

EMPATHY AND REMOTE LEGAL

Second, the

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

In this Essay, we explain why virtual courts may alter decision-capacities to empathize, in comparison to both pre-COVID remote proceedings and traditional in-person proceedings. On the whole, the video interface on Zoom and comparable platforms probably makes empathizing more challenging, although in some respects it may make it easier. Especially concerning, however, are the possible effects of virtual proceedings on empathy for those who are already subject to empathy deficits. Do remote proceedings impair the cognitive ability to assess the

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influence their own attitudes and behaviors.²³ And where the social context does not permit flexible interactions between observer and target, these

emotions may go uncorrected.²⁴

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

The *egocentric bias* stems from our tendency to impute our own thoughts to others.²⁵ That is, when we think we are empathizing with the

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To be sure, this

imagine what it is like to be a specific other person, what one is really doing is imagining what it would be like to be oneself—how one would feel or behave

²⁷ If what results is a misreading of

legal proceedings to deploy empathy inaccurately or to fail to deploy it at all.

In addition, empathy, like other social judgments, is influenced by *affective realism*, the tendency for our own subconscious visceral and bodily reactions to color our evaluations of others.²⁸

what it is that observers think their empathy with others is telling them—may in part reflect their own emotional states instead, confounding the understanding of others that empathy is supposed to yield.

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

Professor of L. & Psych., U. Pa., Presentation on The Psychology of Remote Interactions at the 27th Annual Clifford Symposium on Tort Law and Social Policy: Civil Litigation in a Post-COVID World (June 3, 2021) (on file with authors).

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

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

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

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

27. *Id.* at 52.

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

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

which often precedes empathy³⁰

more confident about the congruence between their own affective state and what they presume a similar other person is feeling. This easy empathy based on perceived similarity is unavailable to subjects whom the evaluator

IV. EMPATHY IN VIRTUAL COURTROOMS

Many have suspected that legal decision-makers find it harder to empathize with those they encounter on a screen rather than face-to-face. For instance, the researchers who found that Cook County, Illinois judges set higher bail for defendants appearing in court via video than for those

of the defendants who appeared remotely.³¹ Only two experimental studies published to date, however, have specifically examined mock legal decision-

person. One study measured responses to child witnesses;³² the other, to adult sexual assault complainants.³³ Neither found that participants felt less empathy for witnesses who testified via closed-circuit television as opposed to in person.³⁴ Several studies have found that witnesses who appear in person are evaluated as more likable,³⁵ but while likeability may be related

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

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

32. Holly K. Orcutt et al., *Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 LAW & HUM. BEHAV. 339, 346-47, 358 (2001).

33. NATALIE PAYLOR & JAQUELINE J. COO, THE IMPACT OF PRE-RECORDED VIDEO AND CLOSED CIRCUIT TELEVISION TESTIMONY BY ADULT SEXUAL ASSAULT COMPLAINANTS ON JURY DECISION-MAKING: AN EXPERIMENTAL STUDY 11, 20 (35-7) (Austl. Inst. of Criminology Rsch. & Pub. Ser. No. 68, 2005).

34. A witness who testified live and in person or in the form of a prerecorded videotaped forensic interview. The researchers found that participants who saw and heard the live testimony were more sympathetic to the witness, which in turn was partly responsible for an increased tendency to find the defendant guilty. Gail S. Goodman et al.,

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to empathy,³⁶ it is not the same thing. Moreover, these more favorable assessments of in-³⁷

In any event, caution is needed in generalizing from these relatively few experimental studies, or from the field observations of remote appearances at arraignments, bail hearings, and sentencing, to contemporary virtual legal proceedings on Zoom or comparable videoconferencing platforms. As we mentioned earlier, various factors apart from empathy deficits may account for the disadvantaging of remote subjects. These include suboptimal access to counsel or interpreters, as well as technical issues such as poor quality and placement of the remote video camera, poor internet connections, limited

that significantly affects the nature of those interactions and the environment

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

cal reality into small head-and-shoulders video images,⁴⁴ as well as the reduction of their vocal ranges

less salient. The less vivid the stimulus, the less intense the response, empathic or otherwise.⁴⁵ At the extreme, decision-makers may dismiss the suffering of the real human being who appears to them only on video, as in the case of this self-

immigrant] was sobbing . . . No one even noticed how stressed out she was. Everyone was stapling exhibits and passing papers, and then it was over . . .

41. Of course, judges, jurors, and other observers, whether in a physical or virtual courtroom,

⁵¹ He observed:
 ical environment
 and visual frame for social interaction. That helped me direct audiences
 toward what I intended to communicate, rather than the movements and

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Third, as has often been noted, standard videoconferencing platforms
 make normal eye contact difficult, if not impossible. If someone appears to

the camera instead. And if the person appears to be looking at you, everyone
 else looking at their respective screens has the same impression, so that it is
 impossible for any one participant to appear to be looking uniquely at any
 other. This lack of mutual, reciprocal gaze has been found to make people
 evaluate others encountered on video as less likeable (and less intelligent)
 than those encountered face-to-face,⁵³ which may, in turn, lessen their
 inclination to empathize with the other.⁵⁴ Relatedly, it may negatively
 influence evaluations of credibility and assessments of remorse, both of
 which are often affected by the presence or absence of direct eye contact.⁵⁵

suggest a kind of diminishment of the individual participants by representing
 them as mere tiles in a larger grid, shorn of real spatial context. In the virtual
 courtroom, a judge cannot turn to and face the defendant, and when the judge
 speaks to the defendant, she appears to address everyone in the interface at
 the same time. These unfamiliar and counterintuitive sightlines interfere
interactional competence:⁵⁶ the ability
 to recognize and adapt to subtle cues in body language and facial expression,
 cial (and, in the case
 of judges, lawyers, and expert witnesses, professional) skills.

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

51. Adam M. Samaha, *Opening and Reopening: Dealing with Disability in the Post-pandemic World*, SLATE

actually). The awareness of the interlocutor is not actually nearby inhibits various behaviors, such as life to maintain a connection with and express empathy for the person next to us.⁵⁷ Indeed, appearing only through a screen may tend to make people feel generally more withdrawn from the proceedings.⁵⁸ This lack of engagement may translate into less engaging testimony, which, in turn, may elicit less empathy.⁵⁹

Fifth, lags and glitches in internet connectivity may affect empathy, and, like many of the effects we discuss, may be particularly problematic in situations where empathy is most effortful. Even a slight lack of synchrony between sound and picture

a useful degree of granularity.⁶⁵ And fourth: Evaluators under cognitive stress may rely more on heuristic cues, including stereotypes,⁶⁶ and may also

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⁷³ and their absence will change the emotional landscape of remote proceedings in ways that remain to be determined. For members in the spectator section and will thus lose those empathy-inducing his community.⁷⁴ But as we have discussed in detail elsewhere, off-stage behavior may be harmful as well as helpful to litigants. For example, empathy for criminal defendants may be overridden by empathy (or members.⁷⁵

The absence of a shared physical space in virtual courtrooms is likely to exert the most profound influence on the dynamics of empathy, for at least two reasons. First, people intuitively associate greater physical distance with greater social distance.⁷⁶ According to *construal-level theory*,⁷⁷ greater social distance leads to a stronger tendency to commit correspondence bias or the fundamental attribution error.⁷⁸ That is, it makes it more likely that

empathic engagement is alrea

V. EMPATHY'S ROLE IN ACCURACY AND FAIRNESS

At bottom, there is no good way to measure empathic accuracy in legal proceedings. One can measure outcomes, and one might also measure the role of empathy in the dynamics of decision-making, but ultimately any measure will be comparative. For example, most of the field studies that have garnered attention have measured outcomes, concluding that petitioners in immigration removal proceedings are less likely to be deported after in-

proceedings, under current conditions, exacerbate empathic divides in ways that impose unequal burdens on some types of litigants. There is substantial troubling evidence that empathic divides based on race, social class, ethnicity, and gender infect legal proceedings even under the most optimal circumstances. These divides may arise from differences in life experience,⁸⁹ for example, different expectations about the social meaning of eye contact⁹⁰ or about when it is appropriate to show emotion.⁹¹ They may be based on or exacerbated by prejudice, including gender-based assumptions about what makes a witness or complainant credible,⁹² or the well-documented tendency to associate blackness with dangerousness,⁹³

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