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Videoconferencing in Immigration Proceedings

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Abstract
[Excerpt] "When there is mention of a legal trial, a certain picture naturally comes to mind. One sees a judge in his black robe sitting on a raised bench. Lawyers are stationed at tables on either side of the courtroom, prepared to present their arguments to the court. A jury box may sit off to the side, holding a cross-section of citizens culled from the population to perform their ancient duty. The courtroom is made of fine wood and polished marble, and it is adorned with the accouterments of justice—American flags, seals, paintings of honored jurists—which let an observer know that he sits in a hall where important decisions are made and grave judgments are rendered.

Many people may be surprised to witness an immigration hearing in present-day America, where important decisions are also made and grave judgments are also rendered, but which has an altogether different and less impressive appearance. Observers are likely to see a small room located deep within a large federal building, with two tables perpendicular to one another, connected to form a right angle. A lawyer sits at each table, one representing the government and the other an alien. A row of chairs, behind these tables and against the walls, seat the family and friends of the alien. On the other side of the room, in view of the advocates and observers, is a television screen with a camera on top. This screen shows the judge on one side, who may be located in another state, and the alien on the other side, who is seated in a detention center in a third location.

As courts struggle to balance large caseloads and limited resources, they have increasingly turned to technological solutions. Videoconferencing, in particular, has become a popular tool in judicial proceedings in the last decade. It has found its way into state, federal, and administrative courts. In 1996, Congress allowed videoconferencing in immigration removal proceedings, and the Department of Homeland Security has steadily expanded the number of such proceedings conducted remotely through videoconferencing technology. The government believes that these proceedings are more efficient, less time-consuming, and more secure than traditional in-person hearings.

Part II of this article surveys the growing use of videoconferencing technology in American courts, including immigration proceedings. Part III examines the problems raised by the use of this new technology in the courtroom, specifically with regard to its impact on communication between the respondent and the judge. Next, Part IV shows how these problems violate the detainee's fundamental rights to presence, confrontation, and counsel. Finally, Part V presents recommendations to mitigate these problems while still taking advantage of new technology. Part V also provides examples of effective uses of videoconferencing.

[…] When we bring new technology into the courtroom in the name of efficiency, we must be careful to examine its impact on the legal process and the administration of justice. Videoconferencing technology has greatly expanded in immigration hearings in recent years, with little consideration into its larger systemic impact. This article attempts to correct that imbalance by raising questions about a quiet revolution occurring in immigration hearings, and by encouraging others to look more carefully at how our system of justice is evolving in surprising and perhaps unintended ways.

Keywords
immigrant, refugee, migrant, court proceedings

Videoconferencing in Immigration Proceedings

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I. INTRODUCTION

When there is mention of a legal trial, a certain picture naturally comes to mind. One sees a judge in his black robe sitting on a raised bench. Lawyers are stationed at tables on either side of the courtroom, prepared to present their arguments to the court. A jury box may sit off to the side, holding a cross-section of citizens culled from the population to perform their ancient duty. The courtroom is made of fine wood and polished marble, and it is adorned with the accouterments of justice—American flags, seals, paintings of honored jurists—which let an observer know that he sits in a hall where important decisions are made and grave judgments are rendered.

Many people may be surprised to witness an immigration hearing in present-day America, where important decisions are also made and grave judgments are also rendered, but which has an altogether different and less impressive appearance. Observers are likely to see a small room located deep within a large federal building, with two tables perpendicular to one another, connected to form a right angle. A lawyer sits at each table, one representing the government and the other an alien. A row of chairs, behind these tables and against the walls, seat the family and friends of the alien. On the other side of the room, in view of the advocates and observers, is a television screen with a camera on top. This screen shows the judge on one side, who may be located in another state, and the alien on the other side, who is seated in a detention center in a third location.

As courts struggle to balance large caseloads and limited resources, they have increasingly turned to technological solutions. Videoconferencing, in particular, has become a popular tool in judicial proceedings in the last decade. It has found its way into state, federal, and administrative courts. In 1996, Congress allowed videoconferencing in immigration removal proceedings, and the Department of Homeland Security has steadily expanded the number of such proceedings conducted remotely through videoconferencing technology. The government believes that these pro-

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ceedings are more efficient, less time-consuming, and more secure than traditional in-person hearings.

Last summer, for example, one of these proceedings was conducted by videoconference in Cleveland, Ohio.[1] The lawyers were located in the federal building in downtown Cleveland, which was the official venue for the trial. The respondent was in a detention facility in Orient, Ohio, a few hours drive from the courtroom. The judge was seated in Arlington, Virginia.

The respondent was a native of Nigeria, but was a legal permanent resident of the United States. He plead guilty to charges related to the robbery of thirty dollars from an individual and was ordered removed from the country on the grounds that he had committed an aggravated felony. The respondent appealed the ruling, asking for a stay of his removal order under the Convention Against Torture (CAT), and argued it was probable that he would be tortured if he was removed to Nigeria. The respondent explained that he was a member of a tribe that had opposed the ruling government, and that his father had been a prominent opponent of the government. He had been tortured three times in the past in Nigeria and feared he would be tortured again if deported there.

Observers could feel the way the videoconferencing technology mediated the interaction and communication between the judge and the respondent, subtly but significantly affecting the conduct of the hearing, the respondent's ability to present his case before the court, and ultimately the verdict itself. Arguably, the turning point in the proceeding came during an important exchange between the respondent and the judge. The judge asked the respondent if he committed the robbery to which he plead guilty. The respondent tried to explain that he had not personally committed the robbery, but was part of a group of men, one of whom had committed this robbery. He plead guilty, he said, as part of a deal with prosecutors to avoid prison time, unaware at the time of the implications on his immigration status. As the respondent began his explanation, the judge cut him off mid-sentence and understood him to say that he was not taking responsibility for the crimes to which he plead guilty.

The miscommunication between the judge and the respondent was partly due to the respondent's lack of fluency in English, but was also caused by time delays in speech recognition inherent to the medium of videocommunication, as well as by the inability to clearly see visual cues of recognition and understanding, or lack thereof. Immediately after this exchange, the judge took a more negative view of the respondent and his claims, and the judge ultimately ruled against the respondent on the CAT

1. The author observed this proceeding, which was unpublished.

claim and ordered him deported. It is impossible to know to what extent the use of videoconference technology affected the outcome of this case, or the many others like it. But, perhaps surprisingly, this issue has not received the amount of attention it deserves.

Proceedings conducted by videoconference raise a number of concerns that have not yet been fully explored, particularly in light of a growing body of scientific evidence that shows video-mediated personal interactions are perceived as significantly different by the participants and observers than in-person interactions. Recent behavioral and psychological studies have found that key differences between the two forms of communication—the lack of eye contact and the difficulty of detecting nonverbal cues—have profound impacts on the cognitive and emotional response of the listener and the perception of the speaker's credibility and guilt. Personal testimony is particularly important in the immigration removal context because respondents often lack the resources to provide evidence and witnesses. These proceedings violate a number of important rights that are fundamental to our conception of justice: the right to be present in court; the right to personally confront the witnesses and evidence against you; and the right to effective representation by an attorney.

Part II of this article surveys the growing use of videoconferencing technology in American courts, including immigration proceedings. Part III examines the problems raised by the use of this new technology in the courtroom, specifically with regard to its impact on communication between the respondent and the judge. Next, Part IV shows how these problems violate the detainee's fundamental rights to presence, confrontation, and counsel. Finally, Part V presents recommendations to mitigate these problems while still taking advantage of new technology. Part V also provides examples of effective uses of videoconferencing.

When a resident is deported to his home country, it can have devastating consequences on his and others' lives. Deportation can lead to the loss of work and livelihood, to the breakup of families, to torture and abuse in an unfriendly land, and to the denial of medical or social care. When we bring new technology into the courtroom in the name of efficiency, we must be careful to examine its impact on the legal process and the administration of justice. Videoconferencing technology has greatly expanded in immigration hearings in recent years, with little consideration into its larger systemic impact. This article attempts to correct that imbalance by raising questions about a quiet revolution occurring in immigration hearings, and by encouraging others to look more carefully at how our system of justice is evolving in surprising and perhaps unintended ways.

II. VIDEOCONFERENCING IN THE COURTROOM

A videoconference is comprised of a set of interactive telecommunication technologies, which allow two or more locations to interact via two-way video and audio transmissions simultaneously.[2] The core technology used in a videoconference system is digital compression of audio and video streams in real time.[3] The resulting digital stream of 1s and 0s is divided into packets and then transmitted through a video network.[4] A courtroom will typically use a dedicated videoconference system, which includes a multi-purpose console with a remote-controlled video camera on top. Omni directional microphones, a television monitor, and loudspeakers are connected to the console.

As the technology has developed and become more affordable, and as high-speed Internet connections have become ubiquitous, videoconferencing has gained popularity in a number of fields. It is commonly used in business, education, medical diagnosis and consulting, and personal communication through cheap web cams and software-based videoconferencing technology.[5] Not surprisingly, a movement to use this technology in courtrooms began in the hope that it would improve the efficiency of the administration of justice.

While no criminal trial has been conducted by videoconference, it has been used in other aspects of the criminal trial process: arraignments, bail, sentencing, and post-conviction hearings. An Illinois court first used video technology to conduct bail hearings in 1972 over videophone.[6] A Philadelphia court began using closed-circuit televisions (CCTVs) for preliminary arraignments in 1974.[7] Dade County, Florida, began using videoconferencing for misdemeanor arraignments in 1983.[8] Videoconferencing has also been used to take the testimony of child witnesses in sexual abuse cases because it shields them from being in the presence of the accused abuser during their testimony. Videoconferencing has also been used in civil trials, where the constitutional guarantees are not as strict as criminal

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2. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, EOIR'S VIDEO CONFERENCING INITIATIVE FACT SHEET 1 (Sept. 21, 2004), http:// www.usdoj.gov/eoir/press/ VCFactSheetSep04.pdf [hereinafter EOIR'S VC FACT SHEET].

3. *Id.*

4. *Id.*

5. *See generally* Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 WM. & MARY BILL RTS. J. 769 (2004) (discussing use of videoconferencing).

6. *Videoconferencing*, NAT'L CENTER FOR ST. CTS.: BRIEFING PAPERS (Nat'l Center for St. Cts., Williamsburg, Va.) 1995, at 2.

7. *Id.*

8. *Id.* at 3.

proceedings, such as civil commitment hearings, workers' compensation hearings, and social security appeals.[9]

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Removal Act, which, among other things, amended the Immigration and Nationality Act to allow removal proceedings to be conducted "through videoconference."[10] Currently, videoconferencing equipment has been installed at the headquarters of the Executive Office of Immigration Review (EOIR), as well as forty immigration courts across the country, and seventy-seven other facilities, including detention centers and correctional facilities, where immigration hearings are conducted.[11]

Court administrators consider this technology to benefit the efficient administration of justice and have enthusiastically supported its continuation and expansion. The EOIR contends that this "alternative communications resource is beneficial to both the immigration courts and the alien respondent in immigration proceedings" because it saves travel time for immigration judges, promotes effective case management, lightens heavy case loads, provides for more expedient hearings, reduces travel costs, and improves safety and security.[12]

A report from the Institute for Court Management at the National Center for State Courts was also strongly supportive of this new technology.[13] It argued that videoconferencing technology would make law enforcement personnel more useful, improve court security, reduce witness and interpreter costs, improve productivity of judges and the court system, improve access to courts, and have other collateral benefits.[14]

Immigration attorneys, however, have been less sanguine about this new method of conducting hearings. Peggy Gleason, an attorney at the Catholic Legal Immigration Network, writes that she has encountered many problems at these hearings.[15] Because there typically are no court officials at the detention center, the judge relies on the prison guards to assist the court. Interpreters are often in separate locations from the respondent, making translation more difficult and less accurate. It is hard to make eye contact and communicate through body language. Frequent

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9. Fern L. Kletter, Annotation, *Constitutional and Statutory Validity of Judicial Videoconferencing*, 115 A.L.R. 5TH 509 (2004).

10. 8 U.S.C. § 1229a(b)(2)(A)(iii) (2000).

11. EOIR'S VC FACT SHEET, *supra* note 2, at 2.

12. *Id.*

13. Michael G. Neimon, *Can Interactive Video Work in Waukesha County? An Analysis and Survey*, NAT'L CENTER FOR ST. CTS.: RES. PAPER (Nat'l Center for St. Cts., Williamsburg, Va.) May 2001, at 3.

14. *Id.*

15. Peggy Gleason, *Reality TV for Immigrants: Representing Clients in Video Conference Hearings*, 5 BENDER'S IMMIGR. BULL. 732 (2000).

equipment difficulties and poor sound quality make it harder to hear and understand respondents, who often speak English poorly. There are problems with the use and presentation of evidence, and with serving notice and other important documents to the detainee. Gleason found the video trial to be a "surreal experience" in which her client was turned into a "piece of electronic equipment."[16] She urged other immigration attorneys to object to these types of hearings and to make special preparations with their clients for the peculiar difficulties incidental to them.[17]

Despite these kinds of protests from attorneys, videoconference trials appear to be a growing trend in immigration jurisprudence. This phenomenon has occurred largely unnoticed outside the world of immigration law and largely unstudied as to its effects on due process and justice. Some findings in media theory and behavioral psychology raise important questions about how implementing videoconferencing technology into the courtroom may be damaging the delivery of justice to our nation's immigrants.

III. PROBLEMS WITH VIDEOCONFERENCE TRIALS

A. *The Medium is the Message*

In 1964, an obscure Canadian literature professor, Marshall McLuhan, published a book called *Understanding Media: The Extension of Man.*[18] It was a meditation on the impact of modern media on society summed up with the phrase, "The medium is the message."[19] He became an instant celebrity and was invited to speak on television programs and at corporate gatherings. Tom Wolfe, writing in *New York* magazine, asked, "Suppose he is what he sounds like: the most important thinker since Newton, Darwin, Freud, Einstein, and Pavlov? What if he is right?"[20] Timothy Leary said McLuhan inspired him to come up with the phrase, "Turn on, Tune in, Drop out."[21] He even appeared in Woody Allen's *Annie Hall*, to rebut a pretentious professor's claim to understand his work.[22] But, his celebrity

16. *Id.*
17. *Id.*
18. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSION OF MAN (1964).
19. *Id.* at 7.
20. Tom Wolfe, *Marshall McLuhan: Suppose He is What He Sounds Like, the Most Important Thinker since Newton, Darwin, Freud, Einstein and Pavlov—What if He is Right?*, *in* MCLUHAN HOT AND COOL: A PRIMER FOR THE UNDERSTANDING OF AND A CRITICAL SYMPOSIUM WITH A REBUTTAL BY MCLUHAN 15 (Gerald Emanuel Steam ed., 1967).
21. MCLUHAN, *supra* note 18, at 5.
22. ANNIE HALL (MGM 1977).

died down and his writings were largely ignored in the 1980s, until the Internet and the Information Age—a term he coined—gave his writings a whole new meaning and prescience.

Writing in the 1960s, McLuhan predicted that electronic media would break down the boundaries of time and space to create a kind of "global village," in which combined media would enable people from all over the world to share the same experiences. He wrote, "Today, after more than a century of electric technology, we have extended our central nervous system itself in a global embrace, abolishing both space and time as far as our planet is concerned."[23]

This prediction of the social impact of digital media and the Internet decades before their appearance is remarkable and has revived his popularity among media scholars. In 1994, Lewis Lapham, the editor of *Harper's Magazine*, commented,

> The world that McLuhan describes has taken shape during my own lifetime . . . . His prescience is extraordinary, and the events of the last thirty years have proved him more often right than wrong. His hypothesis anticipates by two decades the dissolution of international frontiers and the collapse of the Cold War.[24]

Wired, one of the leading new media magazines, dubbed McLuhan its "patron saint."[25]

The core concept behind his belief that "the medium is the message" is that the form of communication is more important, in terms of its effect on the recipient, than the content of the message.[26] He believed that people wrongly focused on the visible elements of communication, when in fact, the more significant impact came from those aspects of the communication medium that unconsciously shape and control the human response.

By way of example, he argued that certain performers and leaders, based on their personalities, were more or less successful communicators depending on their ability to master the relevant medium.[27] It has often been noted that some actors who were successful in silent films immediately became less popular with the introduction of sound, and that certain actors who were very successful on television failed completely when tried

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23. MCLUHAN, *supra* note 18, at 3.

24. Lewis H. Lapham, *Introduction* to MARSHALL MCLUHAN: UNDERSTANDING MEDIA ix, xv-xix (MIT Press 1994) (1964).

25. *See, e.g.*, Noah Schachtman, *Honoring Wired's Patron Saint,* WIRED (May 13, 2002) ("Nearly ten years ago, *Wired* anointed media theorist Marshall McLuhan the magazine's 'patron saint.'").

26. MCLUHAN, *supra* note 18, at 7.

27. *Id.*

try to make movies. Their personalities are well-suited to certain mediums, but not others.

A similar phenomenon can be seen with political leaders. Ronald Reagan's popularity and ability to communicate effectively with the public is often ascribed to his mastery of the television medium.[28] Likewise, Franklin Roosevelt's ability to use radio helped him connect with Americans during wartime.[29]

Perhaps the best illustration of the importance of medium on message is the 1960 debates between presidential candidates Richard Nixon and John F. Kennedy. Public opinion polls came to the striking conclusion that most radio-listeners found Nixon won the debates, while most television viewers found Kennedy more persuasive.[30] McLuhan quotes Philip Deane:

> Regardless of the value of Mr. Nixon's views and principles, he has been defending them with too much flourish for the TV medium. Mr. Kennedy . . . presents an image closer to the TV hero—something like the shy young Sheriff—while Mr. Nixon with his very dark eyes that tend to stare, with his slicker circumlocution, has resembled more the railway lawyer who signs leases that are not in the interests of the folks in the little town.[31]

Nixon was more suited to the medium of radio, and Kennedy was more situated to television. In the television age, the advantage went to Kennedy, and he won the election.

B. *The Media Equation*

Disparities like those seen in response to the Nixon-Kennedy debates can be explained by the different ways in which the audience members interact with the different media. With radio, listeners are largely passive recipients of sound, while television viewers, according to McLuhan, experience a more complex interaction with the images on the screen that demand a degree of imagination and interpretation.[32]

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28. *See* MARY STUCKEY, PRESIDENTIAL ELECTIONS AND THE MEDIA, IN MEDIA POWER, MEDIA POLITICS 168 (Mark J. Rozell, ed., 2003).

29. Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59, 87 (2005).

30. Liette Gidlow, *The Great Debate: Kennedy, Nixon, and Television in the 1960 Race for the Presidency*, HIST. NOW, Sept. 2004, http://www.historynow.org/09_2004/historian2.html.

31. MCLUHAN, *supra* note 18, at 329-30 (quoting Philip Deane, *The Sheriff and the Lawyer*, TORONTO GLOBE & MAIL, Oct. 15, 1960).

32. Eric Norden, *The Playboy Interview: Marshall McLuhan,* PLAYBOY (Mar. 1969), *available at* http://www.digitallantern.net/mcluhan/mcluhanplayboy.htm ("The secret of TV's tactile power is that the video image is one of low intensity or definition and thus, unlike either photograph or film, offers no detailed information about specific objects but instead involves the active participation of the

Indeed, recent research indicates that the interaction between the viewer and the screen image is so intense that viewers cognitively respond to screen images as though they are real and unconsciously and unknowingly equate media images with real life.[33] Byron Reeves and Clifford Nass, both professors at Stanford University, contend that most people believe,

> [T]hat the confusion of mediated life and real life is rare and inconsequential, and it can be corrected with age, education, or thought. We have collected a great deal of evidence that shows this conclusion is not true. Equating mediated and real life is neither rare nor unreasonable. It is very common, it is easy to foster, it does not depend on fancy media equipment, and thinking will not make it go away. The media equation—*media equal real life*—applies to everyone, it applies often, and it is highly consequential.[34]

They continue, "[i]n short, we have found that individuals' interactions with computers, television, and new media are *fundamentally social and natural*, just like interactions in real life."[35] Because of our unconscious biases, we treat television images as though they are real.

This equation of mediated images with real life has profound consequences for the present study. If nonverbal cues are crucial to successful communication, as is shown below, and if video-mediated communication (VMC) distorts or diminishes these cues, as is also shown below, the inability of the audience to distinguish between what they are seeing and real life will lead them to draw different and more negative conclusions about the individual than they would if he was actually present. For example, if, *arguendo,* eye contact is important to establishing credibility and trustworthiness, the inability to make eye contact inherent to the use of VMC will hurt the respondent's chances of establishing his credibility and honesty because the viewer fails to realize that the lack of eye contact from the television imagery is not real. The viewer will respond to the lack of eye contact from the image in front of him the same way that he would respond to lack of eye contact from a person actually in front of him—that is, he

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viewer. The TV image is a mosaic mesh not only of horizontal lines but of millions of tiny dots, of which the viewer is physiologically able to pick up only 50 or 60 from which he shapes the image; thus he is constantly filling in vague and blurry images, bringing himself into in-depth involvement with the screen and acting out a constant creative dialog with the iconoscope. The contours of the resultant cartoon-like image are fleshed out within the imagination of the viewer, which necessitates great personal involvement and participation.").

33. *See generally* BYRON REEVES & CLIFFORD NASS, THE MEDIA EQUATION (1996).

34. *Id.* at 4-5 (emphasis in original).

35. *Id.* at 5 (emphasis in original).

will believe the person is being evasive. This research reinforces the view that medium can overtake content in determining message.

Mark Federman, a media scholar at the University of Toronto, argues that the overemphasis on content, as opposed to the medium itself, extends in modern times to computer-mediated communications and videoconferencing technologies.[36] Federman was asked by the Immigration and Review Board of the Government of Canada to look into how, in light of current research in communications and media theory, the use of videoconference technology could affect immigration proceedings in Canadian courts. Federman argued, "The latest approach to media study considers not only the 'content' but the medium and the cultural matrix within which the particular media operate."[37] He pointed to several factors that could affect outcomes of immigration cases conducted in this way besides the content of the testimony:

> [T]he relative cultural conditioning of television itself; the participants' conditioning relative to video camera's use in surveillance; the effects of distortions in experiencing nonverbal communication, or those induced by shifted eye-contact (through non-alignment of viewing screen and camera angle); the effects a video-mediated environment may have on encouraging or detecting deception; and, the effects of the participants' relative imbalance in experience with videoconferencing, among other secondary and tertiary *ground* influences.[38]

This article will next examine how the medium dominates the message in the case of videoconferencing. In short, the medium fundamentally alters the nonverbal behavioral cues that are a crucial element of successful communication. These distortions make it harder for respondents to establish trust and credibility, connect emotionally with the judge, develop positive impressions, and ultimately, convince the judge of the validity of their arguments.

C. *The Unspoken Dialogue*

A group of researchers at the Center for Gesture and Speech Research at the University of Chicago, led by Professor of Linguistics David McNeill, wanted to understand the role played by paralanguage—the non-

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36. Mark Federman, *On the Media Effects of Immigration and Refugee Board Hearings via Videoconference,* 19 J. REFUGEE STUD. (forthcoming 2006).
37. *Id.*
38. *Id.*

verbal elements of communication—in story-telling.[39] Study participants watched a scene from a Sylvester and Tweety Bird cartoon, in which Sylvester attempted to reach Tweety Bird by climbing up the inside of a drain pipe, only to have Tweety Bird drop a bowling ball down the pipe. Sylvester swallowed the ball, rolled out of the pipe, down the street, into a bowling alley, and down a lane where he scored a strike.[40]

The participants were then told to recount the story in their own words. The researchers watched the gestures and body movements of the participants used to convey drop, roll, down, and other aspects of the story. They found that gestures were not only useful, but essential, to conveying meaning because the gestures and words worked together to transmit understanding. Specifically, they found that meaning only emerges at the intersection of speech communication and gesture communication, at a locus they call the growth point (GP). They found that there are two distinct modes of representation, one linguistic and the other imaginal, and each has its own meaning potential. It is only at the GP where true meaning can emerge because each mode of communication is insufficient in itself to accurately convey meaning.[41]

Gesture, however, is in fact just one of many forms of nonverbal communication humans use to make themselves understood to others. The first scientific study of nonverbal communication (NVC) was published by Charles Darwin in 1872.[42] He argued that animals use NVC to express feelings of anger or pleasure, to communicate between mother and baby, and to increase social bonds. [43] These animal gestures and expressions were passed on to humans through natural selection and are still used in human society today.

Sigmund Freud believed body language and other NVC could reveal the true feelings that people try to hide. For example, explaining that someone who is lying will give his intention away through gestures, Freud wrote, "If his lips are silent he chatters with his fingertips; betrayal oozes out of him at every pore."[44]

Since then, many studies have confirmed the crucial role NVC plays in the way we communicate. One of the most important scholars in this field is Albert Mehrabian, a psychologist at UCLA. After a decade of study, he

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39. David McNeill, *Catchments and Contexts: Non-Modular Factors in Speech and Gesture Production*, *in* LANGUAGE AND GESTURE 312 (David McNeill ed., 2000).

40. *Id.* at 314.

41. *Id.* at 312-24 (detailing the study).

42. CHARLES DARWIN, THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS (1872).

43. *See generally* CHARLES DARWIN, THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS (1872).

44. Sigmund Freud, *Fragments of an Analysis of a Case of Hysteria*, *in* 7 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 77-78 (J. Strachey ed., 1905).

came to two conclusions. First, he found that communication consists of three elements: words, tone of voice, and body language.[45] Second, he found that, with regard to the communication of feelings and emotions, the relative importance of these elements in conveying meaning could be summed up by the 7-38-55 percent rule.[46] That is, words account for seven percent of meaning, tone of voice for thirty-eight percent, and body language for fifty-five percent. For meaningful communication, these different elements need to support each other. If they appear to be in conflict, the element with the higher importance is taken as the correct one. In other words, if a speaker's words appear to conflict with his body language, the audience believes that the body language accurately portrayed the speaker's feelings and that the words are inaccurate.[47]

NVC can emanate from different parts of the body and take many different forms. One of the most important ways we communicate nonverbally is through facial expressions. Studies have shown that there are eight distinct positions for the brow and forehead, seventeen for eyes and lids, and forty-five for the lower face.[48] Each single feature or combination of features on these parts of the face can express different emotions. Happiness, for example, is shown when the corners of the mouth are drawn back and slightly up, by wrinkle lines from the nose to the corners of the mouth, by raised cheeks, and by wrinkles outward from the outer corners of the eyes and below the lower eyelids.[49] Fear and sadness, on the other hand, can only be decoded from the eyes and lids.[50]

The hands are another rich source of expression. One group of researchers showed a film of a woman speaking, with the first group of viewers seeing her face and hand movements, and the second group seeing only her face.[51] The first group found the woman cheerful and friendly, while the second group found the same woman, absent the hand movements, tense and disturbed.[52] Researchers have found that anxiety, for example, is indicated by the interlocking of hands or the opening and closing of fists, while elation is demonstrated by fast, rhythmical hand movements.[53]

The examples are too numerous to iterate here, but it is well-established that emotions can be expressed through voice pitch, eye gaze,

45. ALBERT MEHRABIAN, NONVERBAL COMMUNICATION 178 (1972).
46. *Id.* at 179.
47. *Id.*
48. MICHAEL ARGYLE, BODILY COMMUNICATION 122-31 (2d ed. 1988).
49. *Id.* at 125.
50. *Id.*
51. *Id.* at 197.
52. *Id.*
53. *Id.* at 200.

posture, touching of hair, and many other nonverbal signals and gestures. If paralanguage is indeed crucial to communication, and the video medium distorts the messages given by these signals and gestures, it would be a powerful demonstration of communicative form overwhelming content. To discover whether this is the case, we must look to the use of videoconferencing in legal proceedings.

D. *Videoconferencing Justice: The Experience So Far*

Unfortunately, because videoconferencing technology is new and has not been used in ordinary criminal trials, there have been few studies examining the effects of these kinds of trials as they are actually experienced. One of the first and most important uses of this technology in the courtroom is children's testimony during sexual abuse cases. A major concern in these trials is that it would be too painful or traumatic for children to testify in a courtroom where they come face-to-face with their alleged abuser. Studies conducted on child testimony in sexual abuse trials in Australia[54] and New Zealand[55] are generally positive. These studies, however, were not particularly comprehensive and were understandably infused with the overriding concern of protecting the children from further anxiety and trauma.

In the 1970s, as videotaped testimony began to enter American courtrooms, two groups of researchers tried to determine what effect, if any, this new technology would have on trial outcomes. The teams—one at Michigan State University (Michigan State) and the other at Brigham Young University (BYU)—found little differences between live and videotaped testimony.[56] The studies, however, suffered from a number of problems.

Gordon Bermant, a psychologist at the University of Washington speaking at a symposium entitled *The Use of Videotape in the Courtroom*, pointed out four criticisms the scientific community would have with the methodologies employed in the Michigan State and BYU studies.[57] First, noting that there appeared to be great variation within the realm of video trials and live testimony, he found that permissible changes in technique or circumstance would make the comparisons too general.[58] Second, he found that they failed to establish a null hypothesis: a condition in which

54. Judy Cashmore, THE USE OF CLOSED CIRCUIT TELEVISION FOR CHILD WITNESSES (1992).

55. Lynne Whitney & Angela Cook, THE USE OF CLOSED-CIRCUIT TELEVISION IN NEW ZEALAND COURTS (1990).

56. Gerald Miller & Norman Fontes, REAL VERSUS REEL: WHAT'S THE VERDICT? (1978).

57. Gordon Bermant, *Critique – Data in Search of Theory in Search of Policy: Behavioral Responses to Video in the Courtroom*, 1975 BYU L. REV. 467, 470 (1975).

58. *Id.*

there are no differences to be found among the conditions being compared other than the variable being tested.[59] Third, the investigators lacked a theoretical framework in which to discover meaning from their results.[60] Finally, the studies worked on only one level of analysis, failing to look at the broader implications and second-order effects of an introduction of new technology in such a setting.[61]

A more recent study of simulated child witness testimony found a meaningful difference between live and videotaped presentations. This study presented mock sexual abuse trials in two formats: one in which the child witness testified in open court, and one in which his testimony appeared on videotape.[62] The author found that the child's testimony was more believable and powerful when presented live.[63] Consequently, there was a higher conviction rate of the accused when the child testified live. Specifically, the conviction rate was 60.8 percent in the trials with videotaped testimony and 76.6 percent when the child appeared in person.[64]

Taken together, the few studies looking at real or simulated courtroom impact of VMC are not comprehensive or conclusive enough to draw strong conclusions. As a result, it is necessary to look at scientific studies that, though less informative than actual experience, provide the best window into the impact of this technology in the courtroom. The scientific studies show that videoconferencing diminishes and distorts NVC, leading to a loss of both emotional connection and perceived credibility, and ultimately, to less favorable verdicts.

E. *The Loss of Nonverbal Cues to Meaning*

One of the most important judgments juries must make is about the credibility of the witnesses. In immigration hearings, which often involve few witnesses and little evidence, the perceived credibility of the respondent is often decisive to the outcome of the case. Evidence indicates that juries make frequent use of nonverbal cues in assessing witness credibility, and that these nonverbal cues are not effectively transmitted over video.

In one study, 131 undergraduates at the University of Massachusetts Amherst acted as members of a jury in a trial in which the defendant had been accused of assault and petty larceny. The defendant would serve

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59. *Id.* at 470-71.
60. *Id.* at 471-72.
61. *Id.* at 472.
62. David F. Ross et al., *The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse*, 18 LAW & HUM. BEHAV. 553, 556-58, 561-62 (1994) (describing experimental conditions).
63. *Id.* at 562.
64. *Id.* at 563.

three years in state prison if convicted. Some groups of jurors watched videotapes of simulated defendants' testimony. The testimony involved the defendant's supposed alibi and was designed to be sufficiently vague to support either a guilty or innocent judgment. The verbal testimony was the same in each instance, but sometimes the defendant displayed behaviors indicative of deception and other times his behavior was neutral. Other groups of jurors simply read a transcript of the testimony.[65]

The jury members were instructed to rate the defendants' believability on a seven point scale, with seven being most believable and one being least believable. Significant differences were seen between the defendants. Whereas the transcript received an average 3.76 rating and the neutral defendant a 3.48 rating, the defendant showing nonverbal deception cues received a 2.39. These results indicate that nonverbal behavior is an important factor used by juries in determining the reliability and truthfulness of a defendant's testimony.[66]

These important nonverbal signals are not transmitted as successfully over videoconference equipment as when the communicators are present in the same room. In one important study, investigators compared group communication to complete a task through three different media: audio only, audio and video, and face-to-face.[67] Seventy-two students from the University of Nottingham were organized into pairs and instructed to complete a map orienteering task in each of the three different contexts. The researchers found that the amount of verbal dialogue needed to complete the task was significantly greater over video than in the face-to-face context. This result indicates that video-mediated interaction does not effectively transmit the nonverbal signals that are important to successful communication.[68]

The finding in the University of Nottingham study—that NVC is not as rich over videoconference as in a live setting—is confirmed by further studies. One such investigation occurred at an engineering school, where a class was being conducted via videoconference between three different sites—one at the main campus with the professor present and two at re-

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65. Robert S. Feldman & Richard B. Chesley, *Who is Lying, Who is Not: An Attributional Analysis of the Effects of Nonverbal Behavior on Judgments of Defendants Believability*, 2 BEHAV. SCI. & L. 451, 454-56 (1984) (describing experimental conditions).

66. *Id*. at 456-58 (describing experimental results).

67. Gwyneth Doherty-Sneddon et al., *Face-to-Face and Video-Mediated Communication: A Comparison of Dialogue Structure and Task Performance*, 3 J. EXPERIMENTAL PSYCHOL.: APPLIED 105, 110-23 (1997)

68. *Id.*

mote sites.[69] Students were organized into seven project teams of about four students each and asked to rate their classmates.[70]

The researchers found that the participants made use of different kinds of information in forming their impressions of remote others in comparison to face-to-face others. Specifically, face-to-face communicators were able to make more nuanced judgments of peers, based on more kinds of information than they could with remote colleagues.[71] The study also showed that the impressions people formed of remote others were different from, and less positive than, those they formed of face-to-face others.[72] As the weeks of the course went on, people increasingly had positive impressions of and wanted to work with peers who were in the same room as them, and decreasingly had positive impressions of and wanted to work less with classmates in remote settings.[73] These results indicate that VMC both degrades the richness of human communication and diminishes the ability to generate positive feelings among participants.[74]

F. *Forming Impressions and Connecting Emotionally*

The finding in the engineering school study—that VMC produces more negative impressions of speakers than live interaction—has been demonstrated in the courtroom setting as well. A recent dissertation reported a study that compared the effects on jury perceptions of child witnesses in sex abuse cases of live testimony versus testimony via CCTV.[75] The author recruited mock jurors from the community and had child actors testify either via CCTV or live.

The author found that children who testified via CCTV, all else being equal, were viewed more negatively by jurors than those testifying live. Specifically, those children testifying on CCTV were viewed by jurors as less believable, less accurate for both the prosecution and defense, less accurate in recalling past events, more likely to have made up the story, less honest, less able to testify based on fact rather than fantasy, less attractive, less intelligent, less consistent, and less confident. Unsurpris-

69. John Storck & Lee Sproull, *Through a Glass Darkly: Why Do People Learn in Videoconferences?*, 22 HUM. COMM. RES. 197, 202-05 (1995).
70. *Id.*
71. *Id.* at 200.
72. *Id.* at 209.
73. *Id.*
74. *Id.* at 206-10.
75. Holly Kay Orcutt, Detecting Deception: Factfinders' Abilities to Assess the Truth (1998) (unpublished Ph.D. dissertation, State University of New York at Buffalo) (on file with author).

ingly, jurors were more likely to find the accused abuser guilty when children testified live rather than via CCTV before deliberation.[76]

An important factor in the more negative impressions formed by videoconference communication, in comparison to live interaction, may be the greater difficulty viewers have in feeling close to speakers on the other end of a television screen or computer. The ability to connect with the judge and win his empathy is often crucial to immigrants who must rely on their personal story to win their case. This task is made harder by the use of mediating technology.

In one study, sixty-four undergraduates at Iowa State University were randomly assigned to either a face-to-face or online conversation.[77] Participants in the face-to-face condition reported more self-disclosure and greater satisfaction, levels of closeness, and recall of facts immediately following the interaction. Students in the in-person setting rated themselves and their partners more sharply—higher positive reactions and lower negative reactions—on scales of emotional reaction to the conversation, indicating that the individuals in the face-to-face condition were either experiencing more affect or had more information to rate higher levels of affect. The authors concluded that relationships develop more quickly and achieve greater degrees of comfort and openness when face-to-face. These findings indicate that emotionally charged interactions, like a respondent's testimony about torture abuse, will be more forthcoming and better understood when conducted face-to-face, rather than filtered through media.[78]

G. *The Loss of Trust*

In addition to losing an emotional connection, the respondent suffers from a loss of trust and credibility as a result of the technological barrier between himself and the judge. In one study, a series of elaborately staged mock child abuse trials were held.[79] Children participated in a play session with an unfamiliar male, and later, individually testified about the experi-

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76. *Id.* Interestingly, these biases were wiped out during deliberation, therefore, the ultimate verdict was not affected by the choice of testimony delivery. It should be remembered, however, that immigration hearings are conducted by judges as the sole deciders, so the apparently salutary effects of deliberation may not be relevant in the context of such hearings.

77. Michael J. Mallen et al., *Online Versus Face-to-Face Conversations: An Examination of Relational and Discourse Variables*, 40 PSYCHOTHERAPY: THEORY, RES., PRAC., TRAINING 155 (2003).

78. *Id.*

79. 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, 173-81 (1998)

ence at a local court. Mock juries observed the testimony either live or via CCTV and rated the witnesses.[80]

The study found that CCTV biased jurors against child witnesses. Specifically, children who testified via CCTV were viewed as less believable than children who testified in regular trials. They were also viewed as more likely to be making up their story and less likely to be basing their testimony on fact rather than fiction.[81]

This loss of trust may result from the absence of eye contact inherent in video-mediated communication. People view willingness to make eye contact as an important indicator of trustworthiness. Videoconferencing, however, typically cannot achieve this effect because the camera is located apart from the monitor, such that a person looking into the monitor will appear, from the camera's angle, to be avoiding eye contact. Typical videoconferencing equipment places the camera either directly above the screen, directly below the screen, or to a side of it. It has been found that the vertical or horizontal loss of eye contact associated with these camera placements results in a perceived loss of trust. Eye contact is only perceived when the conversation partner looks directly into the camera, but this is rarely the case due to the placement of the camera and the inexperience most users have with this technology. It is fair to assume that most respondents in immigration proceedings have little or no experience with videoconference technology, and therefore would not know where to look and how to position themselves to maximize their perceived credibility.[82]

The tendency of video-mediated facial and body language to undermine credibility is exacerbated by the fact that viewers rely more on such nonverbal signals when interacting via videoconference. They rely more on NVC in this context because the diminution of interaction makes it harder to understand the verbal communication. One recent dissertation found that VMC led to less understanding of the verbal communication, greater reliance on NVC, and a reduction in the speaker's credibility and persuasive effectiveness.[83]

For this dissertation, the author conducted a field study of lectures at a hospital on different medical topics given by different speakers, some live and some via videoconference.[84] The author found that the videoconference presentations demanded more cognitive work from audience mem-

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80. *Id.*

81. *Id.* at 189-97.

82. Teko Jan Ernst Bekkering, Visual Angle in Videoconferencing (2004) (unpublished Ph.D. dissertation, Mississippi State University) (on file with author).

83. Carlos Ferran-Urdaneta, The Effects of Videoconferencing on Persuasion (2000) (unpublished Ph.D. dissertation, Boston University) (on file with author).

84. *Id.*

bers, who therefore relied on peripheral cues, like body movements and eye contact, rather than systematic processing of the argument itself.[85] The greater cognitive effort demanded from VMC could lead a judge to miss key aspects of the respondent's argument or to rely less on the argument itself than other, less objective factors.[86] If immigrants are seen as less honest and credible when appearing via videoconference, and if inferior cognitive understanding on the part of the judge leads to an over-reliance on these factors, it hurts their ability to make their case, and makes it more likely that they will lose at trial.

H. *Technical Problems*

The problems with videoconference are often made worse by technical difficulties with the videoconference equipment, which appear to be fairly common at these proceedings. Such technical difficulties only serve to exacerbate the effects mentioned above by making the audio and video worse in quality and a greater barrier than usual between the respondent and the judge. The most comprehensive study on this problem was conducted by the Legal Assistance Foundation of Chicago in 2004.[87]

During the summer and fall of that year, researchers observed 110 videoconference hearings at the immigration court in Chicago. They found problems with nearly forty-five percent of the proceedings they observed, ranging from technical problems, to interpretation problems, to problems with access to counsel. Fully twenty-nine percent of immigrants either agreed to be removed or were ordered removed at these hearings, a remarkably large number considering that these were not hearings on the merits, but rather Master Calendar hearings: a preliminary hearing intended to explain the charges, enter a plea, ensure representation by counsel, and set a date for a final hearing. For those immigrants without attorneys at their Master Calendar hearings, a stunning forty-four percent were ordered removed or agreed to be removed before reaching a hearing on the merits.[88]

These problems were even worse for immigrants who did not understand English. Twelve percent of all observed immigrants had comprehension problems due to the insufficient interpretation. The report found that "[o]bservers consistently reported that most of what was said at the hearing

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85. *Id.*
86. *Id.*
87. AMANDA J. GRANT ET AL., VIDEOCONFERENCING IN REMOVAL HEARINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT, LEGAL ASSISTANCE FOUND. METROPOLITAN CHI. & CH I. APPLESEED FUND FOR JUST. 5-7 (Aug. 2, 2005), http://www.lafchicago.org/complete%20report.pdf.
88. *Id.*

was not translated for immigrants, even when immigrants did not have legal representation. It must be assumed that many immigrants who depended on interpreters had no idea of what was happening in their cases." Not surprisingly, seventy-six percent of non-English speaking Latinos were removed, as opposed to forty-six percent of English speaking Latinos.[89]

Other observers witnessed proceedings that seem to confirm what the studies presented above indicate—that it is more difficult to emotionally connect with other people over videoconference than in person. One researcher observed the following at one hearing:

> [The immigrant] was sobbing. She looked like she was a teenager. No one even noticed how stressed out she was. Everyone was stapling exhibits and passing papers, and then it was over . . . . No one explained why [the case] was being continued. Her usual attorney wasn't there. It seems like her condition might have had more of an impact had she been in the courtroom, but no one even noticed her.[90]

Finally, lack of representation also exacerbated the problems with videoconference hearings: fully forty-four percent of observed immigrants without representation were removed, compared to only seventeen percent of those with representation. These findings, taken together, indicate that equipment often does not function properly at these hearings, and, even when it does, it often fails to ensure a fair hearing.[91]

Given the clear and well-documented effect of media technology on message, the importance of NVC, and the way media distorts NVC, there is strong reason to believe that videoconference trials will damage the fairness of immigration removal proceedings. Many studies show that the distortion of NVC impairs the ability of aliens to express emotion, to connect with the judge, to be trusted and believed, to form a positive impression, and even to be understood. The next Part will examine how these effects emerge from proceedings that violate the due process rights of the aliens

IV. LEGAL ARGUMENTS

The previous Part showed that current communications and psychology research strongly indicates that videoconference trials are fundamen-

89. *Id.* at 7-8, 44.
90. *Id.* at 46.
91. *Id.* at 51.

tally different and inferior—from the perspective of the respondent—to ordinary live trials. These differences result from a process that threatens three important rights that are fundamental to our conception of justice: the right of presence; the right to confront one's accusers; and the right to counsel.

A. *The Right of Presence*

Historically, the right of the government to deport aliens had been seen as nearly absolute,[92] but now a removal order requires a meaningful hearing on the issues,[93] which is understood to include the protections of procedural due process under the Fifth Amendment.[94] The United States Supreme Court considers three factors in determining whether procedural due process has been met: the private interest affected by the action; the risk of an erroneous deprivation of that interest; and the government's interest in the efficient administration of justice.[95] Fundamentally, due process is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[96]

There has long been a due process right to be present at a criminal trial where one's life or liberty is at stake.[97] This right was most recently confirmed in 2004, when the United States Supreme Court ruled that state courthouses must be handicap-accessible to ensure that disabled defendants are afforded the right to be present at all important stages of their trial.[98] It is less clear if this right also applies in the civil context.

In civil cases in which fundamental issues like an individual's life or liberty is at stake, however, this right is more likely to apply. For example, in *Specht v. Patterson*,[99] the United States Supreme Court upheld the right to be present during involuntary civil commitment proceedings. Likewise, the Court has upheld the right to be present during proceedings over social security payments, an issue of vital importance to many people.[100]

Immigration proceedings would seem to be ones where decisions crucial to an individual's life and liberty are made. Though this issue has not

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92. Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.").

93. Yamataya v. Fisher, 189 U.S. 86, 100-02 (1903).

94. Mathews v. Diaz, 426 U.S. 67, 77 (1976).

95. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

96. *Id.* at 333 (citation omitted).

97. Hopt v. Utah, 110 U.S. 574, 578-79 (1884).

98. Tennessee v. Lane, 541 U.S. 509, 532-33 (2004).

99. 386 U.S. 605, 608 (1967).

100. Califano v. Yamasaki, 442 U.S. 682, 696-97 (1979).

explicitly been addressed by the courts, there are indications that they consider the right of presence part of due process in this context. In 1989, in *Purba v. INS,*[101] the Ninth Circuit overturned a deportation order given after a hearing conducted by telephone, ruling that deportation proceedings had to be in the "physical presence" of a judge. This ruling appeared to be based solely on statutory interpretation, and the relevant statute was altered in 1996 to explicitly allow immigration proceedings by "video conference" with or without the alien's consent,[102] or by "telephone conference" with the alien's consent.[103]

As recently as last year, however, the Ninth Circuit held that *Purba* had a constitutional dimension as well, finding that it stood for the proposition that "due process requires physical presence in deportation hearings."[104] At least one dissenting opinion in an immigration court proceeding has cited *Purba* for the proposition that due process demands the alien's presence at his hearing. Immigration Judge Lory Rosenberg, dissenting in *In re Lei*,[105] wrote,

> The right to be present at one's deportation hearing arises from the statutory language and from due process considerations that involve issues of personal liberty. It also is related to the concern for reliability in deportation proceedings, which often involve highly complex facts regarding a respondent's attributes and activities and require the respondent's testimony to properly adjudicate the case.[106]

The notion that videoconferencing is inadequate to meet the presence requirements of due process in the civil context has won further support in recent years from rulings by the Seventh, Tenth, and Fourth Circuits. In 2005, in *Thornton v. Snyder*,[107] the petitioner filed a civil rights claim in the United States District Court for the Central District of Illinois protesting his prison conditions. After losing in a videoconference hearing at the district court level, he appealed to the Seventh Circuit on the grounds that the nature of the trial violated his due process.[108]

The court ruled that the decision to conduct the trial by videoconference was at the discretion of the district court, and, in this case, the court

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101. 884 F.2d 516, 516 (9th Cir. 1989).
102. 8 U.S.C. § 1229a(b)(2)(A)(iii) (2000).
103. 8 U.S.C. § 1229a(b)(2)(A)(iv) (2000); 8 U.S.C. §1229a(b)(2)(B) (2000).
104. United States v. Bahena-Cardenas, 411 F.3d 1067, 1077 (9th Cir. 2005).
105. 22 I & N Dec. 113, 1998 WL 422061 (1998).
106. *Id.* at *121 (Rosenberg, J., dissenting).
107. 428 F.3d 690, 692 (7th Cir. 2005).
108. *Id.*

did not abuse that discretion.[109] The appellate court pointed out that the petitioner was considered to be "an extremely high escape risk" with a "moderate aggression level" already serving a life sentence, and his physical presence would require the accompaniment of two prison guards.[110] Despite this decision, the court emphasized the drawbacks of videoconference trials.[111] Specifically, it commented:

> Clearly, a jury trial conducted by videoconference is not the same as a trial where the witnesses testify in the same room as the jury. Videoconference proceedings have their shortcomings . . . . "The immediacy of a living person is lost" with video technology. "Video conferencing . . . is not the same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing. This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion." . . . . The limitations videoconferencing presents demonstrate that the decision to deny a prisoner the opportunity to be physically present at a civil rights trial he initiates is not one that should be taken lightly.[112]

While the court found videoconferencing acceptable based on the facts in *Thornton*, it is unclear how the Seventh Circuit would react in a case where the petitioner did not appear as dangerous, or in response to the systematic and undifferentiated use of videoconferencing in immigration courts today.

In *United States v. Torres-Pahena*,[113] the Tenth Circuit ruled that Federal Rule of Civil Procedure 43, requiring that a defendant be "present" during his sentencing,[114] requires physical presence, and therefore it was illegal to conduct the sentencing hearing via videoconference. The court performed a close textual analysis, using definitions of "present" from the Oxford English Dictionary and Black's Law Dictionary.[115] The Tenth Circuit found that the former defines "present" as "the state of being before, beside, with or in the same place as the person to whom the word has relation," while the later defines it as "in attendance, not elsewhere."[116] While not directly applicable to administrative hearings like immigration, this

109. *Id.*
110. *Id.* at 693.
111. *Id.* at 697-98.
112. *Id.* at 697-98 (citations omitted).
113. 290 F.3d 1244, 1245 (10th Cir. 2002).
114. FED. R. CIV. P. 43.
115. *Torres-Pahena*, 290 F.3d at 1247.
116. *Id.*

case strengthens the view that the due process presence requirement demands actual presence.

The Fourth Circuit, widely considered the most conservative and pro-government of the federal appellate courts, has also appeared skeptical of videoconferencing. Specifically addressing the use of this technology in immigration courts, the Fourth Circuit held,

> Regardless of how rapidly technological improvements, such as videoconferencing, may advance, the Government remains obliged to ensure that asylum petitioners are accorded a meaningful opportunity to be heard before their cases are determined. In this regard, the procedures utilized in [petitioner's] hearing could have resulted in the denial of a full and fair hearing on his claim. The utilization of video conferencing, although enhancing the efficient conduct of the judicial and administrative process, also has the potential of creating certain problems in adjudicative proceedings. As Chief Judge Wilkinson has appropriately observed, "virtual reality is rarely a substitute for actual presence and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it."[117]

This appeal was rejected because the petitioner failed to show he had been prejudiced by the potential due process violation.[118] Nevertheless, the fact that a court as conservative as the Fourth Circuit questioned the ability of videoconferencing to provide the kind of presence demanded by due process is noteworthy. Videoconferencing denies respondents their due process right to be present in court when matters of great importance to their lives are being adjudicated.

B. *The Right of Confrontation*

The right of a defendant to confront the witnesses and evidence against him has long been part of the Western legal tradition. Though dating from Roman times, its common law origins are often found in the 1603 trial of Sir Walter Raleigh for treason, which made frequent use of *ex parte* testimony.[119] In the United States, the right of confrontation, considered "one of the fundamental guarantees of life and liberty,"[120] was enshrined in most

117. Rusu v. INS, 296 F.3d 316, 322 (4th Cir. 2002) (alteration in original) (citation omitted).
118. *Id.* at 324.
119. Crawford v. Washington, 541 U.S. 36, 43 (2004).
120. Kirby v. United States, 174 U.S. 47, 55 (1899).

states through constitutions or declarations of rights,[121] and in the Sixth Amendment.[122]

The right of confrontation has been extended to immigration proceedings. Under the Immigration and Nationality Act, an alien in a deportation proceeding must be given "a reasonable opportunity . . . to cross-examine witnesses presented by the government."[123] In *Bridges v. Wixon*,[124] for example, an alien filed a habeus corpus petition protesting a deportation order that was based on *ex parte* statements that he was a member of the Communist Party and advocated the overthrowing of the government. The Supreme Court overturned the deportation order on the grounds that the use of such statements was prejudicial and violated his right to a fair hearing.[125]

More recently, in *American-Arab Anti-Discrimination Committee v. Reno*,[126] the Ninth Circuit overturned deportation orders against members of the Popular Front for the Liberation of Palestine. In *Reno*, the government made extensive use of secret, undisclosed evidence to find that these individuals belonged to an organization that advocates world communism. The Ninth Circuit found it an "immutable principle" that the government's evidence must be disclosed in adversary proceedings so that individuals have an opportunity to disprove the government's case against them.[127] The court found that secret evidence posed an "exceptionally high risk of erroneous deprivation" of due process because it deprived individuals of their right to confrontation.[128]

Of course, the government will claim that the videoconference medium allows the respondent to cross-examine witnesses and be confronted with the evidence against him, thus satisfying his right to confrontation. But, there are numerous precedents establishing the proposition that the right to confrontation demands a face-to-face meeting with the judge and witnesses.[129]

In early cases, it was found that the right to confrontation could even be violated by courtroom layouts or conditions that blocked the defendant's view of the jury or witness. Thus, in *Herbert v. Superior Court*,[130] a

121. *Id.* at 48.
122. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").
123. 8 U.S.C. § 1252(b)(3) (2000).
124. 326 U.S. 135, 138-40 (1945).
125. *Id.* at 156-57.
126. 70 F.3d 1045 (9th Cir. 1995), *rev'd in part,* 525 U.S. 471 (1999).
127. *Id.* at 1069.
128. *Id.* at 1069-71.
129. *See generally* Andrea G. Nadel, Annotation, *Conditions Interfering with Accused's View of Witness as Violation of Right of Confrontation*, 19 A.L.R. 4TH 1286 (2005).
130. 117 Cal. App. 3d 661 (1981).

conviction for committing lewd acts upon a child was overturned because the judge devised a seating arrangement that prevented the defendant from seeing the complainant when she testified. In *State v. Weldon*,[131] a murder conviction was overturned because court overcrowding prevented the defendant from seeing the jury and witnesses. In *State v. Mannion*,[132] a conviction for assault with intent to commit rape was overturned because the defendant was ordered to sit in the back of the courtroom where he could not see or hear the witnesses. These cases stand for the proposition that the right to confrontation is violated, even when the defendant is in the same room, if he is denied the opportunity to confront his accusers face-to-face.

The principal of confrontation has often been extended to closed-circuit witness testimony. In recent years, with mounting concerns about the emotional and psychological impact on abused children of testifying in front of their abusers, courts have been more willing to allow CCTV testimony in child sex abuse trials. Cognizant of the defendant's right of confrontation, however, courts typically require an individualized finding that CCTV is merited in a particular case despite the undeniably compelling state interest in protecting children. These particular findings stand in stark contrast to the systematic, undifferentiated use of videoconference proceedings in immigration court, where the state interest of efficiency is not nearly as compelling.

In *Maryland v. Craig*,[133] for example, the Supreme Court ruled that although the confrontation right is not absolute, that "does not . . . mean that it may easily be dispensed with."[134] Rather, "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy."[135] The Court went on to endorse Maryland's law allowing for CCTV in child sex abuse cases, "given the State's traditional and 'transcendent interest in protecting the welfare of children,' and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court."[136] Yet, even given this overwhelming state interest, the Court insisted that "the requisite finding of necessity must of course be a case-specific one."[137]

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131. 74 S.E. 43, 45-46 (S.C. 1912).
132. 57 P. 542 (Utah 1899).
133. 497 U.S. 836 (1990).
134. *Id.* at 850.
135. *Id.*
136. *Id.* at 855 (citation omitted).
137. *Id.*

Craig[138] involves a compelling state interest—the emotional and psychological health of abused children—yet demands a case-by-case finding of necessity to overcome the defendant's confrontation right. The far less compelling interest of efficiency claimed by the state in the immigration context, as the policy is presently implemented, does not even require such a particularized finding to overcome the alien's fundamental right to personally confront his accusers and the witnesses against him.

C. *The Right to Counsel*

The right to counsel is a fundamental right of our justice system,[139] enshrined in the Sixth Amendment of the United States Constitution.[140] Though the Sixth Amendment does not apply in immigration proceedings,[141] aliens are understood to have a right to counsel under the Fifth Amendment's Due Process clause,[142] as well as by statute.[143] During immigration videoconference proceedings, typically the respondent is in one location, the government attorney in another location—the official courtroom—and the judge in a third location. The respondent's attorney, therefore, has a difficult decision to make: whether her presence is more valuable near the judge, near her client, or in the courtroom. In reality, many immigration lawyers, especially legal aid and pro bono attorneys, do not have the time or resources to be in the judge's chambers, which are often in another state, or in the respondent's detention facility, which may also be in another state. Ordinarily, therefore, the attorney is in the courtroom.

Naturally, this makes communication with her client extremely difficult. It is hard for these immigration lawyers to communicate confidentially with their clients during the day of the trial because they can only speak through the videoconference system. The government attorney may be in the room with them at the time, and even if he is not, there may be people in either the judge's location or the detention facility who could overhear. Furthermore, they do not know if the conversation is being recorded by the video equipment, and, if so, what will be done with the recordings.

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138. The many other federal and state court cases that follow this line of reasoning are far too numerous to go into here. *See* Annotation, *Closed-Circuit Television Witness Examination*, 61 A.L.R. 4TH 1155 (2005).

139. Johnson v. Zerbst, 304 U.S. 458 (1938).

140. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.").

141. Fong Yue Ting v. United States, 149 U.S. 698 (1893).

142. Rios-Berrios v. INS, 776 F.2d 859, 862 (9th Cir. 1985).

143. 8 U.S.C. §§ 1252, 1362 (2000).

In an ordinary trial, the client can meet with his attorney before and after the proceedings, during breaks, and can whisper to her during the trial itself. This all becomes either impossible or extremely difficult during videoconference proceedings. For legal aid and pro bono attorneys, who may not have the time or resources to visit with their clients in distant detention centers, trial days are some of the few opportunities they have to meet with their clients. Videoconference trials seriously diminish the ability of aliens to receive the assistance of counsel that they deserve.

V. HOW VIDEOCONFERENCING TECHNOLOGY SHOULD BE USED

This Part presents ways to mitigate the negative effects of this new technology in the courtroom, and catalogs some positive uses of the technology for the legal profession in the immigration context.

A. *Recommendations to Mitigate the Negative Effects*

1. *Use videoconferencing technology exclusively for procedural hearings, while conducting substantive hearings live.*

The worst effects of closed-circuit hearings fall on a defendant's ability to tell her story to the court, confront her accusers, and make use of counsel. For Master Calendar hearings in which substantive decisions are not made and testimony is not given, these effects do not pose nearly as much of a problem. Using videoconferencing technology exclusively for procedural hearings, however, would require a greater commitment from the government not to make substantive decisions during these hearings.

2. *Provide a reliable, confidential means of communication between the respondent and his attorney when separated.*

If the respondent is in one location, such as a detention center, and the attorney in another location, like the courtroom, the government should provide a dedicated telephone line and private rooms in both locations to ensure the respondent has access to communicate privately with his attorney during trials. This system would probably require a private room in both the courthouse and detention center, away from the videoconferencing technology, and a free direct telephone connection that the government would agree not to listen in on. Both the attorney and respondent should be allowed to request a break during the hearing to make use of the telephone when appropriate.

3. *Do further study on the use of videoconferencing in the courtroom.*

Surprisingly little research had been done on the impact of videoconferencing technology on trials. Many of the controlled studies by communication and behavioral experts do not perfectly replicate actual trials, and many of them are inconclusive or contradictory. With the possible exception of pilot programs for study purposes, the government should put a moratorium on these trials until further study can be done, and conduct comprehensive studies on this technology before a decision is made to go forward on a broader scale.

4. *Pay attention to how the system is set up.*

One result of this study is the conclusion that the arrangement and design of the videoconferencing system is a big factor in what biases it promotes. Things like the camera angle, the sound system, the size of the image, and the voice delay should be considered in detail when providing regulation for how the system should be used. Additionally, the government should train court personnel how to use the new systems, and should pay extra attention to providing reliable translation services for these hearings.

B. *Beneficial Uses of Technology*

1. *Attorney-Client Communication*

Legal aids and other offices that serve poor clients should try to make greater use of this technology when communicating with clients. Many clients are located in rural areas far away from the downtown locations of most legal aids, and they often have difficulty traveling downtown because they lack the means of transportation, the money, and/or the freedom to miss work. Particularly, legal aids are closing satellite offices for budgetary reasons, and this technology could be a useful means to communicate with clients in a way that is less burdensome to them. Videoconferencing sites can be established in remote locations throughout the service area to be closer to clients without the additional expense to legal aid of creating full-fledged satellite offices.

2. *Reducing Paperwork and Bureaucracy*

Many immigration functions, such as applications for permanent residency, naturalization, and visas, are bureaucratic and paperwork-intensive. This takes up the time of the clients, attorneys, and government officials;

slows down the process; and increases the likelihood of incomplete applications that must be revised. Technology should be utilized to make these processes easier and quicker, which would benefit all of the participants. Many tasks can be automated and done over the Internet, and information can be reutilized across documents to cut down on repeatedly providing the same information in several different documents. Automation would also cut down on errors, which slow down the process even more, require additional work for all involved, and lead to frustration.

3. *Improving communication among legal aids*

If major legal aids had videoconferencing technology, it would increase their ability to communicate with one another. This would allow for more collaboration and information-sharing among legal aids across the country. In addition to sharing best practices in terms of operating and administering such an organization, this would allow subject-area experts to give advice to colleagues in other parts of the country. For example, in the immigration context, experts in immigrant-heavy areas like California and Texas, could share their in-depth knowledge with colleagues in parts of the country with fewer immigrants. Furthermore, colleagues around the country could work together on national priorities; share local experiences and initiatives that could be applied elsewhere; or share special programs or seminars they have prepared with colleagues elsewhere.

VI. CONCLUSION

The idea that the medium is the message—that form can overtake content in communicating meaning—seems particularly resonant in today's immigration court. As important nonverbal cues are distorted, immigrants lose their chance to make their case in subtle but important ways—less emotional connection, more negative impressions, weaker credibility. These effects help us understand why traditional principles, like rights of presence, confrontation, and counsel, are so ingrained in our conception of justice and why we must protect them.

In discussing the drawbacks of a technological innovation, we run the risk of looking like Luddites, as those who are so stuck in the old ways that they are blind to new and better ways of doing things. But by abandoning the process of the traditional trial in the name of efficiency, we may imperceptibly be losing something of great value. The elaborate and seemingly outdated safeguards afforded the accused—to look his accuser in the eye, to be physically present in the courtroom—may serve important, inarticulable purposes not only for the accused but for society as well, in affirming

our values and our notions of justice. The trial process itself, with its ritualistic airs, may impose a certain discipline and education on all its participants. If nothing else, an immigration trial should proceed with a dignity that matches the gravity of the occasion—an occasion that threatens the loss of an individual's health, happiness, livelihood, family, and of "all that makes life worth living."[144] It is this intuitive sense that, in the name of efficiency, we are imperceptibly but decisively departing from long-held beliefs and traditions—beliefs and traditions that have subtle but important effects on our legal system and society—that makes these hearings so unsettling for so many people.

In 1971, Professor Laurence Tribe wrote an article in the *Harvard Law Review* about the role of mathematics in law.[145] In that article, he discusses the importance of legal process, independent of achieving certain outcomes. He wrote,

> Rules of trial procedure in particular have importance largely as expressive entities and only in part as means of influencing independently significant conduct and outcomes. Some of those rules, to be sure, reflect only an "arid ritual of meaningless form," but others express profoundly significant moral relationships and principles—principles too subtle to be translated into anything less complex than the intricate symbolism of the trial process. Far from being either barren or obsolete, much of what goes on in the trial of a lawsuit—particularly in a criminal case—is partly ceremonial or ritualistic in this deeply positive sense, and partly educational as well; procedure can serve a vital role as conventionalized communication among a trial's participants, and as something like a reminder to the community of the principles it holds important. The presumption of innocence, the rights to counsel and confrontation, the privilege against self-incrimination, and a variety of other trial rights, matter not only as devices for achieving or avoiding certain kinds of trial outcomes, but also as affirmations of respect for the accused as a human being—affirmations that remind him and the public about the sort of society we want to become and, indeed, about the sort of society we are.[146]

While videoconference hearings may bring certain efficiencies, we could lose these moral benefits of process that bring humanity and dignity to our justice system.

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144. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (Brandeis, J.).

145. Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

146. *Id.* at 1391-92.

Thurman Arnold, a former professor at Yale Law School and judge on the D.C. Circuit Court of Appeals who was most famous as a trust-busting assistant attorney general in the Franklin Roosevelt administration, believed that the complicated and seemingly inefficient nature of trials were necessary in order to embody our sense of justice and that attempts to find short cuts around them would slowly undermine the core values of our society. He wrote,

> A trial by due process is [such] a cumbersome and inefficient way of investigating facts. . . . [Because] like the human personality it must keep in balance all sorts of conflicting ideals. And over them all, keeping each contradictory social attitude in its proper place, there must be spread the philosophy of justice. That philosophy can never be defined. . . . The only way that it can become real and make itself felt is by the ceremony of a trial by due process of law . . . . The ideal that every man is entitled to a fair and impartial trial is the cornerstone of civilized government. Before this ideal every consideration of efficiency in government administration must give way. . . . The American trial is our only public ceremony which symbolizes the idea that the rights of the individual are superior to the convenience or even the security of the sovereign.[147]

The complications and inconveniences of our trials, though seemingly relics of antiquated traditions, embody our values in ways that would be lost in the search for quicker and easier ways of doing things.

In this era of virtual reality, we convince ourselves that the human touch is no longer important, that the electronic image is equivalent to the beating heart. But the evidence tells a different story—of trust that is undermined, of image that is distorted, and of emotions that fail to resonate. These distortions result from and are evidence of the denial of basic procedural rights—presence, confrontation, and counsel—that are inherent to the live trial of our legal tradition and to the individual facing the judge and pleading his case. These distortions violate our notions of justice, fairness, and the dignity of human life. Before we expand even more the use of videoconferencing in our justice system, we should step back and consider the full implications of this policy for the immigrants and for ourselves. Trials by videoconference undoubtedly save the government's resources, but in our rush to save time and money, we may be losing something far more valuable.

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147. Thurman Arnold, *Due Process in Trials*, *in* 300 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 123-24 (1955) (alterations in original).