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**Videoconferencing in Immigration Proceedings**

**by**

**Aaron Haas**

## ABSTRACT

In this article, I examine the growing use of videoconferencing technology in immigration proceedings. These hearings raise a number of concerns that have not yet been fully explored, particularly in light of a growing body of scientific evidence that video-mediated personal interactions are perceived significantly differently 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, such as the lack of eye contact and the difficulty of detecting non-verbal cues, have profound impacts on the cognitive and emotional response of the listener, as well as on the perception of the speaker's credibility and guilt.

Personal testimony is particularly important in the immigration removal context, in which respondents often lack the resources to provide evidence and witnesses. These proceedings may violate a number of important rights that are fundamental to our conception of justice: the right to be present in court when a matter of great importance to your future is under consideration, the right to personally confront the witnesses and evidence against you, and the right to effective representation by an attorney.

In this article, I first explain the growing use of this technology in American courts, including immigration proceedings. Next, I will examine the problems raised by this new technology in the courtroom, specifically with regard to its impact on communication between the respondent and the judge. In the third part, I will show how these problems violate the fundamental rights of the detainee -- to presence, confrontation, and counsel. Finally, I will conclude with some ideas on how to mitigate these problems while still taking advantage of new technology, and some examples of good uses of videoconferencing technology.

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. The 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, with a cross-section of citizens culled from the population to perform their ancient duty. The courtroom has fine wood and polished marble, and is adorned with the accouterments of justice -- American flags, seals, paintings of honored jurists -- that let someone know that he sits in a hall where important decisions are made and grave judgments are rendered.

It may surprise many people 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. They are likely to see a small room deep within a large federal building, with two tables perpendicular to one another, connected to form a right angle. At each table sits a lawyer, one representing the government and the other the alien. A row of chairs behind these tables and against the walls seat the family and friends of the subject of these proceedings. On the other side of the room, in view of the advocates and observers, is a television screen with a camera on top. This monitor shows, on one side of the screen, the judge, who may be located in another state, and on the other side, the immigrant, who is seated in a detention center in a third location.

As courts struggle with 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.

This summer, I had the opportunity to observe one of these trials conducted by video conference in Cleveland, Ohio. 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, south of Columbus, a few hours drive away from the courtroom. The judge was seated in Arlington, Virginia. The respondent was a native of Nigeria who was a legal permanent resident of the United States. He had plead guilty to certain charges related to the robbery of \$30 from an individual, and was ordered removed from the country on the grounds that he had committed an aggravated felony. The respondent appealed this ruling, asking for a stay of his removal order under the Convention Against Torture (CAT), arguing that 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 he feared that he would be tortured again if deported there.

As I watched this hearing, I felt that the way videoconferencing technology

mediated the interaction and communication between the judge and the respondent had a subtle but significant effect on the conduct of the hearing, the ability of the respondent to present his case before the court, and ultimately on the verdict itself. I felt the turning point in the case came during one important exchange between the respondent and the judge. The judge asked the respondent if he committed the robbery for 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 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 this explanation, the judge cut him off mid-sentence and understood him to say that he was not taking responsibility for crimes to which he had plead guilty. The miscommunication was partly due to the respondent's lack of fluency in English, but was also partly due, in my opinion, to time delays in speech recognition inherent to the medium of video communication, as well as the inability to clearly see visual cues of recognition and understanding, or lack thereof. The judge immediately took a more negative view of the respondent and his claims, and ultimately ruled against his CAT claim and ordered him deported. It can never be known whether and to what extent the use of video conference technology affected the outcome of this case, or the many others in which it is used, but it is an issue that has not received nearly the degree of attention it deserves.

These hearings raise a number of concerns that have not yet been fully explored, particularly in light of a growing body of scientific evidence that video-mediated personal

interactions are perceived significantly differently 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, such as the lack of eye contact and the difficulty of detecting non-verbal cues, have profound impacts on the cognitive and emotional response of the listener, as well as on the perception of the speaker's credibility and guilt. Personal testimony is particularly important in the immigration removal context, in which 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 when a matter of great importance to your future is under consideration, the right to personally confront the witnesses and evidence against you, and the right to effective representation by an attorney.

In this essay, I will first explain the growing use of this technology in American courts, including immigration proceedings. Next, I will examine the problems raised by this new technology in the courtroom, specifically with regard to its impact on communication between the respondent and the judge. In the third part, I will show how these problems violate the fundamental rights of the detainee -- to presence, confrontation, and counsel. Finally, I will conclude with some ideas on how to mitigate these problems while still taking advantage of new technology, and some examples of good uses of videoconferencing technology.

When a resident is deported to his home country, it can have devastating consequences on his and other lives. It 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 of or examination into its larger systemic impact. In this essay, I hope 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.

## **I. Videoconferencing in the Courtroom**

A video conference is a set of interactive telecommunication technologies which allow two or more locations to interact via two-way video and audio transmissions simultaneously. The core technology used in a video conference system is digital compression of audio and video streams in real time. The resulting digital stream of 1's and 0's is subdivided into packets, which are then transmitted through a video network. A courtroom will typically use a dedicated video conference system, a piece of equipment that includes a multi-purpose console with a remote-controlled video camera on top. Omnidirectional microphones are connected to the console, along with a television monitor and loudspeakers.

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

An Illinois court first used video technology to conduct bail hearings in 1972 over videophone. A Philadelphia court began using closed-circuit televisions for preliminary arraignments in 1974. Dade County, Florida, began using videoconferencing for misdemeanor arraignments in 1983.<sup>1</sup> While no criminal trial has been conducted by video conference, the technology has been used in other aspects of the criminal trial process, from arraignments and bail hearings to sentencing and post-conviction hearings. It has been allowed in civil trials, where the constitutional guarantees are not as strict as criminal proceedings, such as civil commitment hearings, workers' compensation hearings, and Social Security appeals.<sup>2</sup> It has been used to take the testimony of child witnesses in sexual abuse cases, in order to shield them from being in the presence of the accused abuser during their testimony.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant

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1 NATIONAL CENTER FOR STATE COURTS, VIDEOCONFERENCING BRIEFING PAPER (1995).

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

Removal Act, which, among other things, amended the Immigration and Nationality Act to allow removal proceedings to be conducted "through videoconference".<sup>3</sup> Currently, video conferencing equipment has been installed at the headquarters of the Executive Office of Immigration Review (EOIR), as well as 40 Immigration Courts across the country, and 77 other facilities, including detention centers and correctional facilities, where immigration hearings are conducted.<sup>4</sup>

Court administrators consider this technology to be of benefit to the efficient administration of justice, and have enthusiastically supported its continuation and expansion. The EOIR argues 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.<sup>5</sup> A report from the Institute for Court Management at the National Center for State Courts was also strongly supportive of this new technology. It argued that VCT would make better use of law enforcement personnel, 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.<sup>6</sup>

However, immigration attorneys have been less sanguine about this new method

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<sup>3</sup> 8 U.S.C. § 1229a(b)(2)(A) (1996).

<sup>4</sup> DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, VIDEO CONFERENCING INITIATIVE, FACT SHEET (Sept. 21, 2004).

<sup>5</sup> *Id.*

<sup>6</sup> MICHAEL G. NEIMON, CAN INTERACTIVE VIDEO WORK IN WAUKESHA COUNTY? AN ANALYSIS AND SURVEY, (National Center for State Courts) (May 2001).

of conducting hearings. Peggy Gleason, an attorney at the Catholic Legal Immigration Network in Washington, writes that she has encountered many problems at these hearings. 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. Technical difficulties with the equipment are frequent and poor sound quality make it harder to hear and understand respondents, who often do not speak English well to begin with. There are problems with the use and presentation of evidence, and with serving notice and other important documents to the detainee. She found the video trial to be a "surreal experience" in which her client was turned into a "piece of electronic equipment". 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.<sup>7</sup>

Despite these kinds of protests from attorneys, video conference trials appear to be a growing trend in immigration jurisprudence. However, this phenomenon has occurred largely unnoticed outside the world of immigration law, and largely unstudied as to its effects on due process and justice. I would now like to examine some findings in media theory and behavioral psychology that raise important questions about how the changing courtroom may be damaging the delivery of justice to our nation's immigrants.

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<sup>7</sup> Peggy Gleason, *Reality TV for Immigrants: Representing Clients in Video Conference Hearings*, BENDER'S IMMIGRATION BULLETIN, Sept. 1, 2000.

## II. Problems with Video Conference Trials

### The Medium is the Message

In 1964, an obscure Canadian literature professor named Marshall McLuhan published a book called *Understanding Media: The Extension of Man*.<sup>8</sup> It was a meditation on the impact of modern media on society, which he summed up with the phrase, "the medium is the message." He became an instant celebrity, 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?"<sup>9</sup> Timothy Leary said McLuhan inspired him to come up with the phrase, "Turn on, Tune in, Drop out." He even appeared in Woody Allen's *Annie Hall*, to rebut a pretentious professor's claim to understand his work. But, his celebrity died down in the 1980's and his writings were largely ignored for a long time, until the Internet and the Information Age, a term he coined, gave his writings a whole new meaning and prescience.

Writing in the 1960's, he 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

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<sup>8</sup> MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSION OF MAN* (MIT Press 1994).

<sup>9</sup> Tom Wolfe, *What if he is Right?*, NEW YORK, November 1965.

central nervous system itself in a global embrace, abolishing both space and time as far as our planet is concerned."<sup>10</sup> This prediction of the social impact of digital media and the Internet decades before their appearance and the conceptualizing of the global community they would spawn is remarkable and has revived his popularity among media scholars. Lewis Lapham, the editor of *Harper's* magazine, writing in 1994, 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."<sup>11</sup> *Wired*, one of the leading new media magazines, called him their "patron saint."

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. He believed that people wrongly focused on the visible elements of a communication when in fact the more significant impact came from those aspects of the communication technology 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. 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 are very successful on television fail completely when

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<sup>10</sup> MCLUHAN, at 3.

<sup>11</sup> Lewis H. Lapham, *Introduction* to MARSHALL MCLUHAN, *UNDERSTANDING MEDIA*, (MIT Press 1994).

they try to make movies. Their personalities are well-suited to a certain medium but not another. 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, and likewise Franklin Roosevelt's ability to use radio to connect with Americans during wartime.

Perhaps the best illustration of the importance of medium on message are 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.<sup>12</sup> McLuhan quotes from an article by Philip Deane of the *Toronto Globe and Mail* that summarized his views: "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."<sup>13</sup> Nixon was more suited to the medium of radio, and Kennedy to television. In the television age, the advantage went to Kennedy, and he won the election.

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12 Liette Gidlow, *The Great Debate: Kennedy, Nixon, and Television in the 1960 Race for the Presidency*, HISTORY NOW, Issue 1 (Sept. 2004).

13 MCLUHAN, at 330.

## The Media Equation

Disparities like those seen in responses to the Nixon-Kennedy debates can be explained by the different ways in which the audience members interact with different media. With radio, the 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 demands a degree of imagination and interpretation.<sup>14</sup> Indeed, recent research indicates, to the surprise of the researchers themselves, that this 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. The researchers, both professors at Stanford University, write that most people believe "that 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,

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14 Eric Norden, *The Playboy Interview: Marshall McLuhan*, PLAYBOY, March 1969 ("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 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.").

and it is highly consequential." They continue, "In short, we have found that individuals' interactions with computers, television, and new media are *fundamentally social and natural*, just like interactions in real life."<sup>15</sup> 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 I show below, and if video-mediated communication (VMC) distorts or diminishes these cues, as I also show 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 were 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. He will respond to the lack of eye contact from the image in front of him the same way he would respond to lack of eye contact from a real person in front of him -- that is, he will believe the person is being evasive. This research re-enforces the view that medium can overtake content in determining message.

Mark Federman, a media scholar at the University of Toronto, argues that this overemphasis on content, as opposed to the medium itself, extends in modern times to

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15 BYRON REEVES AND CLIFFORD NASS, *THE MEDIA EQUATION* 4-5 (Cambridge University Press 1996).

computer-mediated communications and videoconferencing technologies. Mr. Federman was asked by the Immigration and Review Board of the Government of Canada to look into how the use of video conference technology could affect immigration proceedings in their courts, in light of current research in communications and media theory. Federman argued that " the latest approach to media study considers not only the 'content' but the medium and the cultural matrix within which the particular media operate." He pointed to several factors that could affect outcomes of immigration cases conducted in this way besides the content of the testimony, including: "the relative cultural conditioning of television itself; the participants' conditioning relative to video camera's use in surveillance; the effects of distortions in experiencing non-verbal 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."<sup>16</sup>

I will now turn to how the medium dominates the message in the case of videoconferencing. In short, it fundamentally alters the nonverbal behavioral cues that are such 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 rightness of their

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<sup>16</sup> Mark Federman, *On the Media Effects of Immigration and Refugee Board Hearings via Videoconference*, JOURNAL OF REFUGEE STUDIES (forthcoming 2006). This article is scheduled to appear later this year, but can be obtained from the author by emailing him.

arguments.

### 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-verbal elements of communication -- in story-telling. Study participants watched a scene from a Sylvester and Tweety Bird cartoon, in which Sylvester attempts 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 swallows the ball, rolls out of the pipe, down the street, into a bowling alley, and down a lane where he scores a strike. The participants are 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, as 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 point they call the growth point (GP). They found that there are two distinct modes of representation, one linguistic and the other imaginal, and each with 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.<sup>17</sup>

But, in fact, gesture is just one of many forms of non-verbal communication that humans use to make themselves understood to others. The first scientific study of nonverbal communication (NVC) was published by Charles Darwin in 1872. He argued that animals use NVC to express feelings of anger or pleasure, to communicate between mother and baby, and to increase social bonds. These animal gestures and expressions were passed on to humans through natural selection, and are still used in human society today.<sup>18</sup> Sigmund Freud believed body language and other NVC could reveal people's true feelings that they are trying to hide. For example, someone who is trying to lie will give his intention away through gestures. Freud writes, "If his lips are silent he chatters with his fingertips; betrayal oozes out of him at every pore."<sup>19</sup>

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 came to two conclusions. First, he found that communication consists of three elements: words, tone of voice, and body language. 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% rule, that is, that words accounted for 7% of meaning, tone of voice for 38%, and body language for 55%. For meaningful communication,

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17 DAVID MCNEILL, *LANGUAGE AND GESTURE* (Cambridge University Press 2000).

18 CHARLES DICKENS, *THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS* (1872).

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

these different elements needed to support each other. If they appeared to be in conflict, the element with the higher importance would be taken as the correct one. In other words, if a speaker's words appeared to conflict with his body language, the audience would believe that the body language accurately portrayed the speaker's feelings and the words were inaccurate.<sup>20</sup>

Nonverbal communication 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. 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. Fear and sadness, on the other hand, can only be decoded from the eyes and lids.<sup>21</sup>

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. The first group found the woman cheerful and friendly, while the second group found the same woman, absent the hand movements, tense and disturbed. Researchers have found that anxiety, for example,

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20 ALBERT MEHRABIAN, *NONVERBAL COMMUNICATION* (1972).

21 MICHAEL ARGYLE, *BODILY COMMUNICATION* 122-131 (1988).

is indicated by the interlocking of hands or the opening and closing of fists, while elation is demonstrated by fast, rhythmical hand movements.<sup>22</sup> The examples are too numerous to iterate here, but it is well-established that emotions can be expressed through voice pitch, eye gaze, posture, touching of hair, and any number of 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, the first place to look is the experience so far of using videoconferencing in legal proceedings.

#### Videoconferencing Justice: The Experience So Far

Unfortunately, because videoconferencing technology is new and because it is not used in ordinary criminal trials, there have been few studies looking at the effects of these kinds of trials as they are actually experienced. One of the first, and still one of the most important, uses of this technology in the courtroom is to hear children's testimony during cases of sexual abuse. A major concern in these trials is that it would be too painful or traumatic for children to have to testify in a courtroom where they have to come face-to-face with their alleged abuser. Studies of these kinds of trials in both Australia<sup>23</sup> and

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<sup>22</sup> ARGYLE, at 188-202.

<sup>23</sup> Judy Cashmore, THE USE OF CLOSED CIRCUIT TELEVISION FOR CHILD WITNESSES (1992).

New Zealand<sup>24</sup> are generally positive. However, these studies were not particularly comprehensive and were understandably infused with the overriding concern of protecting the children from further anxiety and trauma.

In the 1970's, 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<sup>25</sup> and the other at BYU<sup>26</sup> -- found little differences between live and videotaped testimony. However, their studies 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 their methodologies. 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. Second, he found that they failed to establish a null hypothesis -- a condition in which there are no differences to be found among the conditions being compared other than the variable being tested. Third, the investigators lacked a theoretical framework in which to discover meaning from their results. Finally, they 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

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

25 Gerald Miller and Norman Fontes, *REAL VERSUS REEL: WHAT'S THE VERDICT?* (1978).

26 Gordon Bermant, Charlan Nemeth, Neil Vidmar, *PSYCHOLOGY AND THE LAW* 185-238 (1976).

setting.<sup>27</sup>

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. The author found that the child's testimony was more believable and powerful when presented live, and there was, consequently, a higher conviction rate of the accused when the child testified live. Specifically, the conviction rate was 60.8% in the trials with videotaped testimony, and 76.6% when the child appeared in person.<sup>28</sup> 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. They show that videoconferencing diminishes and distorts non-verbal communication, leading to a loss of both emotional connection and perceived credibility, and ultimately, to less favorable verdicts.

### The Loss of Non-Verbal Cues to Meaning

One of the most important judgments juries must make is about the credibility of the

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<sup>27</sup> Gordon Bermant, *Data in Search of Theory in Search of Policy: Behavioral Responses to Video in the Courtroom* in Symposium, *The Use of Videotape in the Courtroom*, BYU L. REV. 327 (1975).

<sup>28</sup> David F. Ross; Steve Hopkins; Elaine Hanson; R. C. L. Lindsay; Kirk Hazen; Tammie Eslinger, *The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse*, 18 LAW AND HUMAN BEHAVIOR 553 (1994).

witnesses in front of them; 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 non-verbal cues are not effectively transmitted over video.

In one study, 131 undergraduates at the University of Massachusetts, Amherst, acting as members of a jury, watched videotapes of simulated defendants' testimony. 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 simply read a transcript of the testimony. The defendant was accused of assault and petty larceny for which he would serve three years in state prison if convicted. The testimony regarded his supposed alibi, and was designed to be sufficiently vague to support either a guilty or innocent judgment. The jury members were instructed to rate the defendants' believability on a 7-point scale, with 7 being most believable and 1 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.<sup>29</sup>

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<sup>29</sup> 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 (1984).

These important nonverbal signals are not transmitted as successfully over video conference equipment as when the communicators are present in the same room, as has been demonstrated in a number of different contexts. 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. 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.<sup>30</sup>

This finding -- that NVC is not as rich over video conference 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 video conference between three different sites, one at the main campus with the professor present and two remote sites. Students were organized into seven project teams of about four students each, and asked to rate their classmates. 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

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30 Gwyneth Doherty-Sneddon, et. al., *Face-To-Face and Video-Mediated Communication: A Comparison of Dialogue Structure and Task Performance*, 3 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: APPLIED 105 (1997).

judgments of peers, based on more kinds of information, than they could with remote colleagues. The study also showed that the impressions people form of remote others are different from and less positive than those they form of face-to-face others. 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. These results indicate that VMC both degrades the richness of human communication and diminishes the ability to generate positive feelings among participants.<sup>31</sup>

### 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 on a study to compare the effects on jury perceptions of child witnesses in sex abuse cases of live testimony versus testimony via closed-circuit television (CCTV). The author recruited mock jurors from the community and had child actors testify either via CCTV or live. She found that children who testified via CCTV, all else being equal, were viewed more negatively by the jury than those testifying live. Specifically, they were seen as less believable, less accurate for both the prosecution and defense, less accurate in recalling past events, more likely to

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31 John Storck and Lee Sproull, *Through a Glass Darkly: Why do People Learn in Videoconferences?*, 22 HUMAN COMMUNICATION RESEARCH 197 (1995).

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. Not surprisingly, jurors were more likely to find the accused abuser guilty when children testified live rather than via CCTV before deliberation.<sup>32</sup>

An important factor in the more negative impressions formed by video conference communication, in comparison to live interaction, may be the greater difficulty viewers have in feeling close to and bonding with speakers on the other end of a television screen or computer. This 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. Yet, this task is made harder by the use of mediating technology. In one study, 64 undergraduates at Iowa State University were randomly assigned to either a face-to-face or online conversation. Participants in the face-to-face condition reported greater satisfaction, greater levels of closeness, greater recall of facts immediately following the interaction, and more self-disclosure. 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

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32 Holly Kay Orcutt, *Detecting Deception: Factfinders' abilities to assess the truth* (1998) (Ph.D. dissertation, State University of New York at Buffalo). Interestingly, however, these biases were wiped out during deliberation, and therefore, the ultimate verdict was not affected by the choice of testimony delivery. However, it should be remembered that immigration hearings are conducted by judges as the sole deciders, so the apparently salutary effects of deliberation may not be relevant in this context

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 and abuse, will be more forthcoming and better understood when conducted face-to-face, rather than filtered through media.<sup>33</sup>

### 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 was held. Children participated in a play session with an unfamiliar male, and later, individually testified about the experience at a local court. Mock juries observed the testimony either live or via CCTV, and rated the witnesses. 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.<sup>34</sup>

This loss of trust may result from the absence of eye contact inherent in video-

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33 Michael J. Mallen, Susan X. Day, and Melinda A. Green, *Online Versus Face-to-Face Conversations: An Examination of Relational and Discourse Variables*, 40 PSYCHOTHERAPY: THEORY, RESEARCH, PRACTICE, TRAINING 155 (2003).

34 Gail S. Goodman, et. al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 LAW AND HUMAN BEHAVIOR 165 (1998).

mediated communication. People view willingness to make eye contact as an important indicator of trustworthiness. However, videoconferencing 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.

Typically, videoconferencing equipment places the camera either directly above the screen, directly below the screen, or to the side of it. It has been found that the vertical or horizontal loss of eye contact associated with these camera placements result 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 video conference technology, and therefore would not know where to look and how to position themselves to maximize their perceived credibility.<sup>35</sup>

The tendency of video-mediated facial and body language to undermine credibility is exacerbated by the fact that viewers rely more on such non-verbal signals when interacting via video conference. 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. For this dissertation, the author conducted a field study of

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35 Teko Jan Ernst Bekkering, *Visual Angle in Videoconferencing* (2004) (Ph.D. dissertation, Mississippi State University).

lectures at a hospital on different medical topics given by different speakers, some live and some via video conference. The author found that the video conference presentations demanded more cognitive work from audience members, who therefore relied more on peripheral cues like body movements and eye contact rather than systematic processing of the argument itself. 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 on other, less objective factors.<sup>36</sup> 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 they will lose at trial.

### Technical Problems

These problems with video conference trials -- the loss of trust and emotional connection due to degradation of non-verbal cues -- are often made worse by the technical difficulties with the video conference equipment that appear to be fairly common at these proceedings, and which exacerbate the effects mentioned above by making the audio and video even worse in quality and an even greater barrier than usual between respondent and judge. The most comprehensive study on this problem was conducted by the Legal Assistance Foundation of Chicago in 2004. During the summer and fall of that year, they

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36 Carlos Ferran-Urdaneta, *The Effects of Videoconferencing on Persuasion* (2000) (Ph.D. dissertation, Boston University).

observed 110 videoconference hearings at the immigration court in Chicago. They found one or more problems at nearly 45% of the proceedings they observed, ranging from technical problems to interpretation problems to problems with access to counsel. Fully 29% of immigrants either agreed to be removed or were order removed at these hearings, a remarkably large number considering the fact that these were not hearings on the merits but rather "Master Calendar" hearings -- that is, preliminary hearings 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 not uncommon occurrence, a stunning 44% were ordered removed or agreed to be removed before reaching a hearing on the merits.

These problems were even worse for immigrants who did not understand English. 12% of all observed immigrants had comprehension problems due to the absence of or insufficient interpretation. The report found, "Observers consistently reported that most of what was said at the hearing 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, 76% of non-English speaking Latinos were removed, as opposed to 46% of English-speaking Latinos. Other observers witnessed proceedings that seem to confirm what the studies I wrote about above indicate -- that it is more difficult to emotionally connect with other people over video conference 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.

Finally, lack of representation also contributed to exacerbating the problems with video conference hearings: fully 44% of observed immigrants without attorney were removed, compared to only 17% of those with representation. These findings, taken together, indicate that equipment often does not function properly at these hearings, and, even when it does, often fails to ensure a fair hearing.<sup>37</sup>

Given the clear and well-documented effect of media technology on message, the importance of non-verbal communication, and the way media distort NVC, there is strong reason to believe that video conference 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. In the next section, I will look at how these effects emerge from proceedings that violate the rights of the aliens to due process of law.

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37 AMANDA GRANT, MOLLIE HERTEL, AND MALCOLM RICH, LEGAL ASSISTANCE FOUNDATION OF METROPOLITAN CHICAGO, VIDEOCONFERENCING IN REMOVAL HEARINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT (2005). The report can be found online at <<http://www.lafchicago.org/complete%20report.pdf>>.

### III. Legal Arguments

In the previous section, I showed that current evidence in communications and psychology strongly indicate that video conference trials are fundamentally different than and, from the perspective of the respondent, inferior 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.

#### The Right of Presence

Historically, the right of the government to deport aliens had been seen as nearly absolute,<sup>38</sup> but now a removal order requires a meaningful hearing on the issues,<sup>39</sup> which is understood to include the protections of procedural due process under the Fifth Amendment.<sup>40</sup> The Supreme Court said three factors should be considered 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

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38 *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.").

39 *Yamataya v. Fisher*, 189 U.S. 86 (1903).

40 *Mathews v. Diaz*, 426 U.S. 67 (1976).

interest in the efficient administration of justice.<sup>41</sup> Fundamentally, due process is "the opportunity to be heard at a meaningful time and in a meaningful manner."<sup>42</sup>

There has long been a due process right to be present at a criminal trial where one's life or liberty is at stake.<sup>43</sup> This right was most recently confirmed in 2004, when the 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.<sup>44</sup> It is less clear if this right also applies in the civil context. However, in civil cases in which fundamental issues like an individual's life or liberty is at stake, this right is more likely to apply. For example, in *Specht v. Patterson*,<sup>45</sup> the 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.<sup>46</sup>

Immigration proceedings would seem to be ones where decisions crucial to an individual's life and liberty are made. Though this issue has not 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*,<sup>47</sup> the Court of Appeals for 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

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41 *Mathews v. Eldridge*, 424 U.S. 319 (1976).

42 *Id.*, at 333.

43 *Hopt v. Utah*, 110 U.S. 574 (1884).

44 *Tennessee v. Lane*, 541 U.S. 509 (2004).

45 386 U.S. 605 (1967).

46 *Califano v. Yamasaki*, 442 U.S. 682 (1979).

47 884 F.2d 516 (9th Cir. 1989).

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<sup>48</sup> or by "telephone conference" with the alien's consent.<sup>49</sup> However, as recently as last year, 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."<sup>50</sup> 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 Guo Yu Lei*,<sup>51</sup> 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."<sup>52</sup>

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 Circuit Courts of Appeals. In 2005, in *Thornton v. Snyder*<sup>53</sup> the petitioner filed a civil rights claim in the Seventh Circuit

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48 8 U.S.C. § 1229a(b)(2)(A)(iii).

49 8 U.S.C. § 1229a(b)(2)(A)(iv); 8 U.S.C. §1229a(b)(2)(B).

50 *U.S. v. Bahena-Cardenas*, 2005 App. LEXIS 11056 (9th Cir.).

51 22 I & N Dec. 113 (1998).

52 *Id.*, at 121 (Rosenberg, J., dissenting).

53 428 F.3d 690 (7th Cir. 2005).

protesting his prison conditions. After losing in a video conference hearing at the district court level, he appealed to the appellate court on the grounds that the nature of the trial violated due process. 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 did not abuse that discretion. 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. Despite this decision, the court emphasized the drawbacks of videoconference trials and the possibility that the outcome would be different under different circumstances. It wrote,

Clearly, a jury trial conducted by video conference is not the same as a trial where the witnesses testify in the same room as the jury. Video conference 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.<sup>54</sup>

While this court found videoconferencing acceptable in this circumstance, it is not clear how they would react in a case where the petitioner did not appear to be as dangerous,

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<sup>54</sup> *Id.*, at 697-98.

much less how they would react to the systematic and undifferentiated use of videoconferencing in immigration courts today.

In *U.S. v. Torres-Pahena*,<sup>55</sup> the Tenth Circuit ruled that Federal Rules of Civil Procedure 43, which says that a defendant must be “present” during his sentencing, requires physical presence, and therefore it was illegal to conduct the sentencing hearing via video conference. The Court did a close textual analysis, using definitions of “present” from the Oxford English Dictionary and Black's Law Dictionary. This court 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."<sup>56</sup> While not directly applicable to administrative hearings like immigration, this 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 expressed skepticism for the idea that videoconferencing could replace live presence and afford the respondent the fair hearing he is due. Specifically addressing the use of this technology in immigration courts, it found that

regardless of how rapidly technological improvements, such as video conferencing, may advance, the Government remains obliged to ensure that asylum petitioners are accorded a meaningful opportunity to be heard

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<sup>55</sup> 290 F.3d 1244 (10th Cir. 2002).

<sup>56</sup> *Id.*, at 1247.

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."<sup>57</sup>

This appeal was rejected because the petitioner failed to show he had been prejudiced by the potential due process violation. Nevertheless, the fact that a court as conservative as this one 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.

### 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.<sup>58</sup> In the U.S., considered "one of the

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<sup>57</sup> Rusu v. INS, 296 F.3d 316, 322 (4th Cir. 2002).

<sup>58</sup> Crawford v. Washington, 541 U.S. 36, 43 (2004).

fundamental guarantees of life and liberty,"<sup>59</sup> the right of confrontation was enshrined in most states through constitutions or declarations of rights,<sup>60</sup> and in the Sixth Amendment of the U.S. Constitution.<sup>61</sup>

This right 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."<sup>62</sup> In *Bridges v. Wixon*,<sup>63</sup> for example, an alien filed a *habeus corpus* petition protesting a deportation order that was based on *ex parte* statements claiming he was a member of the Communist Party and advocated the overthrow 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.

More recently, in *American-Arab Anti-Discrimination Committee v. Reno*,<sup>64</sup> the Court of Appeals for the Ninth Circuit overturned deportation orders against members of the Popular Front for the Liberation of Palestine, in which the government made extensive use of secret, undisclosed evidence to find that these individuals belonged to an organization that advocates world communism. This court found there to be 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

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59 Kirby v. U.S., 174 U.S. 47, 55 (1899).

60 *Id.*, at 48.

61 U.S. CONST., amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

62 8 U.S.C. § 1252(b)(3).

63 326 U.S. 135 (1945).

64 70 F.3d 1045 (9th Cir. 1995), *vacated and remanded, on other grounds*, 525 U.S. 471 (1999).

against them. The court found that secret evidence posed an "exceptionally high risk of erroneous deprivation" of due process because it deprived individuals of their right of confrontation.<sup>65</sup>

Of course, the government will claim that the video conference 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. 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 of Sacramento County*,<sup>66</sup> a 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 of South Carolina v. Weldon*,<sup>67</sup> a murder conviction was overturned because court overcrowding prevented the defendant from seeing the jury and witnesses. In *State of Utah v. Mannion*,<sup>68</sup> 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.<sup>69</sup>

Therefore, the right to confrontation is violated, even when the defendant is in the same

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<sup>65</sup> *Id.*, at 1069-71.

<sup>66</sup> 117 Cal App. 3d 661 (1981, 3d Dist).

<sup>67</sup> 91 SC 29 (1912).

<sup>68</sup> 19 Utah 505 (1899).

<sup>69</sup> These and other examples can be found in the 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).

room, if he is denied the opportunity to confront his accusers face-to-face.

This principle has often been extended to closed-circuit witness testimony. In recent years, as there has been greater concern 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. However, cognizant of the defendant's right of confrontation, courts typically require an *individualized* finding that CCTV is merited in a particular case despite the undeniably compelling state interest in protecting children. These cases stand in stark contrast to the systematic, undifferentiated use of video conference proceedings in immigration court, where the state interest of efficiency is not nearly as compelling.

In *Maryland v. Craig*,<sup>70</sup> 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." 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." 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." Yet, even given this overwhelming state interest, the Court insisted that "the requisite finding of necessity

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70 497 U.S. 836 (1990).

must of course be a case-specific one."<sup>71</sup> This case, and the many others like it,<sup>72</sup> involves compelling state interests -- the emotional and psychological health of abused children -- yet even they demand 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.

### The Right to Counsel

The right to counsel is a fundamental right of our justice system,<sup>73</sup> enshrined in the Sixth Amendment of the Constitution.<sup>74</sup> Though the Sixth Amendment does not apply in immigration proceedings,<sup>75</sup> aliens are understood to have a right to counsel under the Fifth Amendment's Due Process clause,<sup>76</sup> as well as by statute.<sup>77</sup> During immigration video conference proceedings, typically the respondent is in one location, the government attorney in another location (the official courtroom), and the judge in a third location.

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<sup>71</sup> *Id.*, at 850-55.

<sup>72</sup> 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).

<sup>73</sup> *Johnson v. Zerbst*, 304 U.S. 458 (1938).

<sup>74</sup> U.S. CONST., amend. VI ("In all criminal prosecutions, the accused shall . . . have Assistance of Counsel for his defense.").

<sup>75</sup> *Fong Yue Ting*, 149 U.S. 698, *supra* note 39.

<sup>76</sup> *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985).

<sup>77</sup> 8 U.S.C. § 1252, 1362 (1994).

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, for many immigration lawyers, especially legal aid and pro bono attorneys, they do not have the time or resources to be in the judge's chambers, which is often in another state, or in the respondent's detention facility, which may also be far away from the attorney's office. Ordinarily, therefore, the attorney is in the courtroom.

Naturally, this makes communication with her client extremely difficult. It is hard to communicate confidentially with her client during the day of the trial because they can only speak through the video conference system. The government attorney may be in the room with her 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 listen in (they could be off-screen but still within earshot). Furthermore, she does not know if the conversation is being recorded by the video equipment, and, if so, what will be done with the recordings. 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 video conference 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. Video conference trials seriously diminish the ability of aliens to receive the assistance of counsel to which they are due.

#### **IV. How Videoconferencing Technology Should be Used**

I would like to briefly address ways in which to mitigate the negative effects of this new technology in the courtroom, as well as some positive uses of the technology for the legal profession in the immigration context.

##### Recommendation to Mitigate the Negative Effects

1. *Use VCT exclusively for procedural hearings, while conducting substantive hearings live:* The worst effects of closed-circuit hearings fall on the defendants' ability to tell his story to the court, confront his 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. However, this approach would require a greater commitment from the government not to make final 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 which 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 VCT in the courtroom:* During the course of my research for this paper, I was surprised how little study had been done on the impact of this technology on trials. Many of the controlled studies by communication and behavioral experts do not perfectly replicate an actual trials, and many of them are inconclusive or contradictory. The government should put a moratorium on these trials until further study should be done, with the possible exception of pilot programs for study purposes, and the government should 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 how the video conferencing system is designed and arranged is a big factor in what biases it promotes. Things like the camera angle, the sound system, the size of the image, 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 in using the new systems, and should pay extra attention to providing reliable translation

services for these hearings.

### 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 in communicating with clients. Many clients are located in rural areas far away from the downtown locations of most legal aids, and often have difficulty travelling downtown, lacking the means of transportation or the money or the freedom to miss work. Particularly as some legal aids are shutting satellite offices for budgetary reasons, this technology could be a useful of communicating with clients in a way that is less burdensome to them. VC 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 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, to the benefit of all 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. *Improve 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 initiative that could be applied elsewhere, or share special programs or seminars they have prepared with colleagues elsewhere.

## **V. 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 non-verbal cues are distorted, immigrants lose the 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 violations of them must be guarded against.

In writing a paper on the drawbacks of a technological innovation, I of course run the risk of looking like a Luddite, as someone who is so stuck in the old ways that he is 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, and family, of "all that makes life worth living."<sup>78</sup> I believe 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.

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<sup>78</sup> Justice Brandeis' famous phrase appears in *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

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

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.<sup>79</sup>

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

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 trials were a "necessary part of the emotional background of a proper relation between an individual and his

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<sup>79</sup> Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1391-92 (1971).

government." He believed that the complicated and seemingly inefficient nature of trials were necessary in order to embody our sense of justice, and 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.<sup>80</sup>

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 -- of presence, confrontation, and counsel -- that are inherent to the live trial of our legal tradition, to the individual facing the judge and

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<sup>80</sup> Thurman Arnold, *Due Process in Trials*, 300 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 123-24 (1955).

pleading his case. They violate our notions of justice and fairness, and of 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 video conference undoubtedly save the government's resources, but in our rush to save time and money, we may be losing something far more valuable.