

Virtual Hearings May Serve Justice Better Than A Courtroom

By **Jennifer Shulkin**

At the onset of the coronavirus outbreak, the nation's courts closed their doors and criminal prosecutions slowed to a halt.

Eight months into the pandemic, courts are grappling with whether to take the public health risks of in-person hearings or turn the wheels of justice virtually.

Many judges, attorneys and defendants alike, however, feel that virtual hearings are a poor substitute for in-person hearings, especially when an individual's liberty is at stake in criminal cases.



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Inarguably, being in the same room together, making eye contact and getting a full picture of the defendant, counsel and witnesses allows a judge to determine credibility, weigh the issues and make decisions in a different way than virtual hearings allow.

This is why in 2006, a judge in Michigan's 31st District Court dismissed Ginnah Muhammad's civil lawsuit after she refused to remove her niqab, the traditional Muslim veil covering all but the eyes, while testifying.[1] During Muhammad's trial, Judge Paul Paruk informed her:

One of the things that I need to do as I'm listening to testimony is I need to see your face and I need to see what's going on and unless you take [the veil] off, I can't see your face and I can't tell whether you're telling me the truth or not, and I can't see certain things about your demeanor and temperament that I need to see in a court of law.[2]

Numerous judges share the same sentiment, and have applied a similar logic in rejecting virtual hearings, believing that virtual hearings prevent judges, and jurors, from seeing a full picture of the case before them and thus handicap their decision-making abilities.

There is reason to believe, however, that we human beings — including professional judges — are a lot worse at reading others, determining credibility, and discerning the truth of the matter than we think we are.

Evidence suggests that we are often more handicapped and thrown off by access to all available information than if we only possessed limited information.

In other words, more information can make us worse, not better, judges. If this is true, then perhaps we should not place such high value on criminal prosecutions proceeding in person and should readily adopt virtual hearings as an adequate or even better substitute.

Computers May Be Better Decision Makers Than Human Judges

One 2017 study led by researchers from Harvard University, Stanford University, Cornell University and the University of Chicago demonstrated that a computer algorithm made better decisions than human judges on whether to grant defendants bail in Manhattan Criminal Court's arraignments.[3]

In this study, an artificial intelligence system that was fed information only on the defendants' ages and criminal records went through 554,689 cases with instructions to make a list of 400,000 defendants to grant bail to. The study compared this to the 400,000 out of 554,689 defendants that Manhattan Criminal Court arraignment judges had released between 2008 and 2013.

The ultimate question was this: Which list contained the defendants who committed fewer crimes while out on bail — and were more likely to appear at trial?

Interestingly, the criminal defendants on the computer's list were 25% less likely to commit a crime while awaiting trial.[4] In the battle for better bail decisions, the computer won.

How could it be that the human judges' predictions as to who could be trusted if released while awaiting trial were far less accurate?

Surely a human judge observing a defendant in person and getting a full picture of him should be able to make a more informed and thus more accurate decision than a computer provided with far more limited information.

Unlike the computer, human judges with a live criminal defendant standing just yards away are informed by the defendant's body language, eye contact, style of dress, supportive family members and friends in the courtroom and the prosecutor's and defense attorney's explanations of the arrest and any past failures to appear.

All this information plus common sense and human intuition should lead human judges to make better predictions, right? As intuitive as this may seem, this is not the reality. The results show that we humans are worse at judging another's character, credibility, capabilities, and future actions than we think we are.

In "Talking to Strangers," author Malcolm Gladwell explains that human beings are particularly bad at discerning the truth when another's facial expressions, body language, and/or behaviors are mismatched from the reality.

Most of us do not wear our emotions on our sleeves or our true intentions on our faces, and this lack of transparency is difficult to spot.

For example, Amanda Knox, the American foreign exchange student in Italy, was convicted of murder in 2007 and falsely imprisoned for years because she did not look and act the way people thought that the roommate and friend of a murder victim should — i.e., her behaviors were mismatched from her innocence.[5]

One of the victim's friends said in a widely quoted press interview that he blamed Knox because her eyes did not "show any sadness." Following her total acquittal and release, Knox posed a question to her many accusers:

[Y]ou're trying to find the answer in my eyes ... Why? These are my eyes. They're not objective evidence.[6]

Using human intuition and experience to discern Knox's guilt or innocence resulted in a horrific injustice. Gladwell wonders more generally:

Are we sending perfectly harmless people to prison while they await trial simply because they don't look right?[7]

The converse is also true: Sometimes judges release very dangerous people because they appear sufficiently trustworthy.

In 1995, Patrick Dale Walker tried to kill his ex-girlfriend and only failed because his gun malfunctioned.

A Texas justice of the peace, Howard Lilley, set bail at \$1 million but lowered it to \$25,000 after Walker spent four days in jail, believing that this was long enough for Walker to cool off.[8]

Lilley's decision was informed largely by Walker's manners and temperament in court:

He was a real low-key, mild-mannered young man ... a real smart kid ... valedictorian of his class ... graduated from college.[9]

He also said he thought Walker showed remorse.

All of these assessments were made based on Walker's in-person appearance before Lilley.

But his in-person observations of Walker actually hurt his decision-making ability rather than helped it, because four months later while out on bail, Walker shot and actually succeeded in killing his ex-girlfriend.[10] Separately, Lilley was later himself criminally charged in another matter.[11]

Cases like that of Amanda Knox and Patrick Dale Walker, while dissimilar in many ways, both illustrate the human-decisions studies' principle that:

[W]hatever these unobserved variables are that cause judges to deviate from the predictions – whether internal states, such as mood, or specific features of the case that are salient and over-weighted, such as the defendant's appearance — they are not a source of private information so much as a source of misprediction. The observables create noise, not signal.[12]

For these evidence-based and anecdotal reasons, human judges presiding over in-person proceedings and privy to the plethora of information that comes with in-person hearings may not offer the advantages we imagine they do.

It is worth mentioning as well that the implicit biases and racial prejudices, which indisputably play a role in all in-person proceedings from granting bail to adjudicating guilt to sentencing, further contribute to inaccurate judgments and disparate results among similar defendants.[13]

The negative effects of implicit bias and racial prejudice might actually be more pronounced in person than virtually where video and audio capabilities limit the judge's access to a full picture.

Virtual Hearings Are a Step Toward Achieving the Computer's Accuracy

If human judges' decision making is inherently fallible and inferior to that of an inanimate computer, then human judges should take steps toward becoming more like computers.

The opportunity to do so has presented itself in the form of virtual hearings where human judges are reliant on computer technology and services to preside over hearings.

The objection that virtual hearings limit the information available to the judge is exactly the argument in favor of adopting them.

Videoconferencing allows a judge to see only the attorneys, criminal defendants and witnesses before the court, which removes the distractions and emotional pull of any family members and friends supporting the defendant or victims who would otherwise be present in an in-person courtroom.

Videoconferencing also allows the judge to only see the upper body and faces of the participants, which prevents the judge from being swayed by body language, eye contact and style of dress.[14]

Even technical difficulties could be an advantage in the sense that limited visual and audio capabilities may force a judge to focus more on the legal and factual issues before him, rather than the personalities and appearances of the people themselves.

While of course we want judges to be human and make human decisions that combine both reason and emotion, it is arguably most important that they are objective and strive to reach the truth.

Only through objectivity can we ensure fewer disparate results among different judges. Viewing defendants on a computer screen rather than a few yards away would likely allow judges to feel less personally connected to (or repulsed by) the individuals involved, make less emotional decisions, and be more focused on resolving issues as accurately as possible.

Criticisms of Virtual Hearings

Many people believe that when liberty is at stake, a defendant must be afforded his day in court to be able to tell his story and put on a defense before a live, in-person judge.

Indeed, a defendant's participation in proceedings only remotely may undermine his perceptions about the fairness of the proceedings and the seriousness with which they are being treated.

We want it to be hard for judges to incarcerate people. We want them to understand the gravity of such a decision. Being in the same room with a criminal defendant makes that decision harder emotionally. And some people feel that that is more important than objectivity and reaching the correct outcome.

Virtual hearings may be vulnerable to several constitutional attacks as well. First, does a defendant's right under the Sixth Amendment's confrontation clause — "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him" — include the right to confront witnesses in person and look them in the eye, unimpeded by screens, as they testify?

The U.S. Supreme Court has previously interpreted the Sixth Amendment to mean "guarantees [a] defendant a face-to-face meeting with witnesses appearing before the trier of fact." [15]

Two years following that decision, though, the Supreme Court upheld as constitutional a Maryland procedural rule allowing child victims of abuse to testify by one-way closed-circuit video so that the victim did not have to see his abuser while testifying.[16]

The high court explained that while the confrontation clause's "preference [is] for [a] face-to-face confrontation, ... [it] must occasionally give way to considerations of public policy and the necessities of the case." [17]

The question is now whether public policy considerations stemming from a widespread pandemic are sufficient to warrant an exception to this general preference for face-to-face confrontation. There is currently not a black-and-white answer to this question.

Perhaps the answer depends on the quality of the video and audio quality in a particular proceeding. Perhaps the answer depends on rates of coronavirus infection in the particular jurisdiction where a trial is held. Time will tell.

Furthermore, while the First Amendment does not explicitly mention a right of access, the Supreme Court has held that the right to attend criminal proceedings is implied in our right to freedom of speech.[18]

Virtual hearings generally do not allow anyone other than parties, counsel, court staff and witnesses online access, which arguably violates this right. But importantly, the right of access is not absolute; it is only a presumption that may be overcome by a demonstration that a closed proceeding is essential to preserve a higher interest and the closure is narrowly tailored to serve that interest.[19]

Perhaps such a showing could be made during a pandemic. If not, online access could be made available to the press and the public so that they too can attend hearings and trials from their own computer screens.[20] This does not seem like a difficult hurdle to overcome.

Although the problems with excess information delivery through in-person hearings is equally applicable to jury trials, virtual jury trials present their own set of challenges above and beyond other types of virtual hearings in a criminal prosecution, specifically with respect to the defendant's constitutional right to a trial by a jury of his peers.

Do we lose the critical diversity of a jury pool if we exclude potential jurors who do not have access to the requisite technology — video camera, high-speed Internet, etc. — or have difficulties using this technology? This is certainly possible.

The counterargument, however, is that we will exclude many high-risk potential jurors, primarily the elderly and immunosuppressed, if we proceed with in-person jury trials during the pandemic, which creates a different obstacle to achieving a jury that is a fair cross-section of the community.

Indeed, U.S. District Judge Vanessa Barrett recently postponed the U.S. District Court for the District of Connecticut's first scheduled in-person jury trial since the coronavirus outbreak after months of working with IT, air circulation experts, and virologists to allow it to proceed safely.

Too few jurors were willing to sit in person and hear evidence — many citing health issues and many simply not responding — such that the in-person trial in November simply could not proceed.[21]

One practical issue is the possibility of using technological issues, or feigning technological issues, to one's strategic advantage.

For instance, participants could pretend that the video is lagging or the sound is not coming through in order to delay answering a question and have more time to think about the strongest arguments to make.

Similarly, there is a real possibility of attorneys, or nonattorneys, improperly coaching witnesses off-camera while the judge remains unaware. Virtual hearings also allow participants the opportunity to research a question on the Internet, check Twitter, and email and text others during the proceedings — all of which are improper and unauthorized by the court.

On the other side of the scale, balancing the above constitutional and practical concerns inherent in virtual jury trials, is the defendant's right to a speedy trial, which is necessarily jeopardized if courts wait to proceed to trial until after the pandemic is behind us so that trials can proceed in person.

These concerns recently spurred U.S. District Judge Cormac Carney to dismiss a Newport Beach, California, doctor's indictment — believing that the U.S. District Court for the Central District of California's chief judge's decision to prohibit jury trials during the pandemic "was made with little or no regard for [the defendant's] constitutional right to a public and speedy trial."^[22]

Conclusion

A hybrid approach combining some aspects of in-person hearings and virtual hearings could assuage some of these criticisms and reach a happy middle ground.

For example, my law firm gave virtual arguments and virtually cross-examined witnesses at a client's sentencing hearing in September while our client was physically present in a U.S. District Court for the Northern District of Texas courtroom alongside other counsel and before an in-person federal judge.

This struck a fair balance where counsel was able to avoid air travel and reduce the total number of bodies inside the courtroom, but the defendants themselves were able to appear in-person and look the judge in the eye.

Another option for a hybrid approach would be holding some lower stakes proceedings virtually — e.g., hearings on motions in limine — while holding the higher stakes proceedings in person — e.g., jury trial.

Whether using a hybrid approach or fully adopting virtual hearings, there are many benefits to utilizing videoconferencing services — especially during the present time when infection rates are increasing throughout the country, a vaccine is not yet available to the public, and in-person hearings create added public health risks to all attendees.

Indeed, just weeks before Thanksgiving, seven people involved in an U.S. District Court for the Eastern District of Texas breach of contract trial tested positive for coronavirus, forcing the judge to postpone the case for at least two weeks.^[23] Concerns about surging rates also caused New York state court officials to postpone new jury trials and grand jury proceedings beginning Nov. 16.^[24]

Making the shift to virtual hearings should not seem like so much of a fallback option or an ill-equipped substitute.


This is particularly so if we understand that human judges make more errors with access to the greater information that in-person hearings inherently allow, and virtual hearings may allow judges to make more objective, accurate decisions that more closely resemble the better decision-making skills of computers.

With this understanding, virtual hearings may be a useful tool in years to come, even after the pandemic is behind us.

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[1] Ginnah Muhammad v. Enterprise Rent-A-Car, 2:07-cv-11342-JF-SDP (E.D. Mich. Jan. 11, 2008) Exh. 1, ECF No. 7-3, at 7.

[2] See Muhammad v. Paruk , 553 F. Supp. 2d 893, 896 (E.D. Mich. 2008) (granting Paruk's motion to dismiss Muhammad's § 1983 action against him after he dismissed her state court case) (citing id., Exh. 1, ECF No. 7-3, at 3-4).

[3] Jon Kleinberg et al., Human Decisions and Machine Predictions. Nat'l Bureau Econ. Rsch. (2017), <http://www.nber.org/papers/w23180>.

[4] One of the reasons for this discrepancy is that human judges released 48.5 percent of the subset of defendants that the computer flagged as high-risk, which means the human judges were misjudging the really dangerous defendant as not dangerous. Human judges were selecting which individuals to detain from the entire population of defendants, instead of choosing from just the high-risk pool like the computer did. Id.; see also Malcolm Gladwell, talking to strangers: what we should know about the people we don't know 36-43 (2019).

[5] Gladwell, supra note 4, at 186; see also Amanda Knox, Waiting to Be Heard (2015).

[6] Amanda Knox (Netflix Plus Pictures 2016).

[7] Gladwell, supra note 4, at 186.

[8] Michelle Koidin, Judge Defense Freeing of Murder Suspect, Pittsburgh Post-Gazette (May 26, 1996).

[9] Id.

[10] See Michelle Koidin, Teacher Shot to Death Outside School, AP News (May 24, 1995), <https://apnews.com/article/b9f1551b3b4894c56b6dc6c083334c16>; see also Gladwell, supra note 4, at 164-65.

[11] Kleinberg, *supra* note 3, at 7.

[12] <http://www.polkcountytoday.com/trial070814.html>

[13] See Terry Carter, *Implicit Bias Is a Challenge Even for Judges*, ABA Journal (August 5, 2006, 9:58 PM), https://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges.

[14] A counterpoint is that at least during the pandemic, virtual hearings may actually allow judges to observe more of the witnesses, attorneys, and defendants than they would in person if these same individuals would be required to wear masks in person, since masks greatly obstruct a judge's ability to perceive and read facial expressions in furtherance of making credibility determinations.

[15] *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

[16] *Maryland v. Craig*, 497 U.S. 836 (1990).

[17] *Id.* at 849 (citation omitted).

[18] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (holding that the right to attend criminal trials is implicit in the First Amendment); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) (extending the right of access to jury selections); *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986) (extending the right of access to preliminary hearings); see also Emilie S. Kraft, *Access to Courtrooms, the First Amendment encyclopedia* (2009), <https://www.mtsu.edu/first-amendment/article/1547/access-to-courtrooms>.

[19] *Press-Enterprise*, 464 U.S. at 510; see also *Dhiab v. Trump*, 852 F.3d 1087, 1092 (D.C. Cir. 2017).

[20] See Matthew Schaefer, *Lack of Access to Remote Court Proceedings is Inexcusable*, Law 360 (Nov. 16, 2020), https://www.law360.com/whitecollar/articles/1328481/lack-of-access-to-remote-court-proceedings-is-inexcusable?nl_pk=e28991c3-b242-45d9-9e6e-8a7a775bc578&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar (arguing that remote judicial proceedings be more accessible to the public).

[21] Michael S. Nadel, *A Swing... and a Miss... in Connecticut Courts*, national law review (Nov. 5, 2020), <https://www.natlawreview.com/article/swing-and-miss-connecticut-courts>.

[22] Paul Anderson, *O.C. Federal Judge Dismisses Newport Beach Doctor's Indictment Due to Trial Suspensions*, Daily Pilot (Oct. 14, 2020), <https://www.latimes.com/socal/daily-pilot/news/story/2020-10-14/o-c-federal-judge-dismisses-newport-beach-doctors-indictment-due-to-trial-suspensions>.

[23] Katie Buehler, *More EDTX Trial Participants Test Positive for Virus*, Law 360 (Nov. 13, 2020), https://www.law360.com/whitecollar/articles/1328721/more-edtx-trial-participants-test-positive-for-virus?nl_pk=e28991c3-b242-45d9-9e6e-8a7a775bc578&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar.

[24] Kevin Penton, *NY to Halt New Jury Trials, Grand Juries Amid COVID-19 Spike*, Law 360

(Nov. 13, 2020), https://www.law360.com/whitecollar/articles/1328818/ny-to-halt-new-jury-trials-grand-juries-amid-covid-19-spike?nl_pk=e28991c3-b242-45d9-9e6e-8a7a775bc578&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar.