EMPATHY AND REMOTE LEGAL PROCEEDINGS

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ABSTRACT

Do remote legal proceedings reduce empathy for litigants? Pre-COVID studies of remote bail hearings and immigration removal hearings concluded that the subjects were disadvantaged by the remote nature of the proceedings, and these findings are sometimes interpreted to mean that decision-makers tend to be less empathetic toward remote litigants. Reviewing both the pre-COVID literature and more current studies, we set out to determine whether empathy is reduced in virtual courts. The notion that it is more difficult for decision-makers to exercise empathy toward someone they encounter only on a video screen is consistent with findings that physical distance increases social and hence psychological distance, and may be borne out by future studies. However, there is as yet no firm evidence that the remote nature of legal proceedings, in itself, reduces empathy for litigants, witnesses, or other participants in legal proceedings. In some situations, remote proceedings may even increase empathy. Nevertheless, there are ample grounds for concern that remote proceedings may further disadvantage litigants who are already unequally burdened by empathy deficits based on race, social class, gender, ethnicity, or other factors that may differentiate them from decision-makers. We call attention to particular ways in which virtual proceedings may exacerbate these empathy deficits.

I. INTRODUCTION

Do remote legal proceedings reduce empathy for litigants? Pre-COVID studies of remote bail hearings and immigration removal hearings concluded that the subjects were disadvantaged by the remote nature of the proceedings, and these findings are sometimes interpreted to mean that remote legal

proceedings reduce empathy.[1] We set out to determine whether this is an accurate inference, reviewing both the pre-COVID literature and more current studies. The notion that it is more difficult for decision-makers to exercise empathy toward someone they encounter only on a video screen is consistent with findings that physical distance increases social and psychological distance,[2] and may well be borne out by further research. Nevertheless, it is important to take a clear-eyed look at what the existing evidence shows and what inferences it can support. We conclude that there is thus far no firm evidence that the remote nature of legal proceedings, in itself, reduces empathy for litigants, witnesses, or other participants in legal proceedings. We posit, however, that there are ample grounds for concern that remote proceedings may further disadvantage litigants who are already burdened by empathy deficits based on race, social class, gender, ethnicity, or other factors that may differentiate them from decision-makers.

There are a number of reasons for the lack of clear-cut evidence about the impact of remote proceedings on empathy. First, there is a dearth of studies cleanly comparing the dynamics or the outcomes of remote and in-person proceedings. The remote legal proceedings studied in the pre-COVID era consisted of single remote participants[3] (bail applicants, asylum applicants, detained immigrants in removal proceedings, complainants in sexual abuse trials) appearing via video link. None of the research to date has studied the effects of video—on empathy or anything else—when all the participants are on the same video interface, as they are in virtual courtrooms. The shared platform may reduce or eliminate the perceptual and cognitive asymmetry that exists when only one or two participants are not physically present.[4]

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1. We are among those who have advanced the hypothesis that the "diminished sense of co-presence . . . can impair judges' and jurors' ability to empathize with a witness or party." *See* Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1305 (2020).

2. *E.g.*, Arianna Schiano Lomoriello et al., *Out of Sight Out of Mind: Perceived Physical Distance Between the Observer and Someone in Pain Shapes Observer's Neural Empathic Reactions*, 9 FRONTIERS IN PSYCH. 2, 2-6 (2018); *see* Bodo Winter et al., *Metaphor-Enriched Social Cognition and Spatial Bias in the Courtroom*, 8 METAPHOR & SOC. WORLD 81 (2018).

3. Though litigants were at times accompanied by their attorney.

4. *See, e.g.*, CAROLYN MCKAY, THE PIXELATED PRISONER 89-90 (2018) (how videoconferencing when only the criminal defendant appears remotely "differentiates corporeally between those physically in the courtroom, versus the 'central figure' of the legal proceedings – the prisoner") (internal citation omitted); *see also id.* at 119. One study of a "distributed" courtroom in which multiple participants, not just the criminal defendant, appeared on large screens via high-quality video transmission found that the defendant was judged more harshly when he was present

Second, the sorts of remote proceedings that have been studied to date have presented a range of confounding factors, including difficulties obtaining or consulting with an attorney,[5] problems accessing reliable technology[6] or appropriate settings for remote participation,[7] and interpreter difficulties that affect non-English speakers,[8] all of which fall most heavily on indigent litigants or litigants in custody. Thus, it is not clear whether any of the reported adverse effects of remote proceedings are due to the use of videoconferencing per se or to one or more of these other factors. And finally, the studies have rarely focused specifically on the role of empathy. This last point requires a caveat: There is no agreed-upon definition of empathy, as we discuss below.[9] Findings about whether subjects are rated less sympathetic, less likable, or less credible in virtual court may or may not

in person in the dock (a feature of criminal trials in Australia, where this study was conducted) than when he was remote. DAVID TAIT ET AL., TOWARDS A DISTRIBUTED COURTROOM 48-49 (2017).

5. *See, e.g.*, Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 85-86 (2006); Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court; JULIE DONA ET AL., THE LEGAL ASSISTANCE FOUND. OF METRO. CHI., & AMANDA GRANT ET AL., CHI. APPLESEED FUND FOR JUST., VIDEOCONFERENCING IN REMOVAL HEARINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT 38-40 (2005) [hereinafter REMOVAL HEARINGS], http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf; Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. 197, 216-17 (2021).

6. *E.g.*, PENELOPE GIBBS, TRANSFORM JUST., DEFENDANTS ON VIDEO – CONVEYOR BELT JUSTICE OR A REVOLUTION IN ACCESS? 8 (2017), https://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf; MCKAY, *supra* note 4, at 156-62; Turner, *supra* note 5, at 217.

7. Setting problems include the lack of a quiet or private environment, as well as environments that introduce cues to economic status, custodial status, or other legally irrelevant but potentially damaging factors. *See, e.g.*, Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 978-79 (2015); MCKAY, *supra* note 4, at 129-36; Carolyn McKay, *Video Links from Prison: Court "Appearance" Within Carceral Space*, 14 LAW, CULTURE & HUMANS. 242, 251-52, 258-59 (2018) [hereinafter *Video Links From Prison*].

8. *See, e.g.*, Sabine Braun, *Keep Your Distance? Remote Interpreting in Legal Proceedings – A Critical Assessment of a Growing Practice*, 15 INTERPRETING 200 (2013); Christian Licoppe et al., *Voice, Power, and Turn-Taking in Multilingual, Consecutively Interpreted Courtroom Proceedings with Video Links*, *in* HERE OR THERE: RESEARCH ON INTERPRETING VIA VIDEO LINK 299, 299-317, 319-21 (Jemina Napier et al. eds., 2018); Christian Licoppe & Clair-Antoine Veyrier, *The Interpreter as a Sequential Coordinator in Courtroom Interaction*, 22 INTERPRETING 56 (2020). For example, the Legal Assistance Foundation of Chicago study found that those who use interpreters are more likely to experience technical problems; have problems with evidentiary and testimonial issues, including being offered access to documents; are subject to some material mistranslations; and are ignored even more than in person, so much of what is said is simply not translated. REMOVAL HEARINGS, *supra* note 5, at 40-44.

9. *See infra* text accompanying note 11.

shed light on the dynamics of empathy, depending on both the focus of the study and the definition of empathy employed.[10]

In this Essay, we explain why virtual courts may alter decision-makers' capacities to empathize, in comparison to both pre-COVID remote proceedings and traditional in-person proceedings. On the whole, the video interface on Zoom and comparable platforms probably makes empathizing more challenging, although in some respects it may make it easier. Especially concerning, however, are the possible effects of virtual proceedings on empathy for those who are already subject to empathy deficits. Do remote proceedings impair the cognitive ability to assess the intentions of others? Do they reduce the kinds of affective engagement that empathy often requires? Do they especially disadvantage those with whom judges, jurors, and other decision-makers tend to find empathic engagement more effortful because of a lack of shared demographics, cultural differences in expression, pre-existing assumptions and prejudices, or other factors? Our goal is to lay out precisely what can and cannot be concluded from the current research.

II. EMPATHY: DEFINITIONAL ISSUES

Our first task is to steady the moving target: the meaning of "empathy." The term has no single, consensus-based meaning across fields of study or even within any given field.[11] In this Part, we clarify the definition on which we are relying, acknowledging that others may define the word differently.

Empathy is the capacity to comprehend the situation of another[12] and her emotional responses to that situation.[13] This comprehension need not be accompanied by any inclination to favor the target. Nor should it be confused with action-oriented emotions like compassion or sympathy, which are likely to dispose the decision-maker to help some petitioners, complainants, or litigants at the expense of others. In short, empathy is an essential tool for the legal decision-maker, permitting her to grasp the stakes for all

10. Bandes has previously discussed the definitional issues with empathy in, inter alia, Susan A. Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 373-82 (1996); Susan A. Bandes, *Empathetic Judging and the Rule of Law*, CARDOZO L. REV. DE NOVO 133, 135-36 (2009); Susan A. Bandes, *Empathy and Article III: Judge Weinstein, Cases and Controversies*, 64 DEPAUL L. REV. 317, 321-23 (2015).

11. *See, e.g.*, C. Daniel Batson, *These Things Called Empathy: Eight Related but Distinct Phenomena*, *in* THE SOCIAL NEUROSCIENCE OF EMPATHY 3, 3-8 (Jean Decety & William Ickes eds., 2009).

12. FRITZ BREITHAUPT, THE DARK SIDES OF EMPATHY 10 (Andrew B. B. Hamilton trans., 2019).

13. *See* Raymond S. Nickerson et al., *Empathy and Knowledge Projection*, *in* THE SOCIAL NEUROSCIENCE OF EMPATHY, *supra* note 11, at 43.

participants in the proceeding, yet not requiring her to promote one person's interests over another's.

At first blush, empathy so defined appears purely cognitive, but it also has affective dimensions. The merely cognitive understanding of the needs and desires of others is essential, but it is not necessarily helpful to the subject.[14] It is the affective dimensions of empathy that make it a prosocial capacity. One such dimension is the motivation for the empathic effort: concern for the well-being of the subject, as opposed to clinical curiosity or instrumental aims.[15] The other is the willingness to make the effort that empathy may require.

At times empathy is (or at least seems) effortless: It may be virtually automatic, as when it arises through motor mimicry of another person who is physically co-present and to whose facial expressions and changes in posture we immediately and unconsciously respond in kind.[16] Indeed, this sort of automatic empathy, which occurs most naturally toward those we regard as familiar and "like us," often fails to register as empathy at all, and we may be quite unaware of engaging in it. However, empathy can be effortful, and the effort is especially crucial when the other person seems different or unfamiliar.[17] Empathy requires the humility to understand that one's own perspective is limited and that one cannot simply assume others share one's own internal landscape.[18] It also requires the curiosity and drive to understand the perspective of others.

Investigating the effect of remote proceedings on the exercise of empathy requires a focus on both its cognitive and affective dimensions. We ought to be concerned not only with whether remote proceedings interfere with the ability to read facial expressions and body language but also with whether remote proceedings divert energy from the effort to engage in

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14. In greater detail, *see* Bandes, *Empathetic Judging and the Rule of Law*, *supra* note 10, at 139.

15. As Batson observes, the term empathy is used to provide answers to two distinct questions that are often conflated: "How can one know what another person is thinking and feeling? [and] What leads one person to respond with sensitivity and care to the suffering of another?" Batson, *supra* note 11, at 3.

16. Ulf Dimberg et al., *Unconscious Facial Reactions to Emotional Facial Expressions*, 11 PSYCH. SCI. 86, 86-87 (2000); Jean Decety & Philip L. Jackson, *The Functional Architecture of Human Empathy*, 2 BEHAV. & COGNITIVE NEUROSCIENCE REVS. 71, 76 (2004).

17. On all of this, see MARK H. DAVIS, EMPATHY: A SOCIAL PSYCHOLOGICAL APPROACH 3-21 (1995).

18. "Theory of mind" is the term often used to describe the knowledge that others have mental states, including beliefs, intentions, desires, perceptions, and emotions, that differ from our own. *E.g.*, *American Psychological Association Dictionary of Psychology: Theory of Mind*, AM. PSYCH. ASSOC., https://dictionary.apa.org/theory-of-mind (last visited Aug. 26, 2021).

perspective-taking. When the will and energy to take the other's perspective are in short supply, the temptation to rely on cognitive shortcuts may predominate. The use of these shortcuts too often amounts to a resort to broad-brush generalizations, biases, and prejudices (e.g., people "like that" are responsible for their own misfortunes, whereas people "like us" do the best we can in difficult circumstances). In short, situations in which empathy becomes more effortful give rise to empathic divides that impose unequal burdens on those who do not share the demographic characteristics of the decision-maker, as we discuss in the next Part.

III. EMPATHIC DIVIDES AND SELECTIVE EMPATHY

Individuals vary in their capacity for empathy, their recognition of their own limitations and problematic assumptions, and their commitment to overcoming their blind spots and prejudices. Even when exercised with the best of intentions, empathy can be misdirected. It can also be triggered and deployed in biased ways. Thus the legal system, like other sites of decision-making, is plagued with empathic divides[19] and selective exercises of empathy[20] that disadvantage those who are seen as "other." These divides limit empathy's efficacy and impair the fairness and accuracy of legal proceedings.

It is not uncommon to misread others' emotions even in face-to-face encounters. Inferring emotions accurately from facial movements is much more problematic than is commonly believed.[21] Observers rarely have access to all the past and present situational information that shapes others' emotional states. Even if they do, observers trying to imagine themselves in the target person's situation may not correctly predict how they themselves would think or feel in that situation because people tend to exhibit "empathy gaps."[22] That is, people underestimate how much emotional situations

19. *See, e.g.*, CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 232 (Ronald Roesch ed., 2005); Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1558, 1582-88 (2004).

20. *See, e.g.*, Bandes, *Empathetic Judging and the Rule of Law*, *supra* note 10, at 139-41, 145-46.

21. *See, e.g.*, Lisa Feldman Barrett et al., *Emotional Expressions Reconsidered: Challenges to Inferring Emotion from Human Facial Movements*, 20 PSYCH. SCI. IN THE PUB. INT. 1, 1 (2019) ("[H]ow people communicate anger, disgust, fear, happiness, sadness, and surprise varies substantially across cultures, situations, and even across people within a single situation. Furthermore, similar configurations of facial movements variably express instances of more than one emotion category. In fact, a given configuration of facial movements, such as a scowl, often communicates something other than an emotional state.").

22. We would like to thank Tess Wilkinson-Ryan for sharing a preliminary draft of her discussion of empathy gaps in her 2021 Clifford Symposium essay. *See* Tess Wilkinson-Ryan,

influence their own attitudes and behaviors.[23] And where the social context does not permit flexible interactions between observer and target, these mistakes and discrepancies in the perception and construal of others' emotions may go uncorrected.[24]

Empathy is also subject to a number of biases. We will focus on three: the *egocentric bias, affective realism,* and the *similarity bias*.

The *egocentric bias* stems from our tendency to impute our own thoughts to others.[25] That is, when we think we are empathizing with the other person's thoughts and feelings, we may instead be projecting our own.[26] To be sure, this bias is to some extent unavoidable: "[W]hen one attempts to imagine what it is like to be a specific other person, what one is really doing is imagining what it would be like to be oneself—how one would feel or behave—in the other person's situation."[27] If what results is a misreading of the other's actual thoughts and feelings, however, it can lead participants in legal proceedings to deploy empathy inaccurately or to fail to deploy it at all.

In addition, empathy, like other social judgments, is influenced by *affective realism,* the tendency for our own subconscious visceral and bodily reactions to color our evaluations of others.[28] In the courtroom, observers' evaluations of other people's emotional states—what it is that observers think their empathy with others is telling them—may in part reflect their own emotional states instead, confounding the understanding of others that empathy is supposed to yield.

Perhaps most important for purposes of the present discussion, empathy is subject to the *similarity bias*: Evaluators are more likely to empathize with subjects whom they regard as similar to themselves.[29] This may be because perceived similarity with the other person facilitates the perspective-taking

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23. Leaf Van Boven et al., *Changing Places: A Dual Judgment Model of Empathy Gaps in Emotional Perspective Taking*, 48 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 117 (2013); *see also* Maria Gendron & Lisa Feldman Barrett, *A Role for Emotional Granularity in Judging*, 9 OÑATI SOCIO-LEGAL SERIES 557, 564 (2019) (discussing emotional granularity).

24. *Cf.* William Ickes, *Empathic Accuracy: Its Links to Clinical, Cognitive, Developmental, Social, and Physiological Psychology*, *in* THE SOCIAL NEUROSCIENCE OF EMPATHY, *supra* note 11, at 58, 60.

25. Raymond Nickerson, *How We Know—and Sometimes Misjudge—What Others Know: Imputing One's Own Knowledge to Others*, 125 PSYCH. BULL. 737, 738 (1999).

26. Nickerson et al., *supra* note 13, at 49.

27. *Id.* at 52.

28. Eric Anderson et al., *Out of Sight but Not Out of Mind: Unseen Affective Faces Influence Evaluations and Social Impressions*, 12 EMOTION 1210, 1218-19 (2012).

29. DAVIS, *supra* note 17, at 15; *see also* Nickerson et al., *supra* note 13, at 44.

which often precedes empathy[30]—it's easier to adopt the other's perspective if the other's situation seems familiar. It may also be because observers feel more confident about the congruence between their own affective state and what they presume a similar other person is feeling. This easy empathy based on perceived similarity is unavailable to subjects whom the evaluator perceives as different or "other."

IV. EMPATHY IN VIRTUAL COURTROOMS

Many have suspected that legal decision-makers find it harder to empathize with those they encounter on a screen rather than face-to-face. For instance, the researchers who found that Cook County, Illinois judges set higher bail for defendants appearing in court via video than for those appearing in person suggested as one possible reason the "dehumanization" of the defendants who appeared remotely.[31] Only two experimental studies published to date, however, have specifically examined mock legal decision-makers' empathy toward someone they saw and heard on video versus in person. One study measured responses to child witnesses;[32] the other, to adult sexual assault complainants.[33] Neither found that participants felt less empathy for witnesses who testified via closed-circuit television as opposed to in person.[34] Several studies have found that witnesses who appear in person are evaluated as more likable,[35] but while likeability may be related

30. *See* Jeanine L. Skorinko et al., *Effects of Perspective Taking on Courtroom Decisions*, 44 J. APPLIED SOC. PSYCH. 303, 306 (2014).

31. Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 898, 900 (2010).

32. 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, 346-47, 358 (2001).

33. NATALIE TAYLOR & JACQUELINE JOUDO, THE IMPACT OF PRE-RECORDED VIDEO AND CLOSED CIRCUIT TELEVISION TESTIMONY BY ADULT SEXUAL ASSAULT COMPLAINANTS ON JURY DECISION-MAKING: AN EXPERIMENTAL STUDY 12, 22, 35-36 (Austl. Inst. of Criminology Rsch. & Pub. Pol'y Ser. No. 68, 2005).

34. Another study measured participants' sympathy, rather than empathy, toward a child witness who testified live and in person or in the form of a prerecorded videotaped forensic interview. The researchers found that participants who saw and heard the live testimony were more sympathetic to the witness, which in turn was partly responsible for an increased tendency to find the defendant guilty. Gail S. Goodman et al., *Hearsay Versus Children's Testimony: Effects of Truthful and Deceptive Statements on Jurors' Decisions*, 30 LAW & HUM. BEHAV. 363, 386-87 (2006).

35. *E.g.*, Sara Landström et al., *Witnesses Appearing Live Versus on Video: Effects on Observers' Perception, Veracity Assessments and Memory*, 19 APPLIED COGNITIVE PSYCH. 913, 928 (2005).

to empathy,[36] it is not the same thing. Moreover, these more favorable assessments of in-person witnesses tend not to affect participants' verdicts.[37]

In any event, caution is needed in generalizing from these relatively few experimental studies, or from the field observations of remote appearances at arraignments, bail hearings, and sentencing, to contemporary virtual legal proceedings on Zoom or comparable videoconferencing platforms. As we mentioned earlier, various factors apart from empathy deficits may account for the disadvantaging of remote subjects. These include suboptimal access to counsel or interpreters, as well as technical issues such as poor quality and placement of the remote video camera, poor internet connections, limited screen size, and poor resolution of the image seen in the courtroom.[38] Perhaps more important, as already noted, none of the research to date has studied the effects of video on empathy when all of the participants are on the same video interface, as they are in virtual courtrooms.[39]

Nevertheless, there are several reasons to believe that decision-makers' capacities to empathize are altered in virtual courts, at least in their current configurations on Zoom and comparable platforms, in comparison to both pre-COVID remote proceedings and traditional in-person proceedings. Emotional display and recognition, inside or outside the courtroom, are social practices, constructed and re-constructed via social interactions.[40] Anything

36. Liking the other person can increase empathy for that person by increasing the observer's (unconscious) facial and bodily mimicry of the other, which is one path to empathy. *E.g.*, Mariëlle Stel et al., *Effects of A Priori Liking on the Elicitation of Mimicry*, 57 EXPERIMENTAL PSYCH. 412, 417-18 (2010), https://www.researchgate.net/publication/41548014_Effects_of_a_Priori_Liking_on_the_Elicitation_of_Mimicry. However, liking the other is not necessary for such mimicry, *see* Tanya L. Chartrand & John A. Bargh, *The Chameleon Effect: The Perception-Behavior Link and Social Interaction*, 76 J. PERSONALITY & SOC. PSYCH. 893, 904, 906 (1999), nor is it necessary for the more deliberate perspective-taking path to empathy.

37. *See, e.g.*, Graham Davies, *The Impact of Television on the Presentation and Reception of Children's Testimony*, 22 INT'L J. L. & PSYCHIATRY 241, 251 (1999) ("Jurors may show a preference for live evidence but the positive attributional effects appear to be short-lived and do not survive the deliberation process."); *see also* Chris Fullwood et al., *The Effect of Initial Meeting Context and Video-Mediation on Jury Perceptions of an Eyewitness*, INTERNET J. CRIMINOLOGY 1, 7 (2008), https://www.internetjournalofcriminology.com/primary-research-papers. *But see* Goodman et al., *supra* note 34, at 386-87, 393 (finding that participants who saw live testimony were more sympathetic to the child witnesses when the witnesses testified live and in person, which in turn made them more likely to find the defendant guilty).

38. Diamond et al., *supra* note 31, at 898, 900; GIBBS, *supra* note 6, at 8, 27-28; MCKAY, *supra* note 4, at 89-90, 119-20. Modern videoconferencing technology and faster internet can alleviate some of the technical problems, at least for some proceedings.

39. *See supra* note 4 and accompanying text.

40. *See* Stina Bergman Blix & Åsa Wettergren, *The Emotional Interaction of Judicial Objectivity*, 9 OÑATI SOCIO-LEGAL SERIES 726, 731 (2019); SHARYN ROACH ANLEU & KATHY MACK, JUDGING AND EMOTION: A SOCIO-LEGAL ANALYSIS 6-7 (2021).

that significantly affects the nature of those interactions and the environment in which they occur may affect people's emotional experiences and the effects of those experiences on their behavior and judgment.[41] Conducting legal proceedings on a video interface rather than primarily or entirely in a physical courtroom—literally *dis-placing* adjudication onto a screen—is likely to affect the conditions for experiencing empathy.[42] Although in some respects remote proceedings may facilitate empathy,[43] on the whole, video interfaces probably make empathizing more challenging. Of greatest concern are the possible effects of virtual proceedings on empathy for those who are already subject to empathy deficits.

First, the flattening of other people's physical reality into small head-and-shoulders video images,[44] as well as the reduction of their vocal ranges to whatever the technology can accommodate, makes those others' presence less salient. The less vivid the stimulus, the less intense the response, empathic or otherwise.[45] At the extreme, decision-makers may dismiss the suffering of the real human being who appears to them only on video, as in the case of this self-represented litigant at an immigration proceeding: "[The immigrant] was sobbing . . . No one even noticed how stressed out she was. Everyone was stapling exhibits and passing papers, and then it was over . . .

41. Of course, judges, jurors, and other observers, whether in a physical or virtual courtroom, have access to other sources of information about the target person's situation, such as other witnesses' testimony and the other evidence in the case, as well as the stories that the opposing lawyers have spun from the evidence in their opening statements and summations. This information enables them, if they are so disposed, to supplement and improve their understanding of the subject's situation. That is not all. As Bandes explains in *Empathy and Article III: Judge Weinstein, Cases and Controversies*, *supra* note 10, at 334-35, "a judge armed with empathy, concern, and curiosity can learn quite a bit about litigants' actual motivations" via other means, including questionnaires addressed to class members, and can learn about their situations and predicaments via site visits. *Id.* at 327, 329.

42. It is worth observing that people tend eventually to habituate to new technologies, and so it is certainly plausible that as remote proceedings become more prevalent, participants may adapt their empathic capacities to online environments.

43. For instance, some judges and others have remarked that in speaker view, they can see witnesses better than they might be able to in the physical courtroom. *See, e.g.*, Valerie P. Hans, Virtual Juries 18 (unpublished manuscript) (on file with authors).

44. Possibly very small, depending on the size of the user's screen, the number of participants shown in "gallery view," and the distance of those others from their own cameras.

45. As a general principle, the stronger the stimulus, the stronger the response (although the relationship is not linear). *See* Lawrence E. Williams et al., *The Distinct Affective Consequences of Psychological Distance and Construal Level*, 60 J. CONSUMER RSCH. 1123, 1124-25 (2014). The same is true of affective reactions to others' situations. "Especially with regard to affective reactions, situations vary tremendously in terms of their power to evoke a response from observers. Strong displays of negative emotion . . . are particularly able to engender powerful observer responses." DAVIS, *supra* note 17, at 14-15.

It seems like her condition might have had more of an impact had she been in the courtroom, but no one even noticed her."[46]

Second, the compression and distortion of what each participant can see of others in Zoom's gallery view—those small head-and-upper body views, more or less always frontal, sometimes captured from awkwardly high or low angles, possibly not very well lit—limit the opportunities for the unconscious mimicry of others' facial expressions of emotion, a recognized implicit path for empathy.[47] The reduced field of view also limits access to others' gestures and postures, which can help correct for mistaken inferences of others' emotional states based on their facial expressions alone.[48] The distortions introduced by awkward camera angles, poor lighting, and other features of the video feed may disproportionately affect litigants appearing only by smartphone, those appearing from jail, prison, or other detention facilities, and others with access to only suboptimal environments.[49] Zoom does not eliminate these types of disparities.

One area that requires further study is the effect of image compression on observers' perceptions of those with physical and cognitive disabilities. On the one hand, the effect may be to deprive decision-makers of essential information. One judge in remote immigration proceedings reported that he was "unable to identify a respondent's cognitive disability over [video teleconference, although] the disability was clearly evident when the respondent [later] appeared in person . . . ."[50] On the other hand, as law professor Adam Samaha recently argued, the reduced visibility on Zoom may permit subjects to minimize the impact of their own distracting behaviors, such as uncontrolled bodily movements due to disabilities such as

46. REMOVAL HEARINGS, *supra* note 5, at 46 (alteration in original).

47. *See supra* note 16 and accompanying text.

48. *See* ALEXANDER TODOROV, FACE VALUE 250-54 (2017); Douglas Heaven, *Expression of Doubt*, 578 NATURE 502, 502-03 (2020). One study has found that participants in a videoconference with a head-and-upper-body view of the other person exhibited more empathy (measured in terms of how quickly they picked up a pen dropped by a confederate of the researchers) than did those who had a face-only view of the other person. David T. Nguyen & John Canny, *More than Face-to-Face: Empathy Effects of Video Framing*, CHI: TELEPRESENCE & ONLINE MEDIA 423, 424, 431 (2009), https://www.researchgate.net/publication/221514278_More_than_face-to-face_Empathy_effects_of_video_framing. The researchers speculated that this result was due to the greater availability of proxemics and posture when the other person's upper body as well as head was visible. *Id.* at 431.

49. *See supra* note 7 and accompanying text.

50. Bannon & Adelstein, *supra* note 5, at 6 (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHANGES 55 (2017)).

Parkinson's disease and other neuromuscular conditions.[51] He observed: "Videoconferencing offered me more power over the physical environment and visual frame for social interaction. That helped me direct audiences toward what I intended to communicate, rather than the movements and postures that often distract them."[52]

Third, as has often been noted, standard videoconferencing platforms make normal eye contact difficult, if not impossible. If someone appears to be looking at you, he almost certainly isn't, because he must be looking at the camera instead. And if the person appears to be looking at you, everyone else looking at their respective screens has the same impression, so that it is impossible for any one participant to appear to be looking uniquely at any other. This lack of mutual, reciprocal gaze has been found to make people evaluate others encountered on video as less likeable (and less intelligent) than those encountered face-to-face,[53] which may, in turn, lessen their inclination to empathize with the other.[54] Relatedly, it may negatively influence evaluations of credibility and assessments of remorse, both of which are often affected by the presence or absence of direct eye contact.[55]

Fourth, the array of frames on Zoom and even the term "gallery" itself suggest a kind of diminishment of the individual participants by representing them as mere tiles in a larger grid, shorn of real spatial context. In the virtual courtroom, a judge cannot turn to and face the defendant, and when the judge speaks to the defendant, she appears to address everyone in the interface at the same time. These unfamiliar and counterintuitive sightlines interfere with participants' ability to exercise *interactional competence*:[56] the ability to recognize and adapt to subtle cues in body language and facial expression, which observers understand as a sign of participants' social (and, in the case of judges, lawyers, and expert witnesses, professional) skills.

Relatedly, participants in virtual proceedings are aware that a screen has been interposed between them and every other participant (two screens,

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51. Adam M. Samaha, *Opening and Reopening: Dealing with Disability in the Post-pandemic World*, SLATE (July 6, 2021, 9:30 AM), https://slate.com/technology/2021/07/pandemic-disability-reopening-essay.html.

52. *Id.*

53. Chris Fullwood, *The Effect of Mediation on Impression Formation: A Comparison of Face-to-Face and Video-Mediated Conditions*, 38 APPLIED ERGONOMICS 267, 270-71 (2007).

54. See *supra* note 36 and accompanying text. Also, lack of eye contact may increase the psychological distance between observer and target, which would be expected to decrease the intensity of affective response to the other. *E.g.*, Williams et al., *supra* note 45, at 1123, 1124-25, 1129, 1134.

55. Rocksheng Zhong et al., *So You're Sorry? The Role of Remorse in Criminal Law*, 42 J. AM. ACAD. PSYCHIATRY & L. 39, 43 (2014).

56. *See* 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).

actually). The awareness that one is sitting in front of a screen and that one's interlocutor is not actually nearby inhibits various behaviors, such as inclining one's head or leaning toward the other, which we use in everyday life to maintain a connection with and express empathy for the person next to us.[57] Indeed, appearing only through a screen may tend to make people feel generally more withdrawn from the proceedings.[58] This lack of engagement may translate into less engaging testimony, which, in turn, may elicit less empathy.[59]

Fifth, lags and glitches in internet connectivity may affect empathy, and, like many of the effects we discuss, may be particularly problematic in situations where empathy is most effortful. Even a slight lack of synchrony between sound and picture can alter the communication and uptake of the microexpressions on which our reading of others' demeanors depends, resulting in observers misattributing the negative qualities of the video technology to the person they are observing.[60] This is an instance of what psychologists label the *fundamental attribution error* or *correspondence bias*: overattributing the causes of others' behavior to their fixed character

57. *See* Marie Burton, *Justice on the Line? A Comparison of Telephone and Face-to-Face Advice in Social Welfare Legal Aid*, 40 J. SOC. WELFARE & FAM. L. 195, 202-03 (2018) (comparing telephonic with face-to-face attorney-client interviews; unlike telephonic communication, Zoom of course allows (some) visual access, but some of the same observations apply). To be sure, the video interface is not *just* a screen; it also functions as a window (onto other people and places to whom or which we might not otherwise have access) and a mirror (in self-view). Judy Radul, *What Was Behind Me Now Faces Me: Performance, Staging, and Technology in the Court of Law*, EUROZINE (May 2, 2007), https://www.eurozine.com/what-was-behind-me-now-faces-me/. The semiotics of videoconferencing are complicated and beyond the scope of this essay.

58. MCKAY, *supra* note 4, at 119-20; *Video Links from Prison*, *supra* note 7, at 258 (quoting a criminal defendant in the UK: "M04 felt he was perceived as a generic, screen-based prisoner, indistinguishable from the last: 'You're only a bunch of pixels on a screen, if whether or not the judge is going to be able to look at you and actually feel who you are, rather than just see you wearing green, yeah, you can blend in to the crowd a little bit.'"); *see also* Eagly, *supra* note 7 (finding that detained immigrants are more likely to be deported because they make less use of available processes).

59. *See, e.g.*, Turner, *supra* note 5, at 222 (finding that in deportation hearings, remote participants tend to be more passive and less engaged in the proceedings). One criminal defense attorney in the UK remarked that "[m]any, or even most, defendants seem to feel disconnected from the court process when appearing via video-link," and a magistrate concurred: "[The defendants] appear disengaged and remote. They often give a nonchalant/poor account of themselves and we are left to infer that they couldn't care less/that they are disrespectful of the court." GIBBS, *supra* note 6, at 17.

60. Katrin Schoenenberg et al., *Why Are You So Slow? – Misattribution of Transmission Delay to Attributes of the Conversation Partner at the Far-End*, 72 INT'L J. HUM.-COMPUT. STUD. 477, 478 (2014); *see also* Angela Chang, *Zoom Trials as the New Normal: A Cautionary Tale*, U. CHI. L. REV. ONLINE (Nov. 19, 2020), https://lawreviewblog.uchicago.edu/2020/11/19/zoom-chang/.

traits rather than to the situations in which they find themselves.[61] In virtual court, the resulting negative assessment of the other person (witness, lawyer, party) may dampen the observer's inclination to empathize with that person.

This particular type of error may be particularly harmful across empathic divides. We tend to assume that when we—and those we regard as "like us"—make mistakes, those mistakes are due to external, situational factors. But when those we regard as "other" make mistakes, we tend to attribute those mistakes to stable, internal factors like character. For example, findings of remorse in sentencing often hinge on whether sentencers perceive the wrongful act as an aberration rather than consistent with the subject's character. Thus, whether a subject appears remorseful may be a function of whether the fact-finder makes the effort to understand the nuances of the subject's situation,[62] or simply falls back on the habit of attributing bad conduct to presumed bad character. Empathic divides make this kind of nuanced exploration more effortful and thus less likely, and virtual proceedings may make it even more onerous.

Sixth, "Zoom fatigue" —the experience of becoming mentally or physically exhausted by lengthy or repeated Zoom meetings—may also impede and distort empathy in virtual court. For various reasons, it takes more effort to sustain presence of mind in a videoconference than in a physical meeting, including the strain of sitting relatively immobile in front of a camera for extended periods, the need to make subconscious micro-adjustments for the lags in video transmission, the sense of being gazed at constantly by many others, and the constant awareness of one's own image in the video array.[63] This added cognitive load may adversely affect empathy in four ways. First: Subjects may find it harder to maintain the kinds of demeanor that will elicit decision-makers' empathy.[64] Second: Evaluators may tend to misattribute their own negative affect, resulting from the added strain, to the targets of their attention (affective realism again), reducing their inclination to empathize. Third: Increased cognitive load may make it more difficult to expend the effort to be empathetic in the first place, at least with

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61. *E.g.*, Daniel T. Gilbert, *Ordinary Personology*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 89, 130-34 (Daniel T. Gilbert et al. eds., 1998); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 120-25 (1980).

62. *See* M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 313-14 (2018).

63. *See* Jeremy N. Bailenson, *Nonverbal Overload: A Theoretical Argument for the Causes of Zoom Fatigue*, 2 TECH., MIND, & BEHAV. 1, 2-5 (2021), https://tmb.apaopen.org/pub/nonverbal-overload/release/2.

64. Those who fidget or look anywhere but at the camera—and it's impossible to avoid doing these things in a Zoom session of any length—may be perceived, rightly or wrongly, as not appropriately engaged in the proceedings, making it more difficult for observers to gauge their actual emotional states accurately.

a useful degree of granularity.[65] And fourth: Evaluators under cognitive stress may rely more on heuristic cues, including stereotypes,[66] and may also be more prone to the similarity and egocentric biases that can distort the exercise of empathy. In other words, Zoom fatigue may have the most negative impact on the judgments of those who are already burdened by empathy deficits.

Seventh, virtual legal proceedings unfold not in a courtroom in a courthouse, with the architecture, statuary, and other physical symbols that express the place of justice in the community, but in the *non-place*[67] of cyberspace.[68] The arrangement of the physical courtroom frames and heightens participants' performances of emotion.[69] How the loss of this heightened emotionality on Zoom will affect empathy remains to be seen. As we have discussed elsewhere, while the virtual platform may lead some to feel unmoored or generally let down by the lack of an authoritative setting,[70] others may find virtual space less intimidating and alienating.[71] In addition, while the loss of emotional resonance may rob some testimony of its impact, it has also been observed that virtual proceedings may reduce grandstanding, bullying, and other intimidating behavior.[72]

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65. Gendron & Barrett, *supra* note 23, at 566.

66. Carlos Ferran & Stephanie Watts, *Videoconferencing in the Field: A Heuristic Processing Model*, 54 MGMT. SCI. 1565, 1568 (2008).

67. MARC AUGÉ, NON-PLACES: INTRODUCTION TO AN ANTHROPOLOGY OF SUPERMODERNITY 77-79 (John Howe trans., 1995).

68. *See id.* at 103.

69. *See* Bandes & Feigenson, *supra* note 1, at 1326.

70. *See id.* at 1318; *see also Video Links from Prison*, *supra* note 7, at 257 ("[S]everal [defendants], such as F09, expressed how the AVL experience was 'weird, strange,' and 'like watching TV.' F12 commented that screen space was: 'Surreal, umm you know, watching it on a screen, it's surreal, gotta remind yourself, it's talking about you.' For many prisoners, video links generate a non-immersive and alienating experience.").

71. This may be because of participants' ability to remain in familiar surroundings, Bandes & Feigenson, *supra* note 1, at 1297, and/or because at least some judges are careful to provide clearer instructions for the uninitiated on Zoom than they might in traditional courtrooms, *e.g.*, Elizabeth G. Thornburg, *Observing Online Courts: Lessons from the Pandemic*, 54 FAM. L.Q. 181, 194-95 (2020).

72. *See, e.g.*, Joy Odom et al., *Tips for Effective Witness Cross-Examination in Remote Trials*, LAW360 (Aug. 12, 2020, 4:29PM), https://www.law360.com/articles/1300435/tips-for-effective-witness-cross-examination-in-remote-trials (advising modulating tone and body language, and toning down "dramatics"); *see also* Judge Emily Miskel, *Unavailability*, EXCITED UTTERANCE (June 10, 2021), https://excitedutterance.com/the-unavailability-workshop. Of course, terms like "intimidating," "grandstanding," and "bullying" are freighted, and whether they are apt is likely to be a matter of perception and debate. For example, Turner, *supra* note 5, at 251, reports that defense attorneys found effective remote cross-examination extremely difficult. As one said, "witnesses should not feel the safety of video distancing during questioning. They need to feel confronted, and the eyes of scrutiny upon them." *Id.*

Eighth, because it has no "off-stage," the virtual court has no room for a litigant's family or friends,[73] and their absence will change the emotional landscape of remote proceedings in ways that remain to be determined. For example, a jury in a criminal trial will not see the defendant's family members in the spectator section and will thus lose those empathy-inducing cues to the defendant's roles as a husband, father, son, or valued member of his community.[74] But as we have discussed in detail elsewhere, off-stage behavior may be harmful as well as helpful to litigants. For example, empathy for criminal defendants may be overridden by empathy (or sympathy) toward other spectators, particularly the victims' family members.[75]

The absence of a shared physical space in virtual courtrooms is likely to exert the most profound influence on the dynamics of empathy, for at least two reasons. First, people intuitively associate greater physical distance with greater social distance.[76] According to *construal-level theory*,[77] greater social distance leads to a stronger tendency to commit correspondence bias or the fundamental attribution error.[78] That is, it makes it more likely that those evaluating the behavior of another will attribute it to bad character rather than circumstances, impeding empathy.[79] Indeed, one neuroscientific study has found that greater perceived physical distance from a target person reduced participants' brain activity associated with empathy.[80] Another set of experiments has mapped these general findings regarding physical distance and social or psychological distance onto courtroom adjudication. Using virtual views of a standard courtroom, researchers showed that participants judged the defendant as less likely to prevail when the defendant was depicted as sitting farther from the jury box.[81] We posit that when

73. *See* Bandes & Feigenson, *supra* note 1, at 1335-36.

74. *See* MCKAY, *supra* note 4, at 105.

75. *See* Bandes & Feigenson, *supra* note 1, at 1305-06; *see also* Elizabeth Beck et al., *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 401 (2003) (discussing how bailiffs and others in the capital courtroom at times display sympathy for victims' family members while ignoring the family of the defendant). The lack of a physically co-present audience is likely to influence courtroom dynamics in other ways as well—and we should remain especially alert to the concern that its absence may affect those who are unsophisticated about the perils of performing before an invisible audience.

76. Justin Lee Matthews, How Spatial Is Social Distance? 68-69 (2014) (Ph.D. dissertation, University of California, Merced) (on file with eScholarship, University of California).

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

78. *See id.* at 447-48.

79. *Id.*

80. Lomoriello et al., *supra* note 2, at 9.

81. Winter et al., *supra* note 2.

empathic engagement is already difficult for decision-makers across racial, ethnic, or other demographic divides, the increased challenges posed by distance will lead decision-makers to rely more heavily on cognitive shortcuts—i.e. broad-brush categorizations about types of people. This reliance on heuristics and biases will further disadvantage litigants already less likely to benefit from the intuitive empathy we tend to accord to those "like us."

Second, physical co-presence, which cannot exist in the video interface no matter how sophisticated the technology or how reliable the internet connection, is fundamental to the prototypical natural experience of empathy. It is not essential to empathy; we can empathize with those we read about, or see in movies,[82] on television, or online. Merely seeing a photo of another person performing an action causes us to simulate that action in our minds[83] and, under some conditions, to adopt the perspective of the person performing the action,[84] which can be a prelude to empathy. Indeed, we can empathize with fictional characters, so much so that the reading of good fiction has been recommended as a means of developing emotional and moral intelligence.[85] And some of the qualities of co-presence can be reproduced in virtual environments.[86] What cannot be experienced virtually, however, at least not on current videoconferencing platforms, is the visceral sense of physical co-presence and the realm of awareness of others it enables.[87] It remains to be seen how important this sense of co-presence is, not only to cognitive empathy but also to the affective component of empathy—the desire to learn more about the other, which may, in turn, intensify one's concern for the other. This willingness to make the extra effort is most urgent when the subject is already at an empathy disadvantage.

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82. Adriano D'Aloia, *The Character's Body and the Viewer: Cinematic Empathy and Embodied Simulation in the Film Experience*, *in* EMBODIED COGNITION AND CINEMA 187, 187-88 (Maarten Coëgnarts & Peter Kravanja eds., 2015).

83. *E.g.*, David Kemmerer, *How Words Capture Visual Experience: The Perspective from Cognitive Neuroscience*, *in* WORDS AND THE MIND: HOW WORDS CAPTURE HUMAN EXPERIENCE 289, 301-03 (Barbara C. Malt & Phillip Wolff eds., 2010).

84. Sandra C. Lozano et al., *Putting Action in Perspective*, 103 COGNITION 480, 481-83 (2007).

85. *See, e.g.*, MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE 230-32 (1990).

86. *See* Celeste Campos-Castillo & Steven Hitlin, *Copresence: Revisiting a Building Block for Social Interaction Theories*, 31 SOC. THEORY 168, 171 (2013); *see* Meredith Rossner & David Tait, *Presence and Participation in a Virtual Court*, CRIMINOLOGY & CRIM. JUST. 1, 5-6 (2021), https://doi.org/10.1177/17488958211017372.

87. *See* Iso Kern, *Intersubjectivity*, *in* ENCYCLOPEDIA OF PHENOMENOLOGY, 355, 358 (Lester Embree et al. eds., William McKenna trans., 1997).

V. EMPATHY'S ROLE IN ACCURACY AND FAIRNESS

At bottom, there is no good way to measure empathic accuracy in legal proceedings. One can measure outcomes, and one might also measure the role of empathy in the dynamics of decision-making, but ultimately any measure will be comparative. For example, most of the field studies that have garnered attention have measured outcomes, concluding that petitioners in immigration removal proceedings are less likely to be deported after in-person hearings, that in-person asylum applicants are more successful than remote applicants, and that judges set higher bail after remote hearings compared to in-person ones. These findings may well indicate that the in-person decision-makers were more sympathetic toward the applicants, but they do not demonstrate that the in-person decision-makers were more (or less) accurate in their reading of the applicants' internal mental states than the remote decision-makers were.

The question of accuracy is likely unanswerable in a legal forum because the legal system has no way of measuring what people *actually* feel, desire, or intend. Decision-makers cannot confirm the genuine nature of the asylum applicant's fear, the police officer's fear, or the fear of the defendant claiming self-defense, for example, though they can make a determination about whether it is reasonable to be fearful under the circumstances. Judges and juries cannot know who is truly remorseful, or who is truly a flight risk or a danger to others (though after the fact, researchers can try to find a correlation between in-court expression of emotion and later behavior). There is no baseline evidence about what is in the secret hearts of litigants or witnesses.[88]

Although pinpointing accuracy is elusive in this context, measures of fairness are within reach. If, hypothetically, all parties were equally disadvantaged by the effects of remote proceedings on the elicitation of empathy (for example, in a civil case involving demographically similar litigants), there would be little cause for concern about fairness, especially if we have no way to assess whether empathy is more "accurate" in physical or virtual courts. We do not yet have the studies that allow for such comparisons. But we do have ample reason to be concerned that remote

88. This observation about the legal system can be further generalized to non-legal contexts. Most studies of demeanor and body language, of necessity, focus on how people *read and interpret* facial expression and body language, not on the extent to which these indicia truly reflect inner emotional states. Although there is some controversy on the topic, there is a strong argument to be made that demeanor and body language cannot be reliably tied to inner emotional states and that these are poor indicia when shorn of additional context. For example, Todorov's work on facial expression, *see, e.g.*, *supra* note 48, at 41-42; *see also supra* note 21 and accompanying text, measures what people *believe* is shown by the facial expressions of others, not what those facial expressions *actually show*. *But see* Paul Ekman, *An Argument for Basic Emotions*, 6 COGNITION & EMOTION 169, 193 (1992).

proceedings, under current conditions, exacerbate empathic divides in ways that impose unequal burdens on some types of litigants. There is substantial troubling evidence that empathic divides based on race, social class, ethnicity, and gender infect legal proceedings even under the most optimal circumstances. These divides may arise from differences in life experience,[89] or from cultural expectations or implicit "feeling rules"—for example, different expectations about the social meaning of eye contact[90] or about when it is appropriate to show emotion.[91] They may be based on or exacerbated by prejudice, including gender-based assumptions about what makes a witness or complainant credible,[92] or the well-documented tendency to associate blackness with dangerousness,[93] criminality,[94] lack of remorse,[95] and other negative character traits. Many of these fairness concerns implicate constitutional guarantees against unequal treatment.

Remote proceedings can be designed and conducted to address these concerns, at least to some extent. Judges, court administrators, and other relevant legal actors should be on the lookout for new videoconferencing platforms[96] that promise to reduce the current deficiencies in eye contact and gaze alignment that may impede empathy. In addition, they should adopt protocols that enhance all participants' sense of presence and ability to participate in the virtual environment.[97] These protocols should aim to increase and more equally distribute the mutual awareness and fellow-feeling that are so important to the experience of empathy. Continuing legal

89. *See e.g.*, Susan A. Bandes, *Video, Popular Culture, and Police Excessive Force: The Elusive Narrative of Over-Policing*, 2018 U. CHI. LEGAL F. 1, 2 (2018) (discussing example of a state court judge who found that the complainant's account that he was subjected to unprovoked police brutality was "improbable and contrary to human experience").

90. *See* Zhong et al., *supra* note 55, at 43.

91. Susan A. Bandes, *Remorse and Criminal Justice*, 8 EMOTION REV. 14, 16 (2016) (discussing cultural and age differences).

92. *See* Jessica M. Salerno & Liana C. Peter-Hagene, *One Angry Woman: Anger Expression Increases Influence for Men, but Decreases Influence for Women, During Group Deliberation*, 39 LAW & HUM. BEHAV. 581, 588-89 (2015).

93. *See* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 CORNELL L. FAC. PUBL'N 383, 385 (2006), https://scholarship.law.cornell.edu/lsrp_papers/41/.

94. *Id.* at 383.

95. Hanan, *supra* note 62, at 348; 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, 215 (2001).

96. *See* TAIT ET AL., *supra* note 4, at 7-8.

97. See, for example, the "Journeying to a virtual court" in Meredith Rossner et al., *Justice Reimagined: Challenges and Opportunities with Implementing Virtual Courts*, 33 CURRENT ISSUES IN CRIM. JUST. 94, 104-06 (2021), https://doi.org/10.1080/10345329.2020.1859968.

education programs can inform judges and lawyers about the risks of empathy deficits; model jury instructions can be developed to address them. As technological innovation inevitably changes the legal landscape, it is essential to ensure that virtual proceedings do not exacerbate existing inequities, and, ideally, to explore how they might make adjudication more just and equitable.