and parties speak into their laptop or tablet cameras. Some courts have already begun adopting the practice of providing common virtual backgrounds for all participants<sup>100</sup> to eliminate both visual distractions and disparities among witnesses and parties,<sup>101</sup> which (as we've seen) can also affect assessments of demeanor.

The inadequacies of access to demeanor evidence and the biases likely to result from resorting to it in virtual proceedings could, on the other hand, lead us to question whether the game is worth the candle. As already pointed out, judgmental accuracy is not served if decision-makers routinely gauge witnesses' credibility on the basis of misleading and biased cues. In addition, fairness and dignity for parties are poorly served if judges and jurors systematically misconstrue parties' demeanors based on stereotyped assumptions and prejudices.<sup>102</sup> Conversely, some drawbacks of demeanor evidence in traditional courtrooms are highlighted by what virtual courts leave out. Witnesses may testify less confidently without the physical presence of family or friends in the public gallery, but (as discussed in Part III below) the absence of a visible public from the Zoom hearing or trial also means that witnesses in an excessive force case won't be intimidated by the blue wall of officers staring them down.<sup>103</sup> In a homicide case in a virtual courtroom, jurors won't be susceptible to prejudice from the presence of the victim's family members wearing

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100. See *Griffin v. Albanese Enterprise, Inc.*, No. 16-2019-CA-1555 (Fla. Cir. Ct., August 10, 2020) for an example of a court adopting this practice.

101. See, e.g., *Turner*, *supra* note 22 at 59 (reporting that defense attorneys surveyed expressed significant concerns about their clients' difficulties with access to technology).

102. See *supra* notes 41–47 and accompanying text.

103. See “sea of blue” discussion, *infra* note 203 and accompanying text.

buttons featuring the victim's picture.<sup>104</sup> And whether in physical or virtual court, judges and jurors who lack demeanor evidence will still be able to hear the parties' stories, which can generate the empathy that is so important to litigants' sense of dignity and decision-makers' own well-informed judgments.<sup>105</sup>

We have argued for a more intentional approach to examining how live testimony in open courts advances cherished values like fairness, accuracy, and transparency, in order to determine how those values can be best retained when open trials are under threat or impossible. It is important to note a caveat. These values have always been weighed against countervailing interests such as privacy, security, and efficiency. Just as some may be tempted to try to unthinkingly recreate traditional arrangements, there is a converse temptation, already evident, to prize efficiency too highly. For example, four months into the current pandemic, the chief justice of the Texas Supreme Court and co-chair of the National Center for State Courts' pandemic rapid response team stated, "we're going to be doing court business remotely forever. This has changed the world." Virtual court proceedings have been lauded as making "depositions, oral arguments, and jury selection much more efficient."<sup>106</sup> Efficiency matters, but it can easily subsume other values at the heart of the justice system.

If virtual proceedings lead to the conclusion that reliance on demeanor evidence should be minimized, a different, more radical set of reforms would be in order. For instance, it has been argued that even in physical courtrooms, witnesses should testify behind screens, visible only in silhouette, to

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104. See *Carey v. Musladin*, 549 U.S. 70 (2006).

105. See, e.g., FEIGENSON, *supra* note 27, at 121–24; Bandes, *Remorse, Demeanor, and Consequences*, *supra* note 12.

106. Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forces Seismic Change*, BLOOMBERG LAW, (July 30, 2020, 4:50 AM), <https://news.bloomberglaw.com/us-law-week/zoom-courts-will-stick-around-as-virus-forces-seismic-change>.

reduce the effect of jurors' racial biases on their assessment of witnesses' credibility.<sup>107</sup> Extending this idea to virtual courts, videoconferencing interfaces could include filters to obscure witnesses' facial expressions and upper-body postures. It seems more problematic to extend this to parties; after all, if trying cases on Zoom reduces judges' and jurors' capacity for empathizing with parties, it would seem that taking away most of whatever diminished sense of co-presence is felt would even more strongly undermine the multiple core values of adjudication that empathy serves: inclusivity, dignity, fairness, and accuracy.<sup>108</sup>

There is much to be learned about how virtual proceedings affect the presentation and interpretation of demeanor evidence. Perhaps more to the point, there is still a vast amount to be learned about the presentation and interpretation of demeanor evidence in traditional courtrooms. For a central, largely unquestioned tenet of the common-law system, and one that exercises enormous influence over decisions about property, liberty, and even life, demeanor evidence has been resting on its laurels for far too long.

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107. Chet K.W. Pagar, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373 (2005); see also Stanley P. Williams Jr., *Double-Blind Justice: A Scientific Solution to Criminal Bias in the Courtroom*, 6 IND. J.L. & SOC. EQUALITY 48 (2018) (recommending that to avoid racial bias, defendant not be visible to jurors).

108. The absence of physical co-presence in virtual courts also prevents arguably inappropriate demonstrations of empathy, such as Texas Judge Tammy Kemp's return to the courtroom after the murder conviction of white ex-police officer Amber Guyger, who was found guilty for fatally shooting an innocent black man, Botham Jean, in his own apartment, to hug Guyger (and give her a Bible). Sarah Mervosh & Nicholas Bogel-Burroughs, *Amber Guyger's Judge Gave Her a Bible and a Hug. Did That Cross a Line?*, N.Y. TIMES (Oct. 4, 2019), <https://www.nytimes.com/2019/10/04/us/amber-guyger-judge-tammy-kemp-hug.html>. For that matter, it prevents inappropriate expressions of anger as well, such as the courtroom assault on Larry Nassar by the father of one of his victims. See *infra* note 257 and accompanying text.

## II. THE COURTROOM AS A SITE OF JUSTICE

Since at least the time of Homer, authoritative justice has been performed at a “proclaimed place” known to the entire community.<sup>109</sup> This may have been outside, like the stones on which the judges depicted on Achilles’ shield in the *Iliad* sat<sup>110</sup> or the trees under which South African community tribunals were traditionally convened,<sup>111</sup> or inside, often in buildings also used for other governmental business.<sup>112</sup> The location need not be fixed: Assize hearings were held peripatetically in England for eight centuries, ending only 50 years ago;<sup>113</sup> the Australian Federal Court set up shop in the remote Great Victoria Desert to give its imprimatur to an Aboriginal land claims settlement.<sup>114</sup> The contemporary expectation in Anglo-American legal culture, however, shaped by the dominant practice since the late 18th and especially the 19th century, is that trials take place in courtrooms designed for adjudication, located within a public building, a courthouse, primarily dedicated to that same purpose.<sup>115</sup>

What basic values are served by insisting that adjudication be conducted in courtrooms inside courthouses? In principle, it serves every value we’ve identified. Holding hearings and trials at a publicly known and accessible venue promotes inclusiveness. The nobility and often grandeur of

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109. Richard Mohr, *In Between: Power and Procedure Where the Court Meets the Public Sphere*, in *A THOUSAND EYES: MEDIA TECHNOLOGY, LAW AND AESTHETICS* 99 (Marit Paasche & Judy Radul, eds., 2011) (quoting *District Court Act 1973* (NSW) No 9 div 4 18F (Austl.)).

110. Raymond Westbrook, *The Trial Scene in the Iliad*, 94 *HARV. STUD. CLASSICAL PHILOLOGY* 53 (1992).

111. RESNIK & CURTIS, *supra* note 3, at 351.

112. See LINDA MULCAHY, *LEGAL ARCHITECTURE* 24–27 (2011).

113. Although at each location the judges’ arrival and attendance at the local site of justice were accompanied by great ceremony. LINDA MULCAHY & EMMA ROWDEN, *THE DEMOCRATIC COURTHOUSE* 49–50 (2020).

114. See RESNIK & CURTIS, *supra* note 3, at 366–72.

115. MULCAHY, *supra* note 112, at 31.

the courthouse and the courtrooms within it reaffirm the authority of the state and the centrality of adjudication to good government while simultaneously recognizing every litigant and witness as worthy of equal dignity and respect.<sup>116</sup> A courtroom designed to provide clear sight lines among all the participants and to make each one's speech clearly audible throughout the room enhances the fairness of the proceedings and the accuracy of the resulting judgment. And, to the extent that testimony, other evidence, and argument are also plainly visible and audible to members of the public and press, the courtroom promotes transparency.

In practice, of course, courtrooms in courthouses may fail to achieve some or all of these goals. Much adjudicatory business is done in unprepossessing rooms that convey little sense of dignity or state authority.<sup>117</sup> Antiquated facilities and overcrowding can make showing up for court an oppressive experience. The interiors of courthouse buildings are often designed to ensure the efficiency and privacy of judges' and lawyers' offstage work but at the cost of baffling and disorienting lay participants and their families.<sup>118</sup> Poor acoustics in the courtroom or street noises intruding from outside can distract participants, making it harder for parties, lawyers, judges, and jurors to attend to the testimony and argument on which the decision will be based.<sup>119</sup> In England and Australia, although not the United States, courtrooms are configured as if to stigmatize criminal defendants by placing them in a dock, isolated from the other participants. The perceived need for greater security in recent years has worsened the problem: docks are now enclosed behind Plexiglas shields, impairing defendants' ability to see and hear, and to be seen and heard, including

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116. See Rowden, *supra* note 93, at 265–66.

117. See RESNIK & CURTIS, *supra* note 3, at 317.

118. See MULCAHY, *supra* note 112, at 88–97.

119. MULCAHY & ROWDEN, *supra* note 113, at 15.

by their own counsel.<sup>120</sup>

Consider some benefits of moving proceedings online. Permitting laypeople to conduct legal business via videoconference from their own homes makes participation in the justice system less burdensome and more inclusive.<sup>121</sup> Civil and family court litigants don't have to travel to the courthouse, navigate their way to the proper room, and wait perhaps several hours for their cases to be called, at the cost of forgoing work and arranging for child care (if doing either is even possible for them);<sup>122</sup> they can simply log on to the court's video platform from their smartphone or tablet and follow the instructions.<sup>123</sup> Inclusiveness and dignity may also be enhanced during the virtual proceeding to the extent that litigants and witnesses, especially vulnerable ones, feel less intimidated appearing and testifying from their own homes than when forced to enter formidable buildings, filled with officials enforcing opaque and byzantine rules, and then speak in the physical presence of an imposing judge sitting on high.<sup>124</sup>

Online adjudication—part of a broader trend, predating

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120. *See id.* at 284–98.

121. *See* Jane Donoghue, *The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice*, 80 MOD. L. REV. 995 (2017).

122. For one affecting example of the burdens of going to court, see DAVID FEIGE, *INDEFENSIBLE: ONE LAWYER'S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE* at 127–135 (2006) (account of a young man arrested for walking a friend's dog without carrying vaccination papers, leading to days in jail and the loss of his job as he unsuccessfully attempted to obtain a trial to establish his innocence); *see also* Jennifer Gonnerman, *Before the Law*, NEW YORKER, Oct. 6, 2014 (“A boy was accused of taking a backpack. The courts took the next three years of his life.”).

123. *E.g.*, Press Release, Her Majesty's Courts & Tribunals Serv., New Video Tech to Increase Remote Hearings in Civil and Family Courts (July 1, 2020), <https://www.gov.uk/government/news/new-video-tech-to-increase-remote-hearings-in-civil-and-family-courts>.

124. *See* Linda Mulcahy, *The Unbearable Lightness of Being? Shifts Towards the Virtual Trial*, 35 J.L. & SOC'Y 464 (2008); Rowden, *supra* note 93; Meredith Rossner & Martha McCurdy, *Implementing Video Hearings (Party-to-State): A Process Evaluation*, U.K. MINISTRY JUST. (2018).



the coronavirus pandemic, toward digitizing justice systems<sup>125</sup>—can also be more efficient than requiring hearings and trials to be conducted entirely in physical courtrooms. Lawyers can get their work done instead of spending hours driving to and from distant county courthouses.<sup>126</sup> Evidentiary hearings and trials need not be delayed because remotely located witnesses, attorneys, interpreters, or other key participants cannot get to court on schedule.<sup>127</sup> Judges in criminal courts are able to process more arraignments and bail hearings when the defendants need not be transported from jail and shuttled into and out of the courtrooms.<sup>128</sup> Moreover, the security concerns involved in transporting those defendants and placing them in a physical courtroom are obviated when the prisoners do not need to leave jail to appear.<sup>129</sup>

That something so utterly different in look, sound, and feel as a meeting on Zoom is now widely accepted as adjudication, though, directs our attention to an ineffable quality of courtrooms that these enumerations of pros and cons don't quite explain. In Part III we will explore the complex roles of the public in (and outside of) the courtroom. Here we focus on two aspects of the hallowed tradition of adjudicating in a special kind of *place*. First, those who participate in proceedings in dedicated, culturally resonant

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125. See, e.g., RICHARD SUSSKIND, *ONLINE COURTS AND THE FUTURE OF JUSTICE* (2019).

126. Reed & Alder, *supra* note 106.

127. Gourdet et al., *supra* note 48, at 11.

128. Robin Davis et al., *Research on Videoconferencing at Post-Arrest Release Hearings: Phase I Final Report*, ICF INT'L 4, 28 (2015); Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1091, 1094 (2004).

129. Gourdet et al., *supra* note 48, at 4. Of course, the technology must be working properly and all participants properly prepared to use it in order to realize the benefits of virtual adjudication. Often this is not the case, whether because of deficiencies in infrastructure, preparation for the hearing, or monitoring during the proceedings. See, e.g., *id.* at 13–16; Linda Mulcahy et al., *Exploring the Case for Virtual Jury Trials During the COVID-19 Crisis*, U.K. MINISTRY JUST. (2020); Rossner & McCurdy, *supra* note 124.

courtrooms may find those proceedings more authentic and legitimate than those conducted virtually because they are more likely to feel engaged in something personally significant. Second, the configuration of the courtroom as a stage shapes and structures the emotional interactions of trial participants and thus informs the judgments of decision-makers. For each aspect, we explore what is lost and what is gained in the move from physical courtrooms to virtual ones, and why it matters.

### *The Courtroom as a Place*

Several features of the traditional courtroom tend to make the experience of going to court feel out of the ordinary, even momentous. As we've noted, courtrooms in courthouses are discrete physical places dedicated to a particular kind of activity. For most litigants and witnesses, going to court takes them outside their daily routines and into a separate environment that, by its distinctive location (as well as its symbolism, to be discussed in a moment), signals that they will be engaged in a special, culturally acknowledged kind of activity requiring appropriate behaviors.<sup>130</sup> The courtroom, along with the courthouse of which it is a part, also endures in time. The physical reality of the building and the courtroom binds each litigant's experience not only to the experiences of their contemporaries but to the community's ongoing legal tradition.<sup>131</sup> The performance of a structured, socially significant activity in a special, enduring place of its own, removed from quotidian space and time, is the essence of communal ritual. Courthouses and courtrooms imagined as "temples of justice" carry precisely this connotation.<sup>132</sup>

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130. Rowden, *supra* note 93, at 274.

131. *See id.* at 275–77.

132. RESNIK & CURTIS, *supra* note 3, at 137. Conducting adjudication in these dedicated, quasi-sacred sites is as central to the maintenance of the community's *nomos* as the narratives the community tells about itself in its foundational legal documents. *See generally* Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). This continuity of the place of justice through time is perhaps especially

In addition, the architecture of the traditional courthouse and the symbolism of its interior design, decorations, and statuary reinforce participants' sense that they have entered a special place to engage in a special sort of activity. "Architecture marks off and signifies that authority-to-judge which can only be found inside a court of law and nowhere else; it assigns legal discourse to a proper place."<sup>133</sup> Courthouses and courtrooms throughout Western history have employed a variety of iconography to convey each society's vision of how justice should be performed and what goals it should strive to achieve; in modern democracies, these goals have tended to converge on "independent decisionmakers, requirements of public processes, a new ideal of fairness, and equal access for and equal treatment of all,"<sup>134</sup> represented by a female figure of Justice (sometimes blindfolded, sometimes not) holding scales and a sword.<sup>135</sup> Governmental flags and seals, as well as the generally imposing structure of the building and often the major courtrooms themselves, also signal the authority of the state. The architecture and symbolism of the courtroom and courthouse encourage those who enter to perform their roles in the hearing or trial with an attitude of formality, respect, and seriousness.<sup>136</sup>

Things are different on Zoom. There is no imposing building or formal room; lay participants sit in the same rooms in their homes or offices in which they conduct many of their daily routines.<sup>137</sup> There is no sense of entering

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important in common-law countries whose judge-made doctrine depends on the principles of precedent and stare decisis.

133. Mohr, *supra* note 109, at 107 (quoting Piyel Haldar, *In and Out of Court: On Topographies of Law and the Architecture of Court Buildings*, 7 INT'L J. FOR SEMIOTICS L. 185 (1994)).

134. RESNIK & CURTIS, *supra* note 3, at 15.

135. *See id.* at 1–139.

136. Rowden, *supra* note 93, at 275–76.

137. Or they may appear from often unprepossessing video rooms in courthouses or other locations. MULCAHY, *supra* note 112, at 171–72; ROWDEN ET AL., *supra* note 48.

(crossing the threshold to) a special place. Indeed, the virtual courtroom is in no particular place at all, visible only as an interface on the computer screens of participants—the same sort of interface participants use for socializing with friends and family or meeting with colleagues, which itself is on the same laptop or tablet they use for checking their e-mails and the news, shopping, and watching videos. Nor does the virtual courtroom extend in time. Traditional courthouses and courtrooms were there before the participants arrived and will be there after they leave; the buildings may be decades or centuries old and are built of materials made to last well into the future. Courtrooms and courthouses, like people and communities, have histories. Videoconferencing sessions do not. The virtual court is entirely ephemeral, called into being for each hearing and disappearing at its end with a tap on a keypad. As one legal videographer puts it: “Unless you hit ‘record,’ Zoom is vapor.”<sup>138</sup>

Participation in proceedings in a traditional courtroom, in contrast to videoconferencing, makes people, especially lay participants who are not repeat players, feel that they have engaged in something eventful. This effect is due in part to the difference between direct and mediated experience. Direct experiences, which afford presence and, if social, copresence, are generally richer than mediated or vicarious ones. People who have had a particular experience can remember and imagine it viscerally in ways that those lacking that experience cannot.<sup>139</sup> This stronger hold on consciousness means that, all things being equal, participation in a hearing or trial in a physical courtroom will feel more significant. Just as important, the distinctiveness of the site of adjudication, its continuity in time, and the symbolism of the building and the room elevate the personal significance of the events that take place there by connecting

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138. Interview with Cathie Reese, President, Geomatrix Prod. (July 15, 2020).

139. David Lewis, *What Experience Teaches*, in *THE NATURE OF CONSCIOUSNESS* 579, 579 (Ned Block et al. eds., 1997).

each participant to a location, a time span, and a society that are larger than the individual.<sup>140</sup>

In contrast, remote participation, lacking bodily co-presence and engagement, can feel “depersonalized” and “less humane.”<sup>141</sup> Tiana Clark, a woman who recently got divorced on Zoom, wrote that what should have been a momentous experience seemed not fully real:

My virtual divorce felt dreamlike — weeks later, I sometimes wonder whether it really happened. So much of dreaming feels like you’re trying to grab the hem of something that dissipates right in front of you. Videoconferencing has the same effect, inducing an exhausting sense of placelessness. . . .

. . . .

. . . [Despite the procedure’s legal efficacy], I still felt like I missed something.<sup>142</sup>

Virtual court participants’ sense of presence can never be grounded in a unique place; it is always divided between being “in” the interface and observing it, as spectator or audience, from their homes or offices. This sense of dual presence has been extensively theorized in writings on film and media studies.<sup>143</sup> The gist for our purposes is that the participant who is simultaneously an observer cannot feel as engaged in a videoconferenced proceeding as she would when her consciousness is not thus divided.<sup>144</sup>

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140. See generally Rowden, *supra* note 93. Because “individuals and traditions, psyches and cultures, make each other up,” RICHARD SHWEDER, *THINKING THROUGH CULTURES 2* (1991), enlarging the social and cultural context in which a person acts and interacts can enlarge the person’s sense of self as well.

141. Rowden, *supra* note 93, at 272–73.

142. Tiana Clark, *The Surreal Anticlimax of Getting Divorced over Videoconference*, WASH. POST (June 23, 2020), <https://www.washingtonpost.com/outlook/2020/06/23/surreal-anticlimax-getting-divorced-over-videoconference/>.

143. *E.g.*, ANNE FRIEDBERG, *THE VIRTUAL WINDOW* (2006).

144. Furthermore, the point of view that each participant has of the interface, seeing all other participants (focally or somewhat peripherally) at once without moving her head, is a view that she cannot possibly have in the physical courtroom. *Cf.* Judy Radul, *Video Chamber*, in *A THOUSAND EYES: MEDIA*

This sense of inconsequentiality can also be traced to the eliding of “the distinction between inside and outside, the very distinction that is most essential to the [adjudicatory] performance.”<sup>145</sup> The litigant in virtual court is not physically, kinesthetically inside a special place; she remains in her home or office, while the proceedings take place nowhere in particular (from one perspective, they are distributed among the various physical locations in which all of the respective participants sit; from another, they take place in the cloud). Virtual proceedings feel less momentous because participants do not go to, enter, and then return from the community’s distinctive space dedicated to adjudication.<sup>146</sup>

Why should this matter? Ms. Clark got her divorce; other litigants will have their contracts enforced or not, offenders will be sentenced, witnesses will say their piece, and courts will work through their dockets. What of any real importance is missing? The substantiality of the courtroom in the courthouse, the formality that the configuration of the room encourages, and the state authority that the building’s and room’s symbolism convey all tend to make participants in proceedings feel that they have had the opportunity to be heard. They feel this not just in a technical legal sense but in a way that is vivid, dignified, and resonant. They are more

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TECHNOLOGY, LAW AND AESTHETICS, *supra* note 109, at 117, 122–25. As a consequence, her visual awareness of the proceedings is *disembodied*, further removing it from her everyday phenomenal consciousness and thus making it seem “dreamlike,” “placeless,” and less real.

145. Cornelia Vismann, *Tele-Tribunals: Anatomy of a Medium*, in A THOUSAND EYES: MEDIA TECHNOLOGY, LAW AND AESTHETICS, *supra* note 109, at 81, 83.

146. See Mulcahy, *supra* note 124, at 480 (“It would seem, then, that live link [i.e., participation via video] has the potential to place key actors in the trial outside of the great temples to law that have become synonymous with state-sanctioned adjudication in our cityscapes, and replace them with the mundane . . . Live-link witnesses remain unaffected by the influence of court architecture or ornament. The ritual of a journey to the court and away from it are denied them. The court enters their space at the will of a technician and just as easily vacates it. *Law comes, it goes, but it is constantly elsewhere.*” (emphasis added)).

likely to feel that they have had their “justice moment.”<sup>147</sup> Crime victims, for instance (as we will discuss in Part III), often place great weight on being heard “officially.” This sense of officiality comes from participating in a hearing not only in front of a judge as representative of the judicial system, but also in a physical space whose heft and permanence reflect the weight and authority of the law. The opportunity to be heard matters to people’s sense of procedural justice,<sup>148</sup> and hence their belief that they have been treated fairly. This implication of adjudication in a physical courtroom serves the core value of fairness as well as dignity.<sup>149</sup> It remains to be seen whether a witness appearing only as a talking head on Zoom, in a virtual courtroom that disappears when the hearing ends, experiences the same sense of being heard and recognized. We suspect, however, that this sense of seriousness and shared purpose may be shortchanged as judges, court administrators, and some lawyers emphasize the efficiency of virtual proceedings.<sup>150</sup>

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147. Hazel Genn, Professor, Univ. Coll. London, Online Courts and the Future of Justice, Address at the Birkenhead Annual Lecture 12 (Oct. 16, 2017), [https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead\\_lecture\\_2017\\_professor\\_dame\\_hazel\\_genn\\_final\\_version.pdf](https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf).

148. *E.g.*, Rebecca Hollander-Blumoff & Tom Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 1 J. DISP. RESOL. 1, 4–5 (2011).

149. At the extreme, litigants who feel that appearing virtually does not afford them their “justice moment” may disengage from the process, failing to pursue their rights as vigorously as those who get to appear in person. *See* Eagly, *supra* note 48, at 1000.

150. *See* Reed & Alder, *supra* note 106; *see also* Broward County (FL) Circuit Court Judge, Jack Tuter, remarking on the large number of hearings already conducted on Zoom by late April 2020, while the news report containing his remarks shows as b-roll several of the problems (small image frames, shifting arrays, defendants appearing from stigmatizing remote environments) we’ve noted in this Article, the producers possibly being unaware that the juxtaposition of this footage with the judge’s words could be problematic in any way. WPLG, *After Nearly 2,000 Virtual Hearings, Broward Courts ‘Pleased’ with Zoom Platform*, YOUTUBE (Apr. 28, 2020), <https://www.youtube.com/watch?v=S8VexjxOgVU>.

To some extent, the sense of speaking and being heard at the site of justice may be replicated in virtual courts. For instance, online platforms can be designed to evoke some sense of the “journey to the courtroom”—the transition of going from one’s daily life to the court. Such design innovations may help prompt some awareness of state authority,<sup>151</sup> which may deepen participants’ sense of the gravitas and hence the eventfulness of the proceedings. “[J]udges [will also have to] make more explicit efforts to compensate for the absence of the usual affordances and cues provided by the physical courtroom in order to assist the remote participant to effectively ‘enter’ and remain in the court space.”<sup>152</sup> By explaining to litigants and witnesses who are not repeat players how the proceedings will unfold, what the role of each person on the screen is, and how everyone is expected to behave, judges can help impress upon participants the significance of the occasion. Technological advances are also likely to improve participants’ sense of presence and co-presence in virtual courts, offering an experience a little closer to that of the physical courtroom.<sup>153</sup> Moreover, it’s possible that as people become increasingly accustomed to videoconferencing in their everyday lives, they will be less likely to devalue virtual interactions relative to in-person, face-to-face ones, and thus less likely to feel that online proceedings are somehow “unreal.”<sup>154</sup>

The current world-wide experiment with virtual proceedings also suggests how the experience of justice in

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151. Rossner, *supra* note 87.

152. Emma Rowden & Anne Wallace, *Remote Judging: The Impact of Video Links on the Image and the Role of the Judge*, 14 INT’L J. L. CONTEXT 504, 521 (2018); *see also* Mulcahy et al., *supra* note 129.

153. TAIT ET AL., *supra* note 48.

154. *See* Clark, *supra* note 142. In response, some might contend that this sort of adaptation would reflect merely that in an increasingly online and networked society, people are resigning themselves to diminished interactions with others. SHERRY TURKLE, *ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY AND LESS FROM EACH OTHER* (1st ed. 2011); *see also* JARON LANIER, *YOU ARE NOT A GADGET* (paperback ed. 2011).



physical courtrooms might be enhanced. The ease of getting to the online courtroom (when the technology is working properly) underscores the need to (re)design courthouses so that lay participants can find their way around and feel as comfortable as possible while waiting for their cases to be called.<sup>155</sup> Judges in physical courtrooms should not assume that litigants and witnesses will somehow absorb from the imposing surroundings an understanding of what's expected of them; rather, lay participants should be provided with more of the explicit guidance that is being recommended for virtual courts.<sup>156</sup> The obstacles to mutual visibility and audibility that frequently arise on Zoom should redirect attention to the fact that participants sometimes can't see or hear each other clearly enough in physical courtrooms either, encouraging court administration, judges, and staff to do what they can (within their limited resources) to address these problems. Our nascent experience with virtual courts underscores how the "day in court" as a physical phenomenon is typically discussed with reverence, but often without necessary attention to the practical steps needed to promote the inclusivity, transparency, and other values that make participating in adjudication so legally and culturally resonant.

### *The Courtroom as Theater Space*

The physical courtroom plays yet another powerful but often unarticulated role: It helps shape and channel the emotions the participants display. The configuration of the courtroom is important. "The specific place . . . which is

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155. See, e.g., MULCAHY & ROWDEN, *supra* note 113, at 326–27.

156. We might take a cue from Swedish courts, in each of which the visitor encounters a welcome booth near the entrance, staffed by a friendly person who explains the configuration of the courthouse and the courtroom, provides multi-lingual informational brochures, and offers to accompany the lay visitor to the courtroom to provide emotional support. See, e.g., *Sveriges Domstolar* (last modified Sept. 9, 2014) (Swed.), <http://old.domstol.se/Funktioner/English/Legal-proceedings/To-witnesses/>.

allocated to each participant (prosecution, defense, witness, judge) promotes the coherence of that complex and very sophisticated unity which is the trial.”<sup>157</sup> “In court, *where* you are is *who* you are.”<sup>158</sup> Judges have long been ensconced on raised platforms, front and center, often in rather grand chairs, in front of or flanked by symbols of the state and the court, indicating their authority over the proceedings and facilitating their exercise of it.<sup>159</sup> Increasingly since the 19th century, courtrooms have been further partitioned so that each participant (litigant, lawyer, witness, juror) is limited to a certain location and must speak, if at all, from that position,<sup>160</sup> while leaving room, generally at the back, for members of the press and the public. That some participants can be seen entering to take their positions (the judge entering from behind the bench and sitting down, the witness walking to the stand), while attorneys, at least, have greater freedom of movement within the well of the courtroom and try to use it to their rhetorical advantage, highlights certain moments in the proceedings and draws attention to them.<sup>161</sup> The blocking of the courtroom stage helps structure the often fragmented discourses of the evidentiary hearing or trial into a sequence of dialogic exchanges, or, at any rate, speech directed toward specific other people in the courtroom but with the awareness that there is an audience.<sup>162</sup> Everyone understands at each

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157. Mohr, *supra* note 109, at 108.

158. Radul, *supra* note 144, at 119.

159. Even in those newer courtrooms in which the layout is less hierarchical—the bench may be at the same level as the tables at which counsel and litigants sit, or the furniture may be arranged in a circle—the judge’s position tends to be singled out. *See, e.g.*, MULCAHY & ROWDEN, *supra* note 113, at 243.

160. *E.g.*, MULCAHY, *supra* note 112, at 43–53.

161. FERGUSON, *supra* note 10, at 70–71. This is somewhat analogous to how camera movement and editing enable movies to function as “attentional engines,” concentrating the audience’s focus on important moments in the drama. Carroll & Seeley, *supra* note 68, at 62.

162. Thus, the lawyer conducting direct or cross-examination speaks to the witness, but so that the judge and jury can hear; the witness may respond to the

moment who is addressing whom, and all can know as they speak that other participants and members of the public are watching and listening, gauging their “interactional competence.”<sup>163</sup>

All of the participants, moreover, are present in the space of the courtroom and therefore physically co-present with one another. The physical distance between different pairs or groups of participants varies; the witness may be seated far enough from the jurors that they can't hear her clearly unless she remembers to speak into the microphone, whereas the jurors themselves are seated closely enough to each other that they may be able to sense from their neighbors' postures, glimpsed in their peripheral vision, who is paying attention to the testimony and who is drifting off. But all participants are, and know that they are, in a shared physical space. When a prosecutor asks a witness if she sees the perpetrator in the courtroom and the witness points toward the defendant, everyone can follow her gesture (even though the prosecutor, to create a good record, will add, “Let the record show that the witness pointed at the defendant”). When a lawyer holds up an item of physical evidence or directs everyone's attention to a photograph shown on a large courtroom screen, all heads and eyes tend to turn in the same direction. These and other instances of the “synchronization of mutual attention” feed the shared sense of co-presence.<sup>164</sup> Co-presence extends to the jury room: jurors who have observed the witnesses and the parties together over the course of the trial then deliberate in a common space, where their ability to interact face-to-face, orienting their bodies toward and away from each other and following each other's

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lawyer or also, by turns, to the judge and/or jury; lawyers address the judge with objections; the judge responds to them with her rulings; the judge delivers her instructions to the jury, and so on.

163. Christian Licoppe, *Video Communication and 'Camera Actions': The Production of Wide Video Shots in Courtrooms with Remote Defendants*, 76 J. PRAGMATICS 117, 119, 132 (2015).

164. Campos-Castillo & Hitlin, *supra* note 87, at 171.

gestures, facilitates mutual feedback<sup>165</sup> and can increase their mutual trust.<sup>166</sup>

Once again, things are different on Zoom. Within the interface, the locations and sizes of the boxes in which each participant appears on “gallery view” may or may not evoke the hierarchy of roles in the physical courtroom, with the judge clearly in the command position (say, at the top and center of the array). But the array may be unstable, changing whenever a participant is added or dropped or, in speaker view, whenever someone else begins to speak.<sup>167</sup> This undermines any impression of formal hierarchy, even though the participants are individually identifiable by the small labels Zoom places within each box, aided by introductions made by the conscientious judge. At the same time, the visibility of each participant’s home or office environment can exert a distracting centrifugal force, fragmenting the virtual courtroom into a mere juxtaposition of personal settings filled with window treatments, bookshelves, and tchotchkes.<sup>168</sup> There is of course no bodily co-presence. Participants do not share an actual common space; the relationships between their images on the screen have no

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165. ERVING GOFFMAN, *BEHAVIOR IN PUBLIC PLACES* (1963).

166. See NGUYEN & CANNY, *MULTIVIEW*, *supra* note 49.

167. The convener may stabilize the array somewhat by “pinning” the video showing a given participant. But unless the convener of the Zoom meeting chooses the proper settings, each participant may also change his or her view of the interface at will, toggling between speaker and gallery view. And regardless of the control the convener exercises over the interface, each participant or other viewer may adjust the size of the interface on his or her laptop or other screen, changing the size and reconfiguring the arrangement of the boxes in which participants appear.

168. The injection of this sort of individual informality into the space of adjudication is not unprecedented. For instance, Resnik and Curtis discuss the informality of courtrooms in 17<sup>th</sup> century Netherlands and temporary justice sites in modern Western Australia, which have included onlookers, dogs, and so on. RESNIK & CURTIS, *supra* note 3, at 367–72. The personal environments visible on Zoom strike us as anomalous in contrast to the more regimented formality of 20<sup>th</sup>–21<sup>st</sup> century courts in the United States and England. The other examples, though, suggest that not all of the trappings of what we take to be the traditional courtroom are necessary to what we might deem to be proper adjudication.

connection to the relationships their bodies would have to one another in a real physical room. Among other things, this makes it impossible to determine from the positions of interlocutors' bodies and the directions of their heads and eyes who is speaking to whom. And because there is no courtroom gallery, participants remain unaware of any audience beyond the array of heads and torsos on the interface.

In contrast, the physical courtroom's "large room with space for an audience, exaggerated demarcations and enlarged spatial distances between players prescribe a *public persona*."<sup>169</sup> More specifically, the configuration of the physical courtroom and the actual or at least implied presence of an audience tends to make participants more aware than they generally are in daily life that they are engaged in a *performance*.<sup>170</sup> This heightens the sense of the gravity of their choice of words and expressions, and their interchanges with others. Law's abiding faith in the power of words may incline people to think that verbal content alone, ultimately reduced to words on pages, is sufficient for adjudication. Yet it's the interpersonal performance of expression and behavior which creates lived experience and "reaffirm[s] . . . the moral values of the community."<sup>171</sup>

The tropes of the courtroom as a stage and the trial as

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169. Rowden, *supra* note 93, at 274 (emphasis added) (footnote omitted).

170. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (paperback ed. 1959).

171. *Id.* at 35. "To the degree that a performance highlights the common official values of the society in which it occurs, we may look upon it, in the manner of Durkheim and Radcliffe-Brown, as a ceremony – as an expressive rejuvenation and reaffirmation of the moral values of the community." *Id.* Goffman is concerned to explain performance in everyday interactions, whereas formal legal proceedings, of course, are already structured by procedural rules and the deployment of government officials. Our contention is that conducting the proceedings in a courtroom enables participants to interact expressively, and thus reaffirm (or not) the community's moral values, in ways they cannot when the "same" proceedings are conducted entirely online.

theater are well worn and sometimes criticized<sup>172</sup> but nevertheless valid and pertinent here. “Drama and trial are allies. . . . [In each,] the politics of staging, visualizing, and demonstrating [take center stage]. [T]he right behavior is precisely the art of acting well in the eyes of the subjects watching the performance.”<sup>173</sup> The display of demeanor and emotion in court are part of an essential theatrical representation of the events in dispute, imposing on each witness, litigant, and lawyer (and possibly judge) the demand to “act well” in the eyes of the audience.

Certainly, as Robert Ferguson reminds us, the theatrical nature of trials in physical courtrooms can affect legal judgment by eliciting stereotypical emotional performances and potentially penalizing witnesses and parties who fail to “act well.” This is part of what he describes as the “aura” of the courtroom. The emotional environment created by courtrooms, however, makes them valuable as sites of justice for a reason that is not reducible to ritual or mystique. Courtrooms, as noted above, are configured to enable dialogic speech and expression among physically co-present participants, and these two features of the courtroom facilitate intelligible emotional *interactions*. The emotions people feel and express in social interactions are subject to constant modulation and recalibration based on the moment-to-moment feedback provided by facial expression, tone of voice, and posture.<sup>174</sup> That is, each person can more readily

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172. *E.g.*, FERGUSON, *supra* note 10. Peter Goodrich has examined at length the complex interplays among law, theater, and rhetoric throughout Western legal history. Peter Goodrich, *Law, in* ENCYCLOPEDIA OF RHETORIC 417, 418 (Thomas O. Sloane ed., 2001).

173. Cornelia Vismann, “*Rejouer les crimes*” *Theater vs. Video*, 13 CARDOZO STUD. L. & LITERATURE 119, 127–28 (2001).

174. “[E]motions in social settings emerge during moment-to-moment interactions” but “[e]motion construction at any one point in time is constrained by the ongoing or developing relationship in which it takes place” and “depends on the larger sociocultural context.” Michael Boiger & Batja Mesquita, *A Sociodynamic Perspective on the Construction of Emotion*, in THE PSYCHOLOGICAL CONSTRUCTION OF EMOTIONS 377, 379–82 (Lisa Feldman Barrett & James A. Russell eds., 2015).

read the other and know that he or she is being read.<sup>175</sup> Each significant dyad—defendant-judge, lawyer-witness, witness-jury, juror-juror—features this kind of emotional interaction. Other participants, observing these interactions, can more readily interpret them as well. Judges, for instance, rely on these moment-to-moment affective cues when engaging, together with other participants, in the emotional management of their courtrooms.<sup>176</sup> On a video conference, in contrast, where participants often seem to be addressing everyone (or no one in particular) and it's difficult to follow where they are looking,<sup>177</sup> emotional interactions can seem illegible and inscrutable.

The physical courtroom thus yields a more transparent emotional environment than the virtual court does, inclining decision-makers in physical courtrooms to feel that they are judging rightly. By making emotions available in a way that the videoconferencing interface does not and by affording decision-makers themselves more opportunities to observe and engage in emotional interaction, proceedings in courtrooms can enhance decision-makers' (and the public's) sense that the proceedings are revealing more of the human truth of things, however misled they may be by their stereotypical expectations for how parties and witnesses should express themselves. And if decision-makers have the impression that they are taking more of the witnesses' and parties' psychological reality into account, whether that cashes out in assessments of credibility, character, or both,

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175. GOFFMAN, *supra* note 165. In face-to-face, physically co-present interactions, "sight begins to take on an added and special role. Each individual can *see* that he is being experienced in some way, and he will guide at least some of his conduct according to the perceived identity and initial response of his audience." *Id.* at 16.

176. *See, e.g.*, Stina Bergman Blix & Åsa Wettergren, *A Sociological Perspective on Emotions in the Judiciary*, 8 EMOTION REV. 32 (2015); Terry Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1481; Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work and Emotional Labour*, 32 J.L. SOC'Y 590 (2005).

177. *See supra* notes 49–55, 89 and accompanying text.

they may feel that their judgment process is more grounded and more complete, leading them in turn to feel that the process is going well.<sup>178</sup> Jurors in particular “want to feel right about their decisions . . . striving to work their emotions and their judgments into a satisfying totality.”<sup>179</sup> Believing that they have had access to witnesses’ and litigants’ relevant emotions and registering how they themselves have responded emotionally during the flow of the proceedings, they are more likely to regard their experience and their judgments as well-grounded and authentic. The co-presence of their fellow jurors in the courtroom and the jury room also helps them to negotiate the group’s emotional response,<sup>180</sup> which can reinforce their sense that they are judging rightly.

This is not to say that the resulting verdicts are likely to be more *factually* accurate, assuming that one could access the ground truth apart from the legal process itself.<sup>181</sup> However, insofar as every legal outcome reflects a moral judgment about the parties in light of the values the community deems important,<sup>182</sup> and emotions are not mere bodily signals about how things are going for the person experiencing them<sup>183</sup> but also judgments of value, of what ought to matter,<sup>184</sup> decision-makers who take more emotional information into account and feel right about their

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178. See generally Gerald R. Clore & Jeffrey R. Huntsinger, *How the Object of Affect Guides Its Impact*, 1 EMOTION REV. 39 (2009).

179. NEAL FEIGENSON, LEGAL BLAME 106–07 (2000).

180. See, e.g., PAULA NIEDENTHAL ET AL., PSYCHOLOGY OF EMOTION: INTERPERSONAL, EXPERIENTIAL, AND COGNITIVE APPROACHES 235–36 (2006).

181. See Neal Feigenson, *Emotional Influences on Judgments of Legal Blame: How They Happen, Whether They Should, and What to Do About It*, in EMOTION AND THE LAW: PSYCHOLOGICAL PERSPECTIVES 45, 63–64 (Richard Wiener & Brian Bornstein eds., 2010).

182. See BURNS, *supra* note 1.

183. See generally LISA FELDMAN BARRETT, HOW EMOTIONS ARE MADE (2017); ANTONIO DAMASIO, DESCARTES’ ERROR (1994).

184. See generally Martha Nussbaum, *Emotions as Judgments of Value*, 5 YALE J. OF CRITICISM 201 (1992).



decisions can judge better in this broader sense.<sup>185</sup>

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185. In contrast, those who conceive of legal proceedings as basically a matter of task-oriented information exchange as opposed to interactive moral judgment may be right that videoconferencing (or audioconferencing, for that matter) is not inferior to face-to-face interactions. See Judee K. Burgoon et al., *Testing the Interactivity Principle: Effects of Mediation, Proximity, and Verbal and Nonverbal Modalities in Interpersonal Interaction*, 52 J. OF COMM. 657 (2002). This is also not to say that judges or jurors will experience decision-making as *easier* in physical than in virtual courtrooms. If anything, the increased availability of affective information, other participants' and their own, may make integrating those emotions with their cognitions more challenging. The claim is that to the extent that they are able to integrate all of this information, they are likely to feel satisfied that they are judging well.

## III. PUBLIC TRIALS

The iconic courtroom drama, for all its laser focus on the main stage action between attorneys and witnesses, often widens the lens to include another important character as well: the audience. The courtroom audience in legal dramas plays various roles. It may act as a Greek chorus reflecting and guiding our own emotional reactions to the legal confrontations, or as a counterpoint to the moral message—a depiction of small-town prejudice, for example. It may function as a sort of expanded jury, reacting to the evidence for the benefit of jurors and lawyers, as in *Anatomy of a Murder*.<sup>186</sup> It may by its very presence signal the triumph of the rule of law, as *Judgment at Nuremberg*<sup>187</sup> did. It may, collectively, play a more active role, attempting to encourage a verdict through a unified presence, whether supportive, outraged,<sup>188</sup> or intimidating.<sup>189</sup> It may, as the courtroom gallery in *To Kill a Mockingbird*<sup>190</sup> memorably did, depict hierarchy in the way townsfolk are seated (with all black spectators in the balcony and white spectators on the same level as the core dramatic actors). It may, as *Inherit the Wind* ingeniously did, emphasize the importance of the audience by showing the deflated face of Williams Jennings Bryan when the judge politely offered him a chance to address the (empty) courtroom after the verdict had been rendered.<sup>191</sup>

The camera may home in on individual reactions, for example Scout's sorrow and shock at the verdict on behalf of

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186. ANATOMY OF A MURDER (Columbia Pictures 1959).

187. JUDGMENT AT NUREMBERG (Amber Entertainment 1961).

188. The portrayal of the outraged clamor of the white citizenry as lynch mob quite explicitly illustrated the fragile boundary between the lawless mob and the trial, both in Tom's narrow escape from lynching and in the way the trial that did take place simply placed the veneer of public justice on the foreordained killing of an innocent man. See TO KILL A MOCKINGBIRD (Brentwood Production 1962).

189. See *infra* note 208 (reference to the "sea of blue").

190. See Radul, *supra* note 158.

191. INHERIT THE WIND (United Artists 1960).

her father, her town, and her ideals.<sup>192</sup> It may focus on the reactions of the families of the parties (as in *A Lesson Before Dying*,<sup>193</sup> where the camera lingers on the devastated reaction of the defendant's grandmother to the defense attorney's reference to "putting a hog in an electric chair"<sup>194</sup>). It may showcase attorneys performing for one another<sup>195</sup> or attending a trial to watch other attorneys perform.<sup>196</sup> Or it may capture a non-verbal exchange between witnesses and spectators—a gesture of support<sup>197</sup> or of intimidation.<sup>198</sup> Once the verdict comes down, it often captures the frenzy of reporters sprinting for the telegraph or phone to share the news with the wider public, sometimes even depicting phone lines, excited chatter, and rapidly multiplying newspapers to illustrate the viral spread of the news.<sup>199</sup>

The array of roles ascribed to spectators is not just an artifact of popular culture; it reflects a similar profusion of roles in legal theory and practice. In these images so memorably captured in film and the popular imagination, the public trial achieves a number of goals. As Ferguson describes:

Courtrooms . . . become the face of the law, the place where outside observation operates as a check on authority. Habeas corpus . . .

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192. TO KILL A MOCKINGBIRD, *supra* note 188.

193. See, e.g., A LESSON BEFORE DYING (HBO 1999).

194. *Id.*

195. See, e.g., LEGALLY BLONDE (Metro-Goldwyn-Mayer 2001).

196. See, e.g., *Better Call Saul* (AMC television broadcast) (scenes in which Kim Wexler observes criminal trials in order to decide whether to change from corporate law to indigent criminal defense).

197. MY COUSIN VINNY (20th Century Studio 1992) (showing the approving nod of a woman in the audience when a witness declares that no self-respecting Southerner cooks instant grits).

198. For example, in the first episode of *The Wire*, McNulty observes the trial of D'Angelo Barksdale, both out of interest and to assert his presence. Drug kingpin Stringer Bell sits in the audience, watching the star witness against his nephew recant her testimony to permit D'Angelo to walk free. *The Wire: The Target* (HBO broadcast June 2, 2002).

199. See CHICAGO (Miramax 2002).

signifies the right of the accused person to appear *in public* before a judge, where judgment itself can be judged. When a trial proceeds inappropriately—when even a minority of observing citizens believe it to be unjust . . . the law and its officials face public criticism. Debate then extends beyond the courtroom, leading to controversy of a different order and magnitude.<sup>200</sup>

Although Ferguson is writing here primarily about high profile trials, his points apply across the board. A public trial helps safeguard justice by promoting transparency. It provides an incentive for the principals to conduct themselves appropriately and fairly in the eyes of the immediate audience and the community that audience represents. It serves as a powerful reminder that the proceedings are not merely a private interchange, but a function performed on behalf of the community, in which community-wide problems are addressed and norms articulated. But there are a number of unresolved tensions inherent in the notion of a public trial. Whose right is the right to a public trial? What precisely is the function of spectators in securing this right, and to what extent does it depend on their proximity in time and space? How does the role of spectators differ from the wider goals of public education and norm elucidation, and how does a public trial achieve these goals?

There is nothing inherently problematic about the fact that a trial performs many functions at once, assuming it is able to perform them properly. The current pandemic, however, forces courts and others to grapple with precisely what these functions are, and how to best replicate them when the public's physical, contemporaneous presence may be out of the question. Even then, we might consider this a temporary problem, on the theory that eventually trials can simply return to their previous ways and their previous reliance on the ill-defined nature of the public trial guarantee. This would be a missed opportunity.

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200. FERGUSON, *supra* note 10, at 1.

*The Audience: Off the Radar*

The foundational texts that give rise to the public trial guarantees are familiar, but not nearly as straightforward as they may appear. The Sixth Amendment's right to a fair trial is one of a series of trial rights accorded to the criminal defendant. It is commonly stated that this right "belongs to the defendant rather than the public."<sup>201</sup> Meanwhile, the right of the public and press to attend a trial, whether criminal or civil, is said to inhere in the First Amendment.<sup>202</sup> As Justice Brennan explained, "open trials are bulwarks of our free and democratic government." Public access to court proceedings is an essential check and balance because "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."<sup>203</sup> This division of labor between the right of the defendant and the right of the public oversimplifies, or at least fails to capture adequately, the complex role of public trials where norms are articulated and enforced not merely for the parties present, but for the citizenry more generally.<sup>204</sup>

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201. WAYNE LAFAYE ET AL., PRINCIPLES OF CRIMINAL PROCEDURE: POST-INVESTIGATION 558 (2d ed. 2009).

202. See *id.*; see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 599 (1980) (Stewart, J., concurring). Although *Richmond Newspapers* concerned a criminal trial, it has been widely interpreted to guarantee a right to access in civil trials as well.

203. *Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring). Justice Burger, writing for the majority, also explained that making trials public "provid[es] an outlet for community concern, hostility, and emotion" in reaction to outrageous crimes, discouraging vigilantism and maintaining respect for the justice system, a pertinent observation with regard to our discussion of victim impact statements in sexual assault cases. See *id.* at 571.

204. See generally Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014) (demonstrating an important treatment of this topic and an argument for a more fully articulated recognition of the role of the audience); see also Justin D. Rattey, *Whose Jury: Mediating Between the Competing Individual and Collective Jury Rights* (May 28, 2020) (unpublished Ph.D. dissertation, Georgetown University), <https://ssrn.com/abstract=3612477> or <http://dx.doi.org/10.2139/ssrn.3612477> (arguing that there are at least two versions of the right to a jury: the individual right of the defendant and the collective public right to have criminal charges adjudicated).

No public is present in courtrooms on Zoom. But there are a number of disconnects in the current discourse about public trials that make it difficult to assess what aspects of the public trial are essential to recreate or replace on Zoom. One is between the active and sometimes outsized role the audience plays in courtroom dynamics and the treatment this role receives in the legal literature. Legal scholars tend to treat “the trial” as synonymous with the main stage (or “front stage”<sup>205</sup>) action, and to ignore the presence and significance of the offstage action.<sup>206</sup> Indeed, once the trial is memorialized in a transcript, the role of the spectators in the courtroom dynamics is rendered invisible. At that point the role of the public refers only to the larger public—the subsequent audience that is introduced to the action via the media.

Robert Ferguson gives a rich description of the role of the courtroom audience, but one that casts it in the traditional role of passive observer, at least during the trial:

We tend to forget that trials perform many different functions at once. . . .

[And] these . . . compete with each other and complicate perception. Caught within them, though without an explicit role to play, is the *participant observer*, symbol of the public in a public trial. . . . Participant observers exemplify and strengthen public decorum through the passivity of their presence, but their interest in a case carries them beyond what is being said and done in court.<sup>207</sup>

Yet the role of the physical audience in a trial is not always that of passive observer. In a civil rights suit against a police officer or a criminal trial where a police officer is the defendant, for example, not uncommonly the audience

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205. See, e.g., SARAH BETH KAUFMAN, *AMERICAN ROULETTE: THE SOCIAL LOGIC OF DEATH PENALTY SENTENCING TRIALS* 175 (2020).

206. Except in situations where that behavior is itself raised as an issue. See, e.g., *Carey v. Musladin*, 549 U.S. 70 (2006). But see Rose & Diamond, *supra* note 72, for an in-depth consideration of offstage behavior.

207. FERGUSON, *supra* note 10, at 19.

resembles a “sea of blue”—row upon row of uniformed police officers.<sup>208</sup> The intent to provide support is clear, but the show of solidarity may, intentionally or unintentionally, evoke a host of other emotions in jurors, judges, litigants, and other members of the audience.<sup>209</sup> Also not uncommon are displays of support among victims’ family members, perhaps wearing large pins with photos of the victim.<sup>210</sup> The offstage action is decidedly part of the courtroom dynamic, and this is true even when the spectators do not intentionally organize shows of solidarity. Sarah Beth Kaufman recounts that when she observed the delivery of victim impact statements, the pain the family member described was “met with almost universal empathy from the people in the courtroom. . . . Audience members cried, passed tissues, held hands, and comforted one another.”<sup>211</sup>

None of these dynamics are transcribed. Ignoring them doesn’t make them go away, but it does make it difficult to evaluate them and determine what role they play and ought to play. The specter of virtual trials makes this reckoning all the more crucial. In most virtual trial pilot programs, the virtual backstage consists of private areas, invisible to participants, and there is no spectator section at all, much less one engaged in a complex synchronous dynamic with the main stage action. If this is seen as unproblematic, it ought to signal the need for a larger reckoning about why we currently permit these powerful currents to affect the outcome of trials in physical courtrooms, and to do so entirely under the radar.<sup>212</sup>

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208. KAUFMAN, *supra* note 205, at 181.

209. *See id.*

210. *See Carey*, 549 U.S. at 70.

211. KAUFMAN, *supra* note 205, at 173–74.

212. There has thus far been little attention to the loss of a backstage and audience in virtual proceedings. There may be several explanations for this inattention. First, the legal professionals (judges, lawyers, court administrators) whose views about the matter predominate may simply not be paying that much attention to what they have regarded as inessential. Second, people generally

*The Courtroom: The Prosaic Reality*

Any discussion of what is gained and what is lost in a move toward virtual court proceedings must acknowledge an important disconnect between the imagined pre-COVID baseline and the actual baseline. Specifically, the iconic trial exists mainly in the breach. Pre-pandemic, trials were already extremely rare. Civil disputes are increasingly resolved in administrative settings, arbitrations, or other events that have little in common with public trials.<sup>213</sup> The vast majority of criminal cases are decided by guilty pleas. Many other proceedings were being conducted virtually, without a public audience, before the pandemic: an increasing number of arraignments, bail hearings, and parole hearings, as well as many immigration and asylum cases, providing some early, troubling evidence that virtual hearings may be less protective of the rights of petitioners.<sup>214</sup> Thus, any discussion of the values advanced by public trials should also consider which of these values are lost in the broad range of cases where the public is already largely or entirely absent, and whether these values can be better safeguarded even in non-pandemic conditions.

In addition, many actual trials bear little resemblance to the iconic trials of popular imagination. Consider this excerpt from the description of Courtroom 302 in the Cook County Criminal Courthouse, in Steve Bogira's book of the

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adapt pretty quickly to new environments, and as they become more accustomed to interacting virtually, they may just come to accept as normal what's actually a diminished sort of human interaction. *See, e.g.,* TURKLE, *supra* note 154. That is, the loss will come to seem unproblematic because people are no longer aware of what's been lost. Third, the sorts of proceedings that have actually been conducted online thus far, with isolated exceptions, have not been criminal trials or jury trials, much less the high-profile cases Ferguson writes about. Rather, they have mostly been the sorts of proceedings for which there wouldn't have been much of an audience anyway, which might also help account for what seems to be the general inattention to the absence of the in-court audience. As trials begin to move online, this will be an interesting dynamic to watch.

213. *See* RESNIK, *supra* note 3 and accompanying text.

214. *See supra* note 48 and accompanying text.



same name:

A drab gray carpet covers the floor, and a chintzy fabric is peeling from the walls. . . .

The courtroom's only windows are in the gallery . . . . On sunny mornings the reflection on the Plexiglas [which separates the spectator gallery from the rest of the courtroom] makes it hard to see into the courtroom from the gallery. The courtroom proceedings are transmitted to the spectators via ceiling speakers. [Sometimes the judge flips off the speakers for a private interchange and then forgets to turn them back on]. When he does, the spectators usually sit in meek silence at first . . . . Before one of them risks an act so bold as tapping on the Plexiglas . . . a courthouse regular [will usually] come to the rescue, approaching the glass doors with a hand cupped behind an ear, and [the judge] will lean forward and restore the audio.<sup>215</sup>

Nicole Gonzalez van Cleve also wrote a searing portrait of the Cook County Criminal Courthouse, emphasizing the racial inequities exacerbated by and reflected in the architecture of the courtroom. She recounts:

An elderly black woman sat silent and still in a courtroom. She hypnotically gazed at the courtroom proceedings through bulletproof glass as white professionals . . . casually navigated the daily exchanges that defined the court call . . . . The microphone was off, so you couldn't hear, but you could see the professionals laugh and smile as if they were in a casual workplace. The interaction was like watching a silent movie and the audience of mostly black and brown people who sat watching . . . were like obedient churchgoers at a solemn funeral.<sup>216</sup>

In short, proximity and physical presence have long been scarce commodities in some courtrooms and in many types of proceedings. As the above accounts powerfully capture, courtrooms can be intimidating, hierarchical, exclusionary places in which even those with the most direct stake in the proceeding—waiting witnesses, family members, and the

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215. STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 34–35 (2005); *see also* Eagly, *supra* note 48.

216. NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 22 (2016).

litigants themselves—feel disempowered and alienated.<sup>217</sup> The public courtroom’s loftier purposes, its role in checking abuse or in educating the community, may at times seem abstract and out of reach in the lower state and local courts. For example, Van Cleve describes Cook County Criminal Court’s treatment of court-watchers, particularly non-white court watchers, as far from welcoming.<sup>218</sup> It does not need to be this way. Thus, the question is not merely how to provide a simulacrum of what we had pre-pandemic. A better approach is to focus on the values the public trial is meant to advance and how they can best be achieved.

*Participants and Audiences: Victim Impact Testimony*

As we’ve noted, trials perform many functions at once, and sometimes these functions are at odds. It’s useful to tease out these functions and what arrangements they require. Victim impact testimony provides a rich context for a version of this exercise. According to the U.S. Supreme Court, the appropriate audience for these statements is the sentencing judge (in most criminal cases) or jury (in capital cases), who can use the information about the impact of the crime as a factor in sentencing.<sup>219</sup> In the lower courts, victim impact statements are widely thought to serve additional purposes. Victims and survivors are told that delivering the statements will help them heal and provide a kind of catharsis.<sup>220</sup> The statements are also viewed as a way to

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217. See, e.g., Mulcahy, *Unbearable Lightness of Being*, *supra* note 124, at 480–81.

218. VAN CLEVE, *supra* note 216, at 22–28.

219. See *Payne v. Tennessee*, 501 U.S. 808, 820 (1991).

220. See, e.g., DEP’T OF JUST., VICTIM IMPACT STATEMENTS (2020), <https://www.justice.gov/criminal-vns/victim-impact-statements> (noting that delivering victim impact statements may help provide closure for victims: “What is the purpose of a Victim Impact Statement? It provides an opportunity to express in your own words what you, your family, and others close to you have experienced as a result of the crime. Many victims also find it helps provide some measure of closure to the ordeal the crime has caused.”). *But see* Susan A. Bandes, *Victims, Closure, and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1

confront defendants face to face with the harmful consequences of their actions, ideally eliciting remorse or empathy from the defendant (which, presumably, would show in the defendant's facial expression).<sup>221</sup> The statements may also play a public education function, alerting the community more broadly to the nature of the harm.<sup>222</sup>

The dialogic dimension of victim impact statements, so critical to their cathartic and moral educational goals, is seldom clearly articulated, and needs to be parsed from the rather ambiguous literature on the purposes of the statements.<sup>223</sup> For the formally recognized purpose of conveying "information"<sup>224</sup> about the nature of the harm to the sentencer, the judge or jury needs a sight line to the victim or family member. A reciprocal sight line isn't really necessary, since the information flows only from victim to fact-finder, although (as mentioned in Part I) the victim may benefit from being able to see how her words are being received. Affording synchronous interaction becomes more urgent when we move to the goals of healing and catharsis for the victim and moral education for the defendant.<sup>225</sup>

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(2009) [hereinafter Bandes, *Victims, Closure*]; Susan A. Bandes, *Closure in the Criminal Courtroom: The Birth and Strange Career of an Emotion*, in EDWARD ELGAR RES. HANDBOOK ON L. & EMOTION (forthcoming Susan A. Bandes et al. eds., 2020) [hereinafter Bandes, *Closure in Criminal Courtroom*] (critiquing the concept of the courtroom as a site for "closure" for crime victims).

221. See, e.g., Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 90 (2004).

222. See the MADD victim workbook; Bandes, *supra* note 220, at 14.

223. See Susan Bandes, *What Are Victim-Impact Statements For?*, THE ATLANTIC (Jul. 23, 2016), <https://www.theatlantic.com/politics/archive/2016/07/what-are-victim-impact-statements-for/492443/>.

224. Note the use of the word "information" here, the general refusal of victim impact statement jurisprudence to deal with the emotional dimensions of the statements, and with how the information verbal statements impart differs from that imparted by a written statement read to the fact-finder. See Susan A. Bandes, *Share Your Grief but Not Your Anger: Victims and the Expression of Emotion in Criminal Justice*, in EMOTIONAL EXPRESSION: PHILOSOPHICAL, PSYCHOLOGICAL, AND LEGAL PERSPECTIVES (Joel Smith & Catherine Abell eds., 2016).

225. We do not suggest that we consider these goals appropriate, and have

These require proximity, or at least clear sight lines between victim and defendant as well as between victim and judge, to allow the victim to feel seen, heard and, ideally, understood. In the sexual assault cases against U.S. Gymnastics and Michigan State doctor Larry Nassar, for instance, victim after victim expressed the importance of the opportunity to face Nassar and tell him directly of the harm he had done.<sup>226</sup>

One concern with this dialogic aspect is that it depends on behavior that can't be regulated: the facial expression, body language, and posture of the defendant. For example, Chanel Miller recounted that after Brock Turner was convicted of raping her, she sought to deliver her victim impact statement to him directly, but he, as well as other important court participants, refused to face her:

I looked straight at the judge, meeting his eyes repeatedly, reminding him I was not done. I pointed at the back of the defense attorney's cotton-haired head. He never turned to face me. I bore into the side of Brock's unmoving face, his stoic profile. I was rooted, pointing at him. I wanted everyone consumed by my voice, in my control.<sup>227</sup>

In another case, a mother addressed her daughter's murderer directly, telling him she had "no room in her heart for hating him. But the defendant would not look at her, nor at the photo she held of her daughter. He stared impassively ahead, his big sloping shoulders still as a rock." She said later: "I wanted to make sure he knew I was there." But she "could see nothing in his eyes."<sup>228</sup> Others make their peace with the lack of a reaction. Rebekah Gregory, who lost a leg in the Boston Marathon bombing, wrote an open letter to

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elsewhere been critical of these uses of VIS and, indeed, VIS in general. *See, e.g.*, Bandes & Salerno, *supra* note 43, at 1036–40; Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 410 (1996); Bandes, *supra* note 220, at 1; Bandes, *supra* note 223.

226. *See generally* AT THE HEART OF THE GOLD: INSIDE THE USA GYMNASTICS SCANDAL (S.J. Gibson Films & Sidewinder Films 2019).

227. CHANEL MILLER, KNOW MY NAME 230–31 (2019).

228. Bandes, *supra* note 224, at 21.

defendant Dzhokhar Tsarnaev after giving testimony, telling him that even though he never looked her way, “I realized that sitting across from you was somehow the crazy kind of step forward that I needed all along.”<sup>229</sup>

These dynamics are rarely made explicit to the participants themselves. Victims and survivors are conscripted to deliver statements at a time of great vulnerability and stress, induced by promises about justice and closure,<sup>230</sup> and one hopes they have been prepared for the possibility of disappointment.<sup>231</sup> The current pandemic squarely presents the question whether physical proximity in a public courtroom is a necessary condition for a victim or survivor who wishes to make her presence felt and communicate her pain. As we’ve discussed above, the lack of physical proximity may dissipate some of the immediacy of the face-to-face confrontation, reducing the possibility of a rich emotional interchange.<sup>232</sup> Yet virtual proceedings can disinhibit as well as inhibit emotional expression. Though the lack of immediacy might feel less immersive to the unwilling participant, it might also feel less coercive.<sup>233</sup> We simply don’t know enough yet about how the move to virtual platforms may affect the sorts of strong emotions that victims often express at sentencing or that decision-makers and others feel when hearing them. In general, although we’ve speculated about this in Part I, we don’t yet know how

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229. *Id.*

230. See DOJ guidelines, *supra* note 215; see also Bandes, *supra* note 220, at 16–17.

231. There is troubling evidence that this occurs less often than it should. See, e.g., Eli Hager, *They Agreed to Meet Their Mother’s Killer. Then Tragedy Struck Again*, THE MARSHALL PROJECT (July 21, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/07/21/they-agreed-to-meet-their-mother-s-killer-then-tragedy-struck-again#> (a powerful account of a restorative justice conference gone wrong when the man who murdered their mother broke the children’s hearts by deciding on the day of the meeting that he could not attend).

232. See, e.g., Tait et al., *supra* note 48.

233. See Mulcahy, *supra* note 124, at 481–82.

being on Zoom instead of in a physical courtroom will affect participants' understanding of others' emotional displays—or their absence.<sup>234</sup>

Victim impact statements also serve a symbolic function, albeit a complex and highly contested one.<sup>235</sup> In capital cases, the symbolic function is often expressed by prosecutors and victim advocates in terms of the importance of honoring the victim's life and publicly respecting the victim's worth. In other types of cases, the function may be different. In the Nassar cases, where the crime at issue was sexual assault, many of the statements communicated not just the victims' need to face and tame a monster who had loomed far too large in their lives, but also the desire to do so in the authoritative environment of a courtroom where he was being held accountable for his criminal acts. Indeed, the Nassar cases exemplify the vexed role of the public courtroom in advancing these goals. Judge Rosemary Aquilina drew evident satisfaction and widespread praise for her role in comforting and empowering the victims throughout the proceedings. She “opened her courtroom to any victim who wished to speak, for however long she wished to speak,” emphasizing the cathartic nature of the speech (“leave your pain here”); its public nature (the “whole world” is listening); and its role in promoting accountability.<sup>236</sup> She also made the victims an

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234. For instance, in the physical courtroom, the defendant who “refuses to face” the victim may do so by remaining in what could be construed as a respectful posture toward the court, standing or sitting with his body oriented toward the bench and his gaze lowered. On Zoom, where everyone's usual and normative body and head position is frontal and facing toward the viewer, the defendant, to be seen as refusing to face the victim, would have to turn his body or at least his head and shoulders to the side, a more evident rejection of the victim (and of virtual courtroom norms). Ironically, though, on Zoom the defendant could actually avoid looking at the victim precisely by looking into his laptop camera and *appearing* to look at her. *See supra* Part I. Thus Zoom creates new opportunities for disjunction between expressed and perceived demeanor and hence for misunderstanding emotional interactions.

235. *See, e.g.,* Bandes, *Share Your Grief*, *supra* note 224; Bandes, *Victims, Closure*, *supra* note 220.

236. Scott Cacciola, *Victims in Larry Nassar Abuse Case Find a Fierce*

unusual offer: she would keep her courtroom open to hear and respond to additional victim impact statements, even though the sentence had been handed down and the case was formally over. Although this did not occur, her offer itself neatly raises the question: which aspects of the courtroom experience would be most important to the victims—speaking in an imposing, iconic courtroom, a sacred physical site at which justice rituals occur; knowing that they were participating in an official proceeding on which legal consequences hinge; or speaking in the presence (physical or virtual) of spectators? Before the pandemic, it was rarely necessary to disentangle these elements, but the existence of virtual courts, where there is no physical courtroom and no public presence of which participants are aware, provides an opportunity to do so.

To examine the importance (or not) of a physically present public and, more broadly, the role of spectators outside as well as inside the courtroom in furthering the values of public trials, we return to the Brock Turner case. As noted earlier, Chanel Miller recounted that when she delivered her victim impact statement, Turner refused to face her.<sup>237</sup> Her statement had no discernible impact on Turner, who never evinced a satisfying understanding of the gravity and the impact of the rape of which he stood convicted. Moreover, she (and others) felt that the sentence Judge Persky handed down after hearing her statement was equally devoid of understanding of the harm Turner had caused her. Speaking in a formal courtroom before a judge and a live audience did not provide Miller with the healing or vindication she may have sought; to the contrary, as she recounts: “[w]hen the sentence was announced, the immediate reaction I had was humiliation.”<sup>238</sup> Healing or

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*Advocate: The Judge*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/sports/larry-nassar-rosemarie-aquilina-judge.html>.

237. See MILLER, *supra* note 227.

238. Ellas Williams, *Chanel Miller, Sexual Assault Survivor, On The “Immense Relief” of going public*, NPR (Sep. 23, 2019), <https://www.npr.org/2019/09/23/>

vindication did not come from the act of speaking alone. It required both emotional reactions from others and some sense that the legal outcome took her words into account.

What happened next was unusual. Miller shared her victim impact statement with BuzzFeed and it went viral, reaching eleven million people within four days.<sup>239</sup> At this point, the statement's role in helping Miller heal and, perhaps even more dramatically, its role as an instrument of public education, became cleanly separated from its role as information for the judge. The BuzzFeed statement was credited with widely educating the public about the harm of what was too often dismissed as "date rape," evoking tremendous empathy for the victims of such crimes. Concurrent physical proximity, in this unusual case, turned out to be unnecessary to the public education goal of the public trial—although it certainly mattered that what Miller shared with millions via BuzzFeed she had also declared in open court, which imbued it with the cultural significance that attaches to formal court proceedings and made Turner's and Persky's responses part of the lesson.<sup>240</sup>

### *The Public Beyond the Courtroom*

We have focused in this Section mostly on the complex roles of the public present in the courtroom. At least some of the goals of the public trial articulated by the Supreme Court, however, are furthered by the mediated access to open

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763376211/chanel-miller-sexual-assault-survivor-on-the-immense-relief-of-going-public.

239. The 7,137-word-long victim impact statement by Miller, who was referred to in court documents and media reports as "Emily Doe" for the sake of her anonymity, was published by BuzzFeed on June 3, 2016, the day after Turner was sentenced, and was reprinted in other major news outlets such as *The New York Times*.

240. Note that ultimately the judge was recalled, and subsequently fired from a job as a tennis instructor based on his ruling in the Turner case. Chris Bumbaca, *Judge in Brock Turner Case, Aaron Persky, Fired from High School Tennis Coaching Gig*, USA TODAY (Sept. 12, 2019), <https://www.usatoday.com/story/sports/2019/09/12/brock-turner-case-judge-aaron-persky-fired-tennis-coaching-job-lynbrook/2297795001/>.



trials that the community obtains through the presence of the print media, court watchers, and, where allowed, cameras in the courtroom. Press coverage and responses via comments or letters to the editor provide an outlet for concern, hostility, and emotion to a far wider community than the few who can fit into the courtroom gallery. The right of the press to attend public trials, together with the right of assembly, serves as a “catalyst” to the public’s ability to exercise its free speech rights regarding the case.<sup>241</sup> And of course many more people can see justice being done if the proceedings are available on television or the Internet and not merely open to those in a physical courtroom.

Trials in physical courtrooms to which the press and the public have access can perform these public educational and community engagement functions. The victim impact statements in the Larry Nassar proceedings, for instance, were credited with shining a light on a hidden problem with implications far beyond the courtroom—in this case, the web of complicity that had protected a predatory doctor for many years.<sup>242</sup> Where courtroom proceedings are part of a larger public relations campaign to achieve policy changes on an issue of major importance, such as the litigation against big tobacco or against gun manufacturers arising from mass shootings,<sup>243</sup> the publicity of the litigation is essential for the campaign’s efficacy. Yet over the last two centuries, courtrooms have allocated less and less space to the press and public,<sup>244</sup> and in places like the Cook County Criminal

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241. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980) (Brennan, J., concurring).

242. This raises a difficult question: whether the sentencing hearing in an individual criminal case is the appropriate forum for conducting an essential inquiry into layers of complicity and coverups by an interlocking series of powerful institutional actors. The fact that an official proceeding should occur does not resolve the question of the nature of the forum in which it should occur.

243. William Haltom & Michael McCann, *Litigation, Mass Media, and the Campaign to Criminalize the Firearms Industry*, 4 OÑATI SOCIO-LEGAL SERIES 725 (2014).

244. MULCAHY, *supra* note 112, at 83–107. Indeed, “line-standing” for the free

Court, as we've mentioned, bulletproof Plexiglas further impedes the public from being able to see and hear what's going on, while court officials have routinely discouraged court watchers.<sup>245</sup>

Virtual courts pose additional challenges to the ideals of the public trial. Obviously there's no physical space for the press, court watchers, or members of the public to gather and observe. Some courts post links to livestreamed proceedings, which the public may access from their homes or offices, but observers can access only what is visible and audible on the interface; as noted earlier, Zoom proceedings include none of the offstage behaviors that can, for better or worse, play an influential role in the emotional dynamics of the physical courtroom. And some courts have apparently been restricting access to virtual proceedings.<sup>246</sup> All these phenomena limit the ability of public trials to serve the goals of transparency and accountability.

Moreover, by inviting the public's presence, traditional courtrooms and courthouses become quintessential *public things* on which a living democracy depends.<sup>247</sup> Particularly where the litigation is of concern to the community, the community wants the proceedings and the judgment to take

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but very scarce seats at Supreme Court arguments has become a common phenomenon and even a lucrative business. Katie Bart, *Courtroom Access: Line-standing Businesses Save Spots in the Public Line*, SCOTUS BLOG (Apr. 15, 2020), <https://www.scotusblog.com/2020/04/courtroom-access-line-standing-businesses-save-spots-in-the-public-line/>.

245. VAN CLEVE, *supra* note 216.

246. See, e.g., James Lartey, *The Judge Will See You on Zoom, but the Public Is Mostly Left Out*, THE MARSHALL PROJECT (Apr. 13, 2020), <https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out>; Kevin Penton, *Court Accused of Blocking Public Access to Trials Amid Virus*, LAW360 (June 29, 2020), <https://www.law360.com/articles/1287367/court-accused-of-blocking-public-access-to-trials-amid-virus>.

247. BONNIE HONIG, PUBLIC THINGS: DEMOCRACY IN DISREPAIR (2017). "Public things are part of the 'holding environment' of democratic citizenship; they furnish the world of democratic life. They do not take care of our needs only. They also constitute us, complement us, . . . and interpolate us into democratic citizenship." *Id.* at 5.

place in a courthouse to which it has access.<sup>248</sup> One Australian judge has remarked that “the very presence of the courts affirm[s] the presence of a community, of a society, by reflecting its values back to itself.”<sup>249</sup> Hearings and trials at designated places known and accessible to the community contribute to the community members’ sense of ownership of the justice being performed in their name.<sup>250</sup> Zoom proceedings, by contrast, although convened by the courts and possibly decorated with the seals or other symbol of their authority, unavoidably drift toward the private sphere—the homes or offices from which each participant separately joins the meeting and each spectator watches, from his or her own laptop or tablet.<sup>251</sup> Virtual courts thus become a part of the

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248. See, e.g., Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019) (emphasizing the essential role of “the People” generally and courtwatchers as one important representative of The People, in protecting communal public interests).

249. Rowden & Wallace, *supra* note 152, at 518.

250. Or their sense of alienation from/oppression by it. See VAN CLEVE, *supra* note 216. We would argue that even to the extent that adjudication in a particular place and time is deeply flawed, as are the routine hearings in the criminal courts van Cleve observed, the very fact that they were taking place in a specific location enabled the author to study them more thoroughly (Van Cleve’s work depended on the labors of many trained court watchers) and deepens her social critique: Everyone in the community, as well as everyone in the relevant legal professional community, knew or at least could see and know that injustices were being systematically practiced in that courthouse, presenting a more vivid challenge to what ought to be our sense of justice. “Public things” are no less public when they provoke contestation as well as promoting group identity. HONIG, *supra* note 247.

251. One new source of anxiety for those broadcasting at home is Room Rater, the “trendy twitter account that’s rating everyone’s living rooms.” See Heather Schwedel, *Rating the Trendy Twitter Account That’s Rating Everyone’s Living Room*, SLATE (Apr. 28, 2020), <https://slate.com/human-interest/2020/04/room-rater-twitter-account-rated.html>. The use of home as backdrop raises deeper questions about the ways in which social and class cues provided by such backgrounds may play on or exacerbate economic, cultural, ethnic and racial stereotypes in a setting where legal decisions are being influenced. See, e.g., Regina Austin, *Documentation, Documentary, and the Law: What Should Be Made of Victim Impact Videos*, 31 CARDOZO L. REV. 979 (2010) (discussing social, economic and racial cues in the context of victim impact videos); see also Elizabeth Brico, *Virtual Hearings Have Created a “Caste System” in America’s Courts*, THE APPEAL, (Jul. 31, 2020) (describing the unequal technological conditions in various homes: “[W]e’ve got people that are on laptops or desktops,

ever-increasing privatization of formerly public life and functions which increasingly characterizes our society.<sup>252</sup>

Public access to proceedings is crucial, and as we have seen, it may be encouraged or discouraged in both physical and virtual fora. Virtual courts could ensure broader and more reliable access to livestreams. And when they do, public access to Zoom proceedings actually offers an advantage over access via cameras in the traditional courtroom: it permits any member of the audience to observe what the participants themselves observe, subject to protecting confidentiality when appropriate.<sup>253</sup> In a world of mediated proceedings, Zoom offers public access that is unmediated by a court administrator's or technology consultant's decisions about where to locate and aim the cameras or a television producer's choices of how to edit the footage.<sup>254</sup> In this regard, Zoom proceedings may alleviate some of the concerns about selective snippets that crop up frequently in arguments against cameras in the courtroom.<sup>255</sup> In any case,

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and are perfectly centered, and the audio is great and everything is perfect. Then we have some people that are calling in on their cellphones; then we have some people that only call in on their home phone and so suddenly we have this different class of people. I can't help but think of the implicit bias between prosecutors and judges and even defenders as to how you look at these people" (quoting Rob Mason, director of the juvenile division of the Public Defender's Office in Florida's Fourth Judicial Circuit)).

252. Not to mention that the software itself is privately owned, which means that decisions governing its features and uses may be less amenable to democratic input and access than is desirable in a public justice system.

253. For example, in some circumstances juror anonymity may need to be preserved. In addition, Jenia Turner's survey highlighted a growing concern among criminal defense attorneys that their ability to engage in confidential attorney-client communications is hampered in virtual settings. *See* Turner, *supra* note 22 at 57–59.

254. So, for instance, the public watching broadcast courtroom proceedings, and possibly some members of the public physically present in the gallery, might not be able to see clearly those critical interactions we describe above in which the defendant turns or doesn't turn to face the victim and/or the victim's family member(s). On Zoom, whatever courtroom participants themselves see, the viewing public sees as well.

255. *See, e.g.*, Robert Kessler, *Why Aren't Cameras Allowed at the Supreme Court Again?*, THE ATLANTIC (Mar. 28, 2013), <https://www.theatlantic.com/>

virtual proceedings are here to stay,<sup>256</sup> and a legal system that does not keep current with modern technology may lose the confidence of the public.<sup>257</sup>

What lessons does the possibility of adjudicating without a physically proximate public offer for the traditional courtroom? At least some of the offstage behavior we now take for granted is hard to justify: the sea of blue supporting the defendant police officer in an excessive force case, the homicide victim's family and friends sporting buttons with his picture on them, and certainly the father of one of Larry Nassar's victims, who, emboldened by Judge Aquilina's message of contempt for Nassar, asked whether he could have five minutes alone to inflict punishment on Nassar, and then assaulted him.<sup>258</sup> We take for granted that criminal defendants and even victims will be judged partly by the presence and behavior of their family members in the

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national/archive/2013/03/case-allowing-cameras-supreme-court-proceedings/316876/ (quoting several U.S. Supreme Court justices who have expressed such concerns). For example, Justice Kennedy in March 2007 opined that “[i]f you introduce cameras, it is human nature for me to suspect that one of my colleagues is saying something for a soundbite. Please don’t introduce that insidious dynamic into what is now a collegial court.”

256. Reed & Alder, *supra* note 106; *see also* Madison Alder & Allie Reed, *All US Appeals Courts Embrace Arguing Streaming Due to Covid*, BLOOMBERG LAW (Aug. 4 2020), <https://news.bloomberglaw.com/ip-law/all-u-s-appeals-courts-embrace-argument-streaming-due-to-covid>.

257. As one New Zealand judge has written: “One must express some concern that if the court process is not seen as relevant to modern technologies and modern means of communication, where then will lie the respect for the Rule of Law?” This judge also posited of “digital natives” (persons born after about 1985) in particular: “Their attitude towards the symbolism of the court is that the court is a place where the requirement to be physically present at a certain place for the disposal of court business may be seen as laughable, particularly when there are other systems that are available.” *Courts and Covid 19: Delivering the Rule of Law in a Time of Crisis*, THE IT COUNTRY JUSTICE (Mar. 26, 2020) <https://theitcountryjustice.wordpress.com/2020/03/26/courts-and-covid-19-delivering-the-rule-of-law-in-a-time-of-crisis/>.

258. Christine Hauser, *Victims’ Father Lunges at Larry Nassar in Court*, N.Y. TIMES (Feb. 2, 2018), <https://www.nytimes.com/2018/02/02/sports/larry-nassar-father-victims.html>.

audience.<sup>259</sup> The questions about whether the information conveyed by the audience is relevant to good judgment are not easy ones. As the popular images of iconic courtrooms show, the members of the public who are present in court can model appropriate emotional responses to the case or display more transgressive ones; they can be the eyes and ears for the wider community or, through their demeanor, they can directly influence the participants. The problem is that these sorts of social and emotional dynamics tend to occur below the radar; despite important scholarly work on “offstage behavior,”<sup>260</sup> there is little explicit recognition in the legal literature of how the audience affects the proceedings. The point here is not to claim that the line between the audience’s helpful and harmful effects is easily drawn. Rather it is that if offstage behavior *does* play a useful role, the argument for that role ought to be better articulated so it can be scrutinized and debated.

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259. See, e.g., Scott E. Sundby, *The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 109, 1153 n.99 (1997) (juror recounting that the presence of the defendant’s uncle in court every day, and in the hall of the courtroom reading a Bible, made a deep positive impression on him).

260. See, e.g., Rose & Diamond, *supra* note 72.

## CONCLUSION

The courtroom has long existed as both a physical place and as an ideal: an amalgam of values, beliefs, symbols, norms, and behaviors that both reflect and shape legal practice. In some regards, the courtroom, the jury, and the trial have long been objects of study and fascination. Yet the courtroom's deep common-law roots, its mystique, its longevity, and the sheer force of the status quo have long protected it from the deepest levels of scrutiny—the kinds of scrutiny that call into question our abiding faith in the value of the open courtroom as a venue for observing demeanor, and even the very notion of the “day in court” as a physically situated, synchronous event. The sudden prevalence of virtual legal proceedings offers a kind of forced natural experiment and hence an unprecedented opportunity to revisit what we value about adjudication in public courtrooms, and to think about how best to ensure that court proceedings, whatever form they may take, reflect and reaffirm those values. A more critical approach to traditional practices and received wisdom can enable us not only to sharpen our appreciation for what is worth valuing but also to make more informed trade-offs when what we value conflicts, as it inevitably does, with competing needs and concerns. Our goal in this Article has not been to resolve those questions, but to seize the opportunity to ask them, and to do so in light of the growing body of social science that can help inform our best normative judgments.