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Pandemic Proceedings

Legal Performance in the Time of Covid-19

Philip Auslander

Just two weeks after the federal government's declaration of a national emergency on March 13, 2020, the Congress of the United States passed the Coronavirus Aid, Relief, and Economic Security Act (known as the CARES Act), a law designed to provide a range of emergency assistance to address the impact of the novel coronavirus. Included in its provisions are a number of measures directed to the judiciary, effective for the period from the beginning of the emergency until thirty days after it is declared to be over, one of which concerns "Video Teleconferencing for Criminal Procedures." This part of the law (sec. 15002) empowers "the chief judge of a district court . . . [to] authorize the use of video teleconferencing, or telephone conferencing if video teleconferencing is not reasonably available," in a range of legal proceedings if the judge feels the functioning of the court has been materially affected by the pandemic.

The judges in question took up the offer. Freda L. Wolfson, U.S. Chief District Judge for the District of New Jersey, issued a Standing Order (2020-06) on March 30, 2020, declaring that since "criminal proceedings cannot be conducted in person without seriously jeopardizing public health and safety," video teleconferencing or telephone conferencing should be used in lieu of personal appearances in court for a variety of legal proceedings, the same ones listed in the text of the CARES Act. Similarly, Chief Judge Colleen McMahon of the United States District Court for the Southern District of New York issued an order (M-10-468) that suspends jury trials in that district indefinitely in light of the difficulties of empanelling juries created by the coronavirus pandemic. (It is worth noting that the CARES Act applies only to the federal judiciary; state and local jurisdictions are able to make their own determinations as to when to resume jury trials, independent of when the federal emergency is declared to be over.)

The legal proceedings mentioned in the CARES Act and the orders that flowed from it are all situations in which someone might appear before a judge: arraignments, initial appearances, preliminary hearings, misdemeanor pleas and sentencing, and the like. It is important to observe, first, that the CARES Act does not permit conducting *trials* by video teleconferencing, even under life-threatening emergency conditions, and second, that it required legislation for even the routine appearances mentioned in these documents to be carried out through mediatized communication rather than live physical co-presence in a courtroom. This speaks to the way live presence and performance in the courtroom are deeply engrained in the procedural fabric of American jurisprudence, a theme I take up in greater detail in *Liveness: Performance in a Mediatized Culture*.¹

One of the foundational principles of the American system of justice is enshrined in the so-called confrontation clause of the Sixth Amendment to the United States Constitution, which guarantees the accused the right “to be confronted with the witnesses against him.” This clause has been an insurmountable obstacle to attempts at conducting trials by any means other than as live performances in an open courtroom. The clause enshrines the key belief underpinning jurisprudence in the United States that live, face-to-face confrontation in the ritual space of the courtroom is the only means to the revelation of truth. Although the CARES Act did not make a teleconferenced trial any more likely than it had ever been, it did spur a renewed discussion of the issues surrounding the idea.

The idea of doing trials online or via teleconferencing is not new. China instituted so-called “Internet Courts” designed to adjudicate conflicts arising from e-commerce and the infringement of rights online back in 2017. “The Internet courts are the first courts in China where the entire litigation process can be conducted online, including filing and service of documents, collection and presentation of evidence, preservation of assets, the trial, judgment, enforcement, appeal and other processes.”² In the United Kingdom, Richard Susskind has advocated for the increased use of information technologies in the legal arena for the past thirty years, during which time he has increasingly focused on the possibility of online dispute resolution and trials. Susskind emphasizes efficiency, the speed with which cases can be heard and resolved, and the lower cost of conducting trials online. He admits, however, “it may be that technology-based solutions will be confined to preliminary hearings and most final trials will be conducted in the traditional manner.”³ In other words, the more modest version of Susskind’s vision of a networked legal future corresponds to the terms of what is temporarily allowable in the United States under the CARES Act.

Writing at the end of March of 2020, Ken Broda-Bahm argues that the “idea of an online jury trial could be taking some steps toward reality. The present lockdown

of the nation's court systems, along with the rest of the economy, might end up being a 'crisis is opportunity' moment for distributed and virtually-present legal proceedings, including a jury trial conducted via remote technology."⁴ He refers to "What Online Jury Trials Could Look Like," an article by Richard Gabriel, published only a few days earlier, in which the author outlines the process of a hypothetical jury trial that takes place entirely online using a videoconferencing platform, from pretrial conferences and motions, through jury selection to the hearing itself and the jurors' deliberations, which would take place in a videoconferencing session separate from the "courtroom" session in emulation of the privacy of the jury room. Gabriel argues that

a trial is fundamentally an oral advocacy forum where evidence is communicated through verbal testimony and shown documentary and demonstrative evidence. Legal instruction is also given verbally. As long as all jurors are present, can hear and see witnesses and evidence, listen to instructions, and all deliberate, there is nothing operationally in a trial that would not lend itself to an online function.⁵

He also points out that "while there are jury instructions and statutes that speak of 'open court,' 'the jury room,' and that 'jurors must be present,' there are also no rules in the federal or state courts that explicitly state that trial participants must be physically present during a trial proceeding."

The lack of explicit policies concerning the use of videoconferencing technologies as a means of conducting trials noted by Gabriel was equally seized upon by those opposed to the idea. Ayyan Zubair, also writing in the last week of March 2020, acknowledges that the Sixth Amendment's confrontation clause "does not require in-person confrontation," but points out that the courts have been very inconsistent in codifying the circumstances under which mediatized testimony may be permissible. Zubair's concern is that while "virtual confrontation" may be justifiable during a national emergency such as the coronavirus pandemic, it should be limited to such situations and not become normalized. Zubair argues against trial-by-videoconference primarily on Sixth Amendment grounds: "The confrontation right safeguards defendants and communities by ensuring honest testimony. For the defendant, in-court confrontation forces the witness to 'look him in the eye.' And face-to-face testimony increases the information available to the fact-finder: observing a witness on the stand permits the jury to assess credibility."⁶

Richard K. Sherwin identifies a number of reasons why electronic transmission of testimony may not be acceptable, including the perceptual limitations created by the video frame, the ways in which setting (especially a prison) and lighting

may shape the jury's perception of the defendant negatively, and attorneys' lack of direct and immediate access to their clients. Sherwin also raises an intriguing point concerning the courtroom's *mise-en-scène*:

Courtrooms are designed to equalize the playing field among advocates and their clients. The appearance of justice requires that each side is assigned their own space, equidistant from the judge and jury. That is not so, however, when the defendant appears as an isolated figure on the screen. When his courtroom is a bare room perhaps in a jail, it may seem as if the distant defendant is unworthy of joining the ranks of trial participants and spectators.⁷

This speaks not only to the appearance of fairness created by this staging but also to the ritual value of the courtroom setting itself and the events that take place there. Susskind addresses this by arguing that for future generations used to doing everything online, an online court may carry the same symbolic weight a physical courtroom does now.⁸ Sherwin observes that in all probability, "electronic images can never meet the constitutional requirements of confrontation" because, from the perspective of those opposed to their use in (or as) the courtroom, "virtual appearances simply lack sufficient reality." He continues, however, by asking, "But what does this mean? No judge . . . has ever spelled out the exact nature of this ontological or perhaps even metaphysical insufficiency."⁹ Although Gabriel and Zubair are not judges, placing their respective remarks side-by-side dramatizes Sherwin's point, as it becomes clear that they have very different understandings of what confrontation entails.

Gabriel describes confrontation in terms of the reception of information: as long as the jurors can hear and see the evidence, testimony, instructions, and each other in deliberation, implicitly in real time, the fundamental purpose of confrontation, and of a trial, has been fulfilled whether or not the parties were physically present to one another. For Zubair, however, confrontation is not so much a matter of the transmission of information as it is a matter of performance. Confrontation does not simply mean that all participants can hear and see one another in real time. Rather, it defines their interactions. Addressing the same example Zubair uses, that of a defendant looking into a witness's eyes, Susskind holds out the possibility that "close-up, three-dimensional video on large, high-resolution monitors [might] permit improved scrutiny."¹⁰ While it is true that an attorney, juror, or defendant can look into the eyes of a witness (or at least into a real time electronic image of their eyes) on a high-resolution monitor or as a participant in a video conference, the second person may not be aware that this action is taking place and cannot return the gaze in any case (try to imagine two

people looking into each other's eyes from separate boxes on a videoconference grid). Reporting on her experience of an online mock trial, Samantha P. Jessner, Supervising Judge, Los Angeles Superior Court, observes: "My instinct when I'm videoconferencing is to look at the person's face with whom I'm talking. Now that all of my meetings are conducted by videoconference, I need to remind myself to look at the camera peephole rather than the eyes of the person on the screen because, if the speaker doesn't look at the camera, she appears to be avoiding eye contact."¹¹ In order to appear to be looking into another person's eyes on a videoconference, one cannot actually look at their image on the screen. The electronic image, whether on a monitor or a teleconferencing screen does not allow courtroom confrontation to be staged as two people facing off with each other.

On May 4, 2020, the CBS legal drama *All Rise* became the first fictional scripted program on U.S. television to include a coronavirus lockdown-themed episode as the finale of its regular season. *All Rise* was not the first show on U.S. television to produce under socially distanced conditions. News programs, both local and national, started doing so earlier, as well as competitions such as *American Idol*, which had contestants participate live from their homes beginning on April 26, 2020. In fictional programming, *All Rise* had been preceded on May 1 by a special reunion episode of the NBC comedy *Parks and Recreation* presented as a series of video phone calls by characters in lockdown to one another; the series had ended its official run in 2015.

The episode of *All Rise* titled "Dancing at Los Angeles," written by Greg Spottiswood, was praised for its accurate representation of a legal system overwhelmed by the crisis with a growing backlog of cases and trial dates continuously deferred. A conversation on the program among four fictional judges during a videoconference convened to discuss the possibility of conducting online bench trials echoed similar conversations among legal professionals in the real world. The same arguments were rehearsed: that online trials do not fulfill the defendant's right to confront their accuser, to be heard by a jury, or even to consult in person with their attorney. The concern about whether the setting in which the defendant appears will affect perception of that person is suggested in the show by the fact that every time the defendant in the eventual case is shown, he appears against a blank gray wall with "LOS ANGELES COUNTY CENTRAL MEN'S JAIL" stenciled in dark capital letters above him. However, the supervising judge, saying "Clients can waive certain guarantees or they can sit in jail for who knows how long," argues that the promise of a timely trial outweighs these concerns and instructs Judge Lola Carmichael, the show's main character, to find a test case for a trial by videoconference. The case in question, a criminal com-

plaint, involves two brothers, one of whom has accused the other of carjacking. The defendant claims that the episode was simply an overheated sibling conflict over the ownership of an automobile. The defendant's partner is expected to give birth in five weeks, lending some urgency to the situation and leading his attorney, a public defender, to request an expedited trial.

In addition to the ways the episode accurately represents a legal system in crisis and the dialogue around the online trial as a possible solution, one of the most intriguing things about it is its emphasis on the idea that an online trial must not only provide an opportunity for the case to be heard, but must also replicate the ritual elements of a physical trial as much as is possible. Key to this idea is the treatment of the concept of place. The internet is said to allow us to be in more than one place at once: working from home, for example, we are simultaneously at home and at work; watching a theatrical production on television, we are simultaneously at the theatre and in our own living room. However, in the legal context, this notion of simultaneous presence in two different locations is unacceptable: the ritual of jurisprudence demands full presence in the courtroom and its attendant locations, such as the judge's chambers or the jury room. The Southern District of New York has established a dedicated videoconferencing system so that grand jurors from different parts of the state can meet together to deliberate during the Covid-19 pandemic. Although the grand jury deliberations, which are closely held secrets, will take place in cyberspace, the jurors will be physically located at one of two court facilities in New York City and Westchester County, not in their homes or elsewhere. The grand jury room will be virtual, but it will be anchored by the jurors' physical presence in ritually sanctioned judicial spaces. In another example, a judge demanded that a juror respect the sanctity of judicial space by placing themselves in an imagined jury room.

U.S. District Judge Alison Nathan in Manhattan allowed one of the 11 jurors in the trial of an Iranian banker to deliberate by FaceTime because the juror reported feeling unwell. In light of coronavirus concerns, Judge Nathan stated the court was under "extraordinary circumstances" and in "untested waters." After being assured the juror would be secluded in their apartment, Judge Nathan stated to the juror, "You must think of yourself as present in the jury room."¹²

A similar moment occurs on *All Rise* when the judge's assistant advises an unruly lawyer during a pretrial teleconference, "You are in Judge Carmichael's chambers, standing right in front of her desk, in fact" and admonishes him to act accordingly. Since the virtual court cannot replicate the physical arrangements and sacred spaces central to legal proceedings, it is incumbent on participants to

project themselves imaginatively into those spaces and to suppress the knowledge that they are also elsewhere.

During the trial scenes of “Dancing at Los Angeles,” the spatial relationship among the participants is a schematic approximation of what it would be in a courtroom to create a virtual version of the equal playing field Sherwin describes. The screen is broken up into nine boxes, arranged in a three-by-three grid. The upper leftmost box contains text stating that the trial is taking place in Room 802 of the Los Angeles Superior Court, thus anchoring a virtual space in a physical place and denying the duality of the participants’ whereabouts. The judge is positioned centrally in the middle box of the upper row, with the witness (teleconferencing from home) in the box immediately to her left, just where the jury box would be in the courtroom. The defendant, who is in jail, appears in the leftmost box in the second row, with his attorney in the box to his left, resembling the usual proximity of the accused to his representative. The District Attorney appears in the box to the left of the defendant’s attorney, visually closer than would be the case in a physical courtroom, but still in the correct relative position. The bottom row is devoted to court functions and functionaries: the judge’s assistant appears in the leftmost box; the middle box is devoted to the display of evidence; and the rightmost box contains the court reporter. The effort to preserve in this schematic form the legal *mise-en-scène* described by Sherwin is apparent, though the grid arguably cannot readily be dissociated from the currently ubiquitous teleconferencing screen, an association that makes it difficult to perceive the screen as a specific location—a courtroom, with all of its attendant ritual—rather than the virtual space of a generic teleconference.

Even if the spatial arrangements of the courtroom are basically preserved on the *All Rise* teleconferencing screen, the interaction among the participants, including their ability to “look one another in the eye,” is not. Confrontation of the kind described by Zubair takes place between the two brothers (respectively the prosecutor’s witness and the accused); during this moment, the courtroom grid is replaced on the screen by just their two boxes, side-by-side, with the court’s official seal in the background. Although this creates an effect of confrontation to an outside observer, it would not function that way for the parties themselves, for in order to appear to be confronting one another they cannot actually be looking at each other. The impossibility of looking directly at another person while videoconferencing is one of the topics discussed by Bill Irwin and Christopher Fitzgerald in “In Zoom,” a short lockdown-themed play Irwin wrote for videoconference performance, presented online by the Old Globe Theatre of San Diego in May of 2020. Irwin’s character proposes to Fitzgerald’s that they present their audience with inspirational passages from the Bible, saying “What

I imagine is that we just speak them directly to each other just looking directly into each other's eyes." Fitzgerald replies, "Oh well, you can't do that." After some experimentation, Irwin becomes convinced that Fitzgerald is correct, replying testily, "In the theatre, we look at each other!"

Simone Messick, the actor who plays Judge Carmichael on *All Rise*, describes the challenges of making this episode in terms well worth quoting at length:

For storytelling purposes, I had to place the actors opposite of where they were on the screen. I would be looking at Emily (Jessica Camacho), but really talking to Mark (Wilson Bethel). Eventually, I had to print out pictures of everyone and tape them onto my computer screen, which in-turn blocked my view of the actual actors. In one scene, Mark was making a funny face, but since I couldn't see him, I had to imagine what he would look like and react accordingly.

Typically, when I'm acting on set, I rely so much on the non-verbal: body language and all the unsaid things that make a connection feel real and alive. Although filming remotely wasn't ideal, it forced me to get creative and find new ways to connect with the other actors.¹³

Although Messick is speaking here of what was involved in creating a fictional representation of an online trial, the same difficulties in constructing the interaction among those involved would also be experienced by those participating in a real teleconferenced trial. The kinds of things that Messick mentions—non-verbal cues and body language—are exactly the kinds of things attorneys and judges say they depend on in assessing a witness's veracity and are therefore central to the argument that "virtual confrontation" cannot serve the same purpose as physical confrontation in a courtroom. As Kathryn Leader observes, this is not a question of establishing objectively whether face-to-face testimony is "inherently more likely to facilitate the truth" as much as it is a question of recognizing that "live confrontation in the criminal jury trial has a symbolic (and real) value because we invest in the belief that it does."¹⁴

If Susskind is correct, the Internet may become in the near future such a naturalized environment that the current objections to the online trial will evaporate. In the meantime, however, the success of entrenched Sixth Amendment objections to the online trial even in an environment in which it is potentially fatal to encounter other people in real space and in which it is permissible to perform a limited range of legal procedures via teleconference, suggests that, for the moment, the online trial will remain a hypothetical possibility to be explored in fiction but not yet in fact.

NOTES

1. Philip Auslander, *Liveness: Performance in a Mediatized Culture*, 2nd ed. (London: Routledge, 208), 128–82.
2. Mimi Zou, "'Smart Courts' in China and the Future of Personal Injury Litigation," *Journal of Personal Injury Law* (forthcoming, June 2020). Accessed April 13, 2020. <https://ssrn.com/abstract=3552895>.
3. Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future*, 2nd ed. (Oxford: Oxford University Press, 2017), 118.
4. Ken Broda-Bahm, "Plan for Online Jury Trials," *JD Supra*, March 31, 2020. Accessed April 11, 2020. <https://www.jdsupra.com/legalnews/plan-for-online-jury-trials-53527/>.
5. Richard Gabriel, "What Online Jury Trials Could Look Like," *Law 360*, March 26, 2020. Accessed April 12, 2020. <https://www.law360.com/articles/1257185/what-online-jury-trials-could-look-like>.
6. Ayyan Zubair, "Work may move online, but the courts should not in criminal cases," *California Lawyer*, 26 March, 2020. Accessed April 11, 2020. <https://www.dailyjournal.com/articles/356931-work-may-move-online-but-the-courts-should-not-in-criminal-cases>
7. Richard K. Sherwin, *Visualizing Law in the Age of the Digital Baroque: Arabesques and Entanglements* (London: Routledge, 2011), 152–3
8. Suskind, *Tomorrow's Lawyers*, 120.
9. Sherwin, *Visualizing Law*, 151.
10. Suskind, *Tomorrow's Lawyers*, 119.
11. Samantha P. Jessner, "Your Honor, you're still on mute," *California Lawyer*, May 14, 2020. Accessed May 20, 2020. <https://www.dailyjournal.com/articles/357701-your-honor-you-re-still-on-mute>.
12. Gabriel, "What Online Jury Trials Could Look Like."
13. Emily Vogel, "'All Rise' Star Simone Missick on Filming Quarantine Episode Using Zoom, FaceTime," *The Wrap*, May, 4, 2020. Accessed May 14, 2020. <https://www.thewrap.com/simone-missick-all-rise/>.
14. Kathryn Leader, "Closed-Circuit Television Testimony: Liveness and Truth-telling," *Law Text Culture* Vol. 14 (2010): 326.

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