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From the Legal Literature: Virtual Testimony Post-COVID

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From the Legal Literature

Francesca Laguardia*

VIRTUAL TESTIMONY POST-COVID

When the novel coronavirus that caused the COVID-19 pandemic first rocked the nation during the winter of 2020, courtrooms and much of the legal process ground to a halt.¹ However, it quickly became clear that courts could not simply sit out the pandemic, and emergency processes were developed.² These processes largely relied on remote proceedings, wherein attorneys, parties, witnesses, and judges each sat in separate rooms, addressing each other only via Zoom or other teleconference platforms.³

Much as the need for emergency responses to COVID-19 was immediately apparent, so too were the flaws inherent in these methods of remote representation.⁴ What may not have been apparent to many scholars was the risk that these emergency responses might remain indefinitely.⁵ Now, three years after the COVID-19 pandemic started, the legal world is beginning to confront the likelihood that

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¹Molly Crane-Newman, *NYC Courts Indefinitely Halt Most in-Person Proceedings After Uptick in Coronavirus Cases*, N.Y. DAILY NEWS (Nov. 13, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-courts-halted-proceedings-indefinitely-20201113-punyp25c2nh7jd2iftbdkie7e-story.html>; McKenna Oxenden, *Federal Courts in Maryland Are Closing to the Public Again After a Rise in Coronavirus Cases*, CAP. GAZETTE (Nov. 11, 2020), <https://www.capitalgazette.com/coronavirus/bs-md-district-court-closing-20201111-nsdzjsjgfrb7talyawhuqfb4si-story.html>.

²David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISCOURSE 246 (2020) (discussing generally emergency responses to COVID-19); see also Brandon Marc Draper, *And Justice for None: How COVID-19 Is Crippling the Criminal Jury Right*, 62 B.C. L. REV. E. SUPP. I.-1 (2020); Ryan Shymansky, *Justice Diseased Is Justice Denied: Coronavirus, Court Closures, and Criminal Trials*, 122 W. VA. L. REV. ONLINE 1, 11–12 (2020) (discussing the threat to speedy trial rights).

³Draper, *supra* note 2, at 1; Engstrom, *supra* note 2, at 250–51; Shymansky, *supra* note 2, at 11–12.

⁴Draper, *supra* note 2, at 1, 6–8, 10; Shymansky, *supra* note 2, at 11–12. These discussions were the subject of a prior *From the Legal Literature* column. See Francesca Laguardia, *From the Legal Literature: COVID and the Criminal Law*, 57 CRIM. L. BULL. 278 (2021).

⁵Laguardia, *supra* note 4, at 282. *But see* Engstrom, *supra* note 2, at 246, 248, 264–65 (arguing that the pandemic might give an impetus for courts to develop

many of these developments might outlast the pandemic.⁶ Several authors have suggested that such developments could be a positive step towards either reducing delay and increasing access, or a general opportunity to rethink our criminal justice system.⁷ But is it possible for remote trials to satisfy the constitutional requirements of the Sixth Amendment's Confrontation Clause? Both legal scholars and law students have offered good arguments that video evidence fundamentally fails to replace in-person testimony with regard to the core interests underlying the Confrontation Clause.⁸ Social science

tools to improve on delays and inequalities of access in the criminal justice system more broadly).

⁶Andrew Guthrie Ferguson, *Courts Without Court*, 75 VAND. L. REV. 1461, 1465 (2022); Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. 197, 199–200 (2021); see also Aebra Coe, *Remote Courtrooms Here to Stay as Judges Tackle Backlogs*, LAW360 (May 11, 2020), <https://www.law360.com/articles/1271812/remot-e-courtrooms-here-to-stay-as-judges-tackle-backlogs>.

⁷See Engstrom, *supra* note 2, Ferguson, *supra* note 6; see also Matthew Bender, *Unmuted: Solutions to Safeguard Constitutional Rights in Virtual Courtrooms and How Technology Can Expand Access to Quality Counsel and Transparency in the Criminal Justice System*, 66 VILL. L. REV. 1, 4 (2021) (arguing technology can provide greater public access to trials); Christopher Robertson & Michael Shammas, *The Jury Trial Reinvented*, 9 TEX. A&M L. REV. 109, 114 (2021) (suggesting this might be an opportunity to completely reinvent jury trials, in order to expand the representativeness of juries and create trial procedures that better focus jurors on the trial).

⁸Akua F. Abu, *Remote Justice: Confronting the Use of Video Teleconference Testimony in Massachusetts Criminal Trials*, 34 HARV. J.L. & TECH. 307, 342 (2020) (“[I]t is recommended that the Massachusetts court systems continue to recognize that the mere convenience of the justice system does not satisfy the compelling need for determining when to permit [video teleconferencing]—such testimony should require not only witness unavailability, but also a specific finding of compelling need as has been demonstrated in some cases involving child witnesses.”); Susan Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275 (2020); Brandon Marc Draper, *Revenge of the Sixth: The Constitutional Reckoning of Pandemic Justice*, 105 MARQ. L. REV. 205, 246–263 (2021); Norman M. Garland, *The Constitutionality of Remote Trials*, 51 SW. L. REV. 107 (2021) (offering reasons to protect face to face confrontation, even in circumstances such as the COVID-19 pandemic); Garret Stone, *Please Unmute Yourselves, Court Is Now in Session-The Future of the Confrontation Clause Post-Covid-19*, 11 WAKE FOREST J.L. & POL’Y: SUA SPONTE 133 (2021) (discussing the use of videoconference testimony); see also Dubin Rsch. & Consulting, *Covid-19’s Next Victim? The Rights of the Accused*, 44 CHAMPION 22, 22, 29–30 (2020) (“As a threshold matter, while ‘trial by video’ may be permissible in civil cases, it is wholly insufficient for criminal cases.”); Jessica Arden Ettinger, David Gerger & Barry Pollack, *Ain’t Nothing Like the Real Thing: Will Coronavirus Infect the Confrontation Clause?* 44 CHAMPION 56, 56–57 (2020) (“[C]redibility is best determined in person, not by reading a transcript or watching a video.”); Nina J. Ginsberg, *The Perils of Virtual Trials*, 44 CHAMPION 5, 6 (2020) (“What is clear is that that two-way video procedures fail to meet even the minimal standards articulated by Rule 15.”).

evidence appears to support these arguments.⁹ Similar arguments

Student notes have also explored this issue, including Zoë Green Appler, Note, *Covid-19 & the Sixth Amendment: Questions of Confrontation, Credibility, and Constitutionality in Cook County's Courtrooms*, 97 CHI.-KENT L. REV. 441 (2022); Michael T. Deer, *On-Screen vs. in Person: How A Tech-Savvy World Is Impacting Jurors' Perceptions of Witnesses*, 60 DUQ. L. REV. 339, 370 (2022) (arguing that full, in-person confrontation is necessary for jurors to be able to consider verbal and nonverbal behavior); Madison C. DeRegis, Note, *"Can You Hear Me Now?": The Implications of Virtual Proceedings on Criminal Defendants' Constitutional Rights*, 81 MD. L. REV. ONLINE 71 (2022); Sabin K. Jackson, Note, *Constitutional Risks Associated with the Implementation of Videoconference Technology in Criminal Trials*, 48 RUTGERS COMPUT. & TECH. L.J. 224 (2022); Meghan O'Connell, Note, *Zoom Jury Trials: The Inability to Physically Confront Witnesses Violates A Criminal Defendant's Right to Confrontation*, 52 STETSON L. REV. 329 (2022); Jefferson Wolfe, Note, *Virtual Witness Testimony and the Zoom Age: A Sixth Amendment Violation or the Future of Criminal Law?*, 91 UMKC L. REV. 217 (2022) (exploring constitutional limitations on video testimony); Ayyan Zubair, Note, *Confrontation After Covid*, 110 CAL. L. REV. 1689, 1690 (2022).

⁹For a summary of such evidence, see, e.g., Liz Bradley & Hillary Farber, *Virtually Incredible: Rethinking Deference to Demeanor When Assessing Credibility in Asylum Cases Conducted by Video Teleconference*, 36 GEO. IMMIGR. L.J. 515, 569–70 (2022) (offering social science evidence to support the argument that “video distorts how we interact and further strains the tenuous relationship between demeanor and truthfulness”) (citing, *inter alia*, Johannes M. Basch, Klaus G. Melchers, Anja Kurz, Maya Krieger & Linda Miller, *It Takes More Than a Good Camera: Which Factors Contribute to Differences Between Face-to-Face Interviews and Videoconference Interviews Regarding Performance Ratings and Interviewee Perceptions?*, 36 J. BUS. & PSYCH. 921, 933 (2021); Leanne S. Bohannon, Andrew M. Herbert, Jeff B. Pelz & Esa M. Rantanen, *Eye Contact and Video-Mediated Communication: A Review*, 34 DISPLAYS 177, 182–83 (2013); R. Glenn Cummins & Todd Chambers, *How Production Value Impacts Perceived Technical Quality, Credibility, and Economic Value of Video News*, 88 JOURNALISM & MASS COMM'N Q. 737, 747 (2011); Andrea De Cesarei & Maurizio Codispoti, *Effects of Picture Size Reduction and Blurring on Emotional Engagement*, 5 PLOS ONE 1, 1 (2010); Vincent Denault & Miles L. Patterson, *Justice and Nonverbal Communication in a Post-Pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges*, 45 J. NONVERBAL BEHAV. 1 (2021); Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869 (2010); Susan Goldin-Meadow & Martha Wagner Alibali, *Gesture's Role in Speaking, Learning, and Creating Language*, 64 ANN. REV. PSYCH. 257 (2013); Julia Hautz, Johann Füller, Katja Hutter & Carina Thürridl, *Let Users Generate Your Video Ads? The Impact of Video Source and Quality on Consumers' Perceptions and Intended Behaviors*, 28 J. INTERACTIVE MKTG. 1, 1–4 (2014); Arvid Kappas, Ursula Hess, Carol L. Barr & Robert E. Kleck, *Angle of Regard: The Effect of Vertical Viewing Angle on the Perception of Facial Expressions*, 18 J. NONVERBAL BEHAV. 263 (1994); Sara Landström, Pär Anders Granhag & Maria Hartwig, *Children's Live and Videotaped Testimonies: How Presentation Mode Affects Observers' Perception, Assessment and Memory*, 12 LEGAL & CRIMINOLOGICAL PSYCH. 333, 344–45 (2007); Sara Landström, Pär Anders Granhag & Maria Hartwig, *Witnesses Appearing Live Versus on Video: Effects on Observers' Perception, Veracity Assessments and Memory*, 19 APPLIED COGNITIVE PSYCH. 913, 928–29 (2005); Rodd McColl & Marco Michelotti, *Sorry, Could You Repeat the Question? Exploring Video-Interview*

have been made in court yielding mixed results.¹⁰ Even some treatises have acknowledged these concerns.¹¹

As many, but not all of these authors note, the question of replacing witness testimony with two-way live video feed is not a new

Recruitment Practice in HRM, 29 HUM. RES. MGMT. J. 637, 646 (2019); Holly K. Orcutt, Gail S. Goodman, Ann E. Tobey, Jennifer M. Batterman-Faunce & Sherry Thomas, *Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 LAW & HUM. BEHAV. 339 (2001); Miles L. Patterson, *A Parallel Process Model of Nonverbal Communication*, 19 J. NONVERBAL BEHAV. 3, 6 (1995); Byron Reeves, Annie Lang, Eun Young Kim & Deborah Tatar, *The Effects of Screen Size and Message Content on Attention and Arousal*, 1 MEDIA PSYCH. 49 (1999); Dane Thorley & Joshua Mitts, *Trial by Skype: A Causality-Oriented Replication Exploring the Use of Remote Video Adjudication in Immigration Removal Proceedings*, 59 INT'L REV. LAW. & ECON. 82 (2019).

For an exploration of the implications of the Sixth Amendment right to a public trial, see Stephen E. Smith, *The Online Criminal Trial as a Public Trial*, 51 SW. L. REV. 116 (2021).

¹⁰*E.g.*, *State v. Smith*, 636 S.W.3d 576 (Mo. 2022) (holding that video testimony is not acceptable under the Confrontation Clause unless witness is a child or victim or a specific showing of unavailability is made); *In re C.A.R.A. v. Jackson County Juvenile Office*, 637 S.W.3d 50 (Mo. 2022) (testifying via video is allowable only after a specific showing of unavailability and defendant has had some other opportunity to cross-examine); *Chaparro v. State*, 137 Nev. 665, 497 P.3d 1187, 137 Nev. Adv. Op. No. 68 (2021) (holding that a Zoom sentencing hearing did not violate Confrontation Clause); *Haggard v. State*, 612 S.W.3d 318 (Tex. Crim. App. 2020) (finding testimony should be excluded from analysis because the witness had insufficient reason to testify by Zoom rather than in person); *State v. Tate*, 969 N.W.2d 378 (Minn. Ct. App. 2022), review granted, (Mar. 15, 2022) and aff'd, 985 N.W.2d 291 (Minn. 2023) (allowing Zoom testimony of a quarantined witness during the Covid pandemic).

Questions regarding the Sixth Amendment right to a public trial are also arising in judicial proceedings. See, e.g., *State v. McClendon*, 2022 WL 996549, at *6–7 (Minn. Ct. App. 2022), review denied, (June 21, 2022) (holding that livestreamed proceedings were an adequate replacement for open courtrooms due to the Covid pandemic); *State v. Modtland*, 970 N.W.2d 711, 725 (Minn. Ct. App. 2022), review granted in part, (Apr. 27, 2022) and review denied, (Mar. 14, 2023) (same).

¹¹Robert H. Dierker, *Witnesses: Confrontation Issues*, in 28 MO. CRIM. PRAC. HANDBOOK § 23:6 (citing *Smith*, 636 S.W.3d at 576; *In re C.A.R.A.*, 637 S.W.3d at 50); Lewis R. Katz, John Martin & Jay Macke, *Right to "Face-to-Face" Confrontation*, in BALDWIN'S OHIO PRAC. CRIM. L. § 69:4 (Lewis R. Katz et al. eds., 3d ed. 2009 & 2022 Supp.) ("Remote testimony may meet constitutional expectations but, to do so, must be administered in such a manner as to ensure that the witness is not able to manipulate their side of the technology to avoid having to see the defendant (even if the defendant can still see the witness from the defendant's vantage point in the courtroom.)"); Michael J. McCormick et al., *Trial Procedure—Evidence and Objections: Commentary—Jury Trials*, in 7A TEX. PRAC., CRIM. FORMS & TRIAL MANUAL § 73.1 (11th ed. 2005 & 2022 Supp.) (citing *Haggard*, 612 S.W.3d at 318); Peter N. Thompson, *Hearsay: Federal and State Constitutional Issues*, in 11 MINN. PRAC., EVID. § 801.03 (4th ed. 2012 & 2022 Supp.) (summarizing *Tate*, 969 N.W.2d at 378).

one.¹² To the contrary, arguments over the use of teleconferencing technology to facilitate testimony in criminal trials have resurfaced consistently over the last two decades, particularly given the rise of prosecutions for terrorism and piracy which often implicate international witnesses.¹³ While it is possible that a true turning point has been created by the global disruption of the COVID-19 pandemic, it is also possible that this is simply one more example of the fact that, all too often, we assume developments are “new” when they are simply outside of our own area of experience.¹⁴ Or, perhaps the COVID-19 pandemic is a watershed moment, when an argument that has traditionally lost manages to overcome and shift the conversation, fundamentally “disrupting” our established procedures.¹⁵

The vast majority of scholars who have examined this issue have

¹²Abu, *supra* note 8, at 312; Dubin Rsch., *supra* note 8, at 28; Ettinger, *supra* note 8, at 58; Ferguson, *supra* note 6, at 1516; Ginsberg, *supra* note 8, at 5; O’Connell, *supra* note 8, at 349–51; Zubair, *supra* note 8, at 1698–99.

¹³See, e.g., J. Benjamin Aguinaga, *Confronting Confrontation in a FaceTime Generation: A Substantial Public Policy Standard to Determine the Constitutionality of Two-Way Live Video Testimony in Criminal Trials*, 75 LA. L. REV. 175 (2014); Yvonne M. Dutton, *Virtual Witness Confrontation in Criminal Cases: A Proposal to Use Videoconferencing Technology in Maritime Piracy Trials*, 45 VAND. J. TRANSNAT’L L. 1283, (2012) (discussing generally the use of videoconferencing technology in exceptional cases); Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 WM. & MARY BILL RTS. J. 769 (2004) (generally discussing the use of videoconferencing in criminal trials); Lynn Helland, *Remote Testimony—A Prosecutor’s Perspective*, 35 U. MICH. J.L. REFORM 719 (2002); Fredric I. Lederer, *The Potential Use of Courtroom Technology in Major Terrorism Cases*, 12 WM. & MARY BILL RTS. J. 887, 919 (2004); Fredric I. Lederer, *Technology-Augmented Courtrooms: Progress Amid A Few Complications, or the Problematic Interrelationship Between Court and Counsel*, 60 N.Y.U. ANN. SURV. AM. L. 675, 678 (2005); Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?*, 25 REV. LITIG. 633 (2006) (discussing generally the move towards use of technology in the courtroom, including videoconferencing); Will Resnik, *Get with the Times: Why the Use of Live Two-Way Video Testimony Does Not Violate the Confrontation Clause*, 45 AM. J. CRIM. L. 461 (2018); Barry M. Sabin, Ryan C. Eney & Nabeel A. Yousef, NYU Ctr. L. & Sec., *Proposed Changes to Federal Rule of Criminal Procedure 15: Limitations, Technological Advances, and National Security Cases*, in THE TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2009, at 34-57 (Karen J. Greenberg ed., 2010), https://www.lawandsecurity.org/wp-content/uploads/2011/09/02_TTRCFinalJan1422009.pdf [<https://perma.cc/CCQ5-RG26>]; see also *U.S. v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008); *Horn v. Quarterman*, 508 F.3d 306, 317 (5th Cir. 2007); *U.S. v. Yates*, 438 F.3d 1307, 1314 (11th Cir. 2006); *State v. Rogerson*, 855 N.W.2d 495, 505 (Iowa 2014).

¹⁴See, e.g., Francesca Laguardia, *The Nonexceptionalism Thesis: How Post-9/11 Criminal Justice Measures Fit in Broader Criminal Justice*, 19 NEW CRIM. L. REV. 544 (2016) (discussing arguments thought to be “exceptional” in the counterterrorism context, and their existence in criminal justice arguments over the 1990s).

¹⁵Ferguson, *supra* note 6, at 1465.

suggested that even live, two-way video testimony and cross-examination is insufficient.¹⁶ The reason for this rejection goes beyond Justice Scalia's broad statement that "there is something deep in human nature that regards face-to-face confrontation between [the] accused and accuser as 'essential to a fair trial in a criminal prosecution.'"¹⁷ In 1990, the U.S. Supreme Court reiterated the importance of actual presence, even while allowing that some exceptions might be made in limited circumstances. The Court stated that defendants' ability to test the reliability of the evidence against them fundamentally relied upon "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact."¹⁸ In 1965, the Court had argued that the need for the physical presence of the accuser before the accused responds to something "deep in human nature,"¹⁹ and later reasoning seems to rely on the notion that "[i]t is always more difficult to tell a lie about a person to his face than behind his back."²⁰

These interests are well known—every article to discuss the issue acknowledges these concerns.²¹ But the vague nature of the notion that "it is easier to tell a lie behind his back" is frustratingly slippery in the face of specific policy interests, leading many to argue that policy purposes should triumph over vague confrontation purposes.²² Do we know in person testimony is more reliable or more easily tested? For what reason should we slow down courtrooms and make trials less pleasant for all involved, if we have no hard evidence that physical presence matters? In a particularly provocative article, Christopher Robertson and Michael Shammass argue that technological advancements such as teleconferencing should be utilized to facilitate larger juries without peremptory challenges; asynchronous

¹⁶*E.g.*, Deer, *supra* note 8, at 370; Draper, *supra* note 8, at 246–63; Dubin Rsch., *supra* note 8, at 29–30; Ettinger et al., *supra* note 8, at 56–57; Ginsberg, *supra* note 8, at 6.

¹⁷*Coy v. Iowa*, 487 U.S. 1012, 1017, 108 S. Ct. 2798, 101 L. Ed. 2d 857, 25 Fed. R. Evid. Serv. 865 (1988).

¹⁸*Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157, 111 L. Ed. 2d 666, 30 Fed. R. Evid. Serv. 1 (1990).

¹⁹*Pointer v. Texas*, 380 U.S. 400, 404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

²⁰*Coy*, 487 U.S. at 1019.

²¹*E.g.*, Bender, *supra* note 7, at 41–42; Ferguson, *supra* note 6, at 1516; Robertson & Shammass, *supra* note 7, at 159.

²²*E.g.*, Robertson & Shammass, *supra* note 7, *passim* (arguing generally that video trials enable access and civic engagement, sufficient to make this technological addition worthwhile).

presentation; shorter, edited trials; a larger, national jury pool; and vote aggregation without deliberation.²³

But the world has progressed in more ways than just technological capabilities, and the understanding of the problems presented by teleconferenced witness testimony has progressed as well. This is best demonstrated in an article studying immigration proceedings, rather than criminal trials. In “Virtually Incredible: Rethinking Deference to Demeanor when Assessing Credibility in Asylum Cases Conducted by Video Teleconference,” Professors Liz Bradley and Hillary Farber present empirical evidence on the quality and problems with demeanor evidence in teleconferenced testimony.²⁴ Summarizing the state of empirical analysis of demeanor evidence and video testimony, they first remind the reader that in fact demeanor evidence is notoriously unreliable and subject to bias.²⁵ But before we allow that evidence to push us to abandon demeanor evidence entirely, Bradley and Farber also bring to light significant studies suggesting that video evidence is *noticeably worse*.²⁶ In particular, they highlight that it is difficult to make eye contact across a videoconference, and that eye contact is an essential aspect of assessing truthfulness in Western culture, leading to a lack of understanding and incorrect assumptions of dishonesty when it cannot be established.²⁷ Additionally, “camera location, angle, lighting, and space constraints” can distort body language, leading to an inaccurate read of the witness by the decisionmaker.²⁸ They can also distort the physical size of the individual.²⁹ “Too much light, too little light, or shadows can obfuscate facial expressions and impact credibility.”³⁰ Testimony that is already difficult to give before complete strangers can become even more difficult using videoconferencing platforms.³¹

We might add to these problems the facts that,

[v]arying camera angles may also bias judges’ and jurors’ evaluations of witnesses and parties. Standard filmmaking texts teach that high angle shots tend to make the person depicted appear smaller or weaker, while low angle shots make the person seem more significant and powerful, and experimental studies have found that faces seen

²³ See generally Robertson & Shammass, *supra* note 7, *passim*.

²⁴ Bradley & Farber, *supra* note 9.

²⁵ Bradley & Farber, *supra* note 9, at 534–43.

²⁶ Bradley & Farber, *supra* note 9, at 544–58.

²⁷ Bradley & Farber, *supra* note 9, at 546–47.

²⁸ Bradley & Farber, *supra* note 9, at 547–51.

²⁹ Bradley & Farber, *supra* note 9, at 549.

³⁰ Bradley & Farber, *supra* note 9, at 549.

³¹ Bradley & Farber, *supra* note 9, at 553.

from below are perceived more positively than faces seen from above. Finally, context matters: “[W]hen a person looks at a human face with the goal of perceiving emotion, the perceiver encodes the face in context,” so the various backgrounds that appear behind different witnesses and parties may affect judges’ and jurors’ interpretations of their demeanors differently.³²

In the face of these concerns, Robertson and Shammas’s proposal is somewhat terrifying.³³ While it would certainly make trials less burdensome for jurors, and expanding jury representation clearly would be a positive step for criminal trials, Robertson and Shammas’s inclusion of edited testimony would risk exaggerating the problems that both Bradley and Farber, and Bandes and Feigenson previously described:

First, video-editing allows evidentiary presentation to be more condensed and, therefore, focused. The current debate on whether and how courts should limit trial time evinces perceptions that modern trials largely waste the time of everyone involved. Indeed, raw testimony involves plenty of proverbial throat-clearing, parrying, dodging, and repeating. In contrast, the use of video depositions in today’s trials shows how they can be condensed from raw material consuming, say, seven hours (or more) to just an hour or so, featuring only the key testimony that each party designates as most essential. This distillation obviously offers increased efficiency. Concision may also improve accuracy by improving juror attention and comprehension. Eliminating extraneous testimony lessens the risk that jurors will grow bored, confused, or distracted.³⁴

If merely catching a witness at the wrong angle can so significantly change jurors’ perceptions of the witness’s honesty and intent, how much worse would edited testimony be? It would seem that, as annoying as it may sound, throat-clearing and verbal parrying must be included in an assessment of demeanor.

Altogether, moving testimony to a virtual format more generally appears to be an idea that will not be laid to rest. The COVID-19 pandemic may have put new life into this debate, but it has not changed the arguments that are made. In the end, the question is how and whether jurors can be trusted to assess the credibility of witnesses. Social science does not support the claim that two-way videoconferencing can match in-person testimony; to the contrary, evidence appears to suggest that videoconferencing is inherently

³²Bandes & Feigenson, *supra* note 8, at 1302–03 (internal footnotes omitted). For a general description of the way camera angles can mislead, see also Kathy Pezdek & Tamar Lerer, *Let’s Go to the Tape: Science-Based Standards for Non-Eyewitness Identifications in a Surveillance World*, 59 CRIM. L. BULL. 1 (2023) (generally discussing inaccuracy in identifications based on camera angle, lighting, difficulties discerning the influence of video recording).

³³Robertson & Shammas, *supra* note 7, at 136.

³⁴Robertson & Shammas, *supra* note 7, at 136 (internal footnotes omitted).

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inferior for purposes of communication and assessing reliability. Absent the type of specific necessity presented by an alternative of complete closure of courts, or a particularly vulnerable witness, videoconferencing is unlikely to be found an adequate replacement for a witness's presence.