ARTICLES

VIRTUALLY INCREDIBLE: RETHINKING DEFERENCE TO DEMEANOR WHEN ASSESSING CREDIBILITY IN ASYLUM CASES CONDUCTED BY VIDEO TELECONFERENCE

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ABSTRACT

The COVID-19 pandemic forced courthouses around the country to shutter their doors to in-person hearings and embrace video teleconferencing (VTC), launching a technology proliferation within the U.S. legal system. Immigration courts have long been authorized to use VTC, but the pandemic prompted the Executive Office for Immigration Review (EOIR) to expand video capabilities and encourage the use of video "to the maximum extent practicable." In this technology pivot, we must consider how VTC affects cases for international humanitarian protections, where an immigration judge's ability to accurately gauge an applicant's demeanor can have life-or-death consequences.

This Article takes a deep dive into the law and social science regarding demeanor-based credibility assessments and examines the potential impact of VTC on the adjudication of asylum, withholding of removal, and Convention Against Torture (CAT) claims. With empirical and doctrinal grounding, it recommends a prohibition on adverse credibility findings based on demeanor for hearings conducted via video. The assumptions that underpin the extraordinary deference afforded to immigration judges' demeanor assessments are incongruous with the realities of virtual hearings. Demeanor is an unreliable metric for credibility, even for in-person hearings. Video distorts how we interact and further strains the tenuous relationship between demeanor and

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truthfulness. The current legal framework is ill-suited to safeguard against erroneous demeanor findings. A prohibition on demeanor-based adverse credibility findings for hearings conducted via VTC would embrace the benefits of our technological advancements while instilling greater confidence in the fair adjudication of humanitarian protection claims.

TABLE OF CONTENTS

INTRODUCTION

The COVID-19 pandemic launched a technology proliferation that has forever changed our lives and our institutions.[1] The pandemic forced us to attain proficiency, if not fluency, in technology that can beam us into a remote classroom, a work meeting, a doctor's appointment, and even a courtroom. Although the story of our post-pandemic world is still unwritten, we know intuitively that when there is a return to 'normalcy,' there are aspects of our pre-COVID society that will not return to the way they were.[2] Our technology pivot also provides us with an opportunity to reconsider some of the assumptions that underpin the rules, laws, and procedures that govern our institutions to ensure that they too adapt to our changing reality.

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1. *See generally* Jason Zweig, *The Overnight Business Boom That Took a Century; Why a Global Pandemic Transformed Videocalling from a Technology Most People Didn't Like to the Technology Everybody Had to Have*, WALL ST. J. (Nov. 13, 2020), https://perma.cc/QBF9-L8BS ("For decades, dozens of companies kept trying to foist videocalling onto an unready and unwilling public. Then, like a bolt from the blue, the coronavirus thrust nearly everyone into isolation. Videocalling went from a technology most people didn't like or want to the technology everybody had to have.").

2. *How COVID-19 Has Pushed Companies over the Technology Tipping Point—and Transformed Business Forever*, MCKINSEY & COMPANY (Oct. 2020), https://perma.cc/XRC2-X6WA; Rauf Arif, *In the Post Covid-19 World, Zoom Is Here to Stay*, FORBES (Feb. 26, 2021), https://perma.cc/BNV7-QPVU; Kara Swisher, *Tech in the Post Pandemic World*, N.Y. TIMES (Apr. 20, 2021), https://perma.cc/VVJ8-YBHF.

During the pandemic, courthouses around the country shuttered their doors to in-person proceedings and embraced video conferencing technology. Courts issued orders and amended rules about what types of cases would be heard, how the public would be able to access the hearings, the platforms used to effectuate the proceedings, and tolled certain deadlines and statutes of limitations.[3] Courts strived to balance procedural due process guarantees with the imperative that the courts continue to function.[4] One common concern among criminal courts was the reluctance to conduct evidentiary hearings virtually.[5] Notwithstanding circumstances where criminal defendants assented to virtual hearings, many courts struggled with whether to continue criminal trials and evidentiary hearings until courtrooms reopened to in-person hearings, citing the Confrontation Clause and America's long-held belief that in-person hearings and face-to-face communication are essential to assess demeanor and ensure the accuracy and fairness of the proceedings.[6]

Immigration courts began using Video Teleconferencing (VTC) in removal proceedings in select jurisdictions long before the global pandemic. In 1996, Congress authorized immigration courts to use VTC in lieu of in-person hearings as they wished, even for evidentiary hearings, without needing to obtain consent from the parties.[7] Roll out of VTC was initially sporadic

3. *See Court Orders and Updates During COVID-19 Pandemic*, U. S. COURTS, https://perma.cc/6SQA-56T5 (last visited Mar. 11, 2022) (providing links to federal court orders in U.S. courts of appeals, district Courts, and bankruptcy courts); *see also Court's Response to the Covid-19 Crisis*, BRENNAN CTR. FOR JUST., https://perma.cc/PH6R-5CVU (last updated Sept. 10, 2020) (compiling federal, immigration, and state court orders).

4. *See* CARES Act, Pub. L. No. 116-136 § 15002, 134 Stat. 281, 527–29 (Mar. 27, 2020) (authorizing courts to conduct remote hearings in a variety of criminal proceedings); Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1902–09 (2021) (discussing courts' varying approaches to ensuring Confrontation Clause and other constitutional rights in virtual hearings during the ongoing pandemic); *Coronavirus and the Courts*, NAT'L CTR. FOR STATE COURTS, https://perma.cc/G3ZC-HT6U (last visited Mar. 11, 2022) (providing an interactive map of state-specific resources and guides for virtual hearings).

5. *See* Nina J. Ginsberg, *From the President: The Perils of Virtual Trials*, CHAMPION 12 (May 2020), https://perma.cc/Q3YR-KW8L (NACDL President Nina Ginsberg implores the criminal defense bar to remain vigilant in ensuring that the constitutional rights guaranteed to criminal defendants are not undermined by courtroom technology for the sake of expediency).

6. *See* Bannon & Keith, *supra* note 4; *see also* United States v. Carrillo, 1:19-CR-01991 KWR, 2020 WL 6707834 (D.N.M Nov. 16, 2020) (granting the continuation of a jury trial despite the defendant's objection: "[G]iven the record COVID-19 cases in New Mexico, the Court finds that the need to protect the health of the public during a deadly pandemic outweighs the best interest of the Defendant and the public to a speedy trial."); COVID-19 Emergency Procs. in the Fla. State Cts., No. AOSC20-13 (Fla. Mar. 13, 2020), https://perma.cc/G5GU-W8VH (Florida Supreme Court order suspending all court rules that limit the use of video proceedings, but noting that Confrontation Clause rights still must be honored in criminal cases); Coy v. Iowa, 487 U.S. 1012, 1015–20 (1988) (holding that the Confrontation Clause guarantees a criminal defendant the right to "confront" face to face the witnesses against him and that confrontation is "essential to fairness" and helps "ensure the integrity of the factfinding process") (internal quotation omitted); Mattox v. United States, 156 U.S. 237, 242–43 (1895) ("The primary object of the constitutional provision [is to give] the accused [] an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.").

7. 8 U.S.C. § 1229a(b)(2)(A)(iii); 8 C.F.R. § 1003.25(c) ("An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person.").

and largely focused on detained courts.[8] But by 2019, one in six hearings were conducted over VTC.[9] As the pandemic closed schools, offices, and courts around the country, immigration judges significantly increased their use of VTC to adjudicate cases, including claims for asylum, withholding of removal, and protections under the Convention Against Torture (CAT). In early March 2020, the Executive Office for Immigration Review (EOIR) issued the first of many policy memorandums giving guidance on how to adjudicate hearings during the COVID-19 outbreak. Specifically, EOIR Policy Memorandum (PM) 20-10 heralded VTC as a "proven success" and encouraged its use "to the maximum extent practicable," especially for immigrants in detention.[10] In November 2020, EOIR announced a policy to further expand the use of VTC in immigration hearings, commending VTC as "beneficial to both the immigration courts and the [noncitizen] respondent."[11] In January 2022, due to rising COVID-19 infection rates, EOIR issued a nationwide order that all hearings be conducted via telephone or video for the month, with limited exceptions.[12]

As courts have increased reliance on video technology, academics, social scientists, and practitioners have amplified their warnings about the ways in which video conferencing can affect perception and participation among those involved in the proceedings.[13] Empirical data confirms that video can distort both how we communicate and how we understand others.[14] Studies on the use of video teleconferencing in immigration proceedings have found that detained respondents[15] who appear at their removal proceedings remotely via a video screen are overall more likely to be deported than

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8. *Video Hearings in Immigration Court FOIA*, AM. IMMIGR. COUNCIL, https://perma.cc/76FK-CA55 (last visited Mar. 11, 2022).

9. *Use of Video in Place of In-Person Immigration Court Hearings*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Jan. 28, 2020), https://perma.cc/Y9K8-ZCSL (TRAC data in this report was based on EOIR court records obtained through a series of Freedom of Information Act requests) [hereinafter TRAC 2020 *Use of Video in Place of In-Person Immigration Court Hearings*].

10. Memorandum from James R. McHenry III, Dir. of the Exec. Off. for Immigr. Rev. to the Exec. Off. for Immigr. Rev., *Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak* (Mar. 18, 2020), https://perma.cc/JLX3-MEZM [hereinafter EOIR PM 20-10].

11. Memorandum from James R. McHenry III, Dir. of the Exec. Off. for Immigr. Rev. to the Exec. Off. for Immigr. Rev., *Immigration Court Hearings Conducted by Telephone and Video Conferencing* (Nov. 6, 2020), https://perma.cc/WG25-WUDB [hereinafter EOIR PM 21-03].

12. *See EOIR Operational Status*, DEP'T OF JUST. (Jan. 22, 2022), https://perma.cc/7M8Z-3KAU.

13. *See, e.g.*, Vincent Denault & Miles L. Patterson, *Justice and Nonverbal Communication in a Post-Pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges*, 45 J. NONVERBAL BEHAV. 1 (2021); Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1290–1306 (2020); Emily B. Leung, *Technology's Encroachment on Justice: Videoconferencing in Immigration Court Proceedings*, 14-07 IMMIGR. BRIEFINGS 1 (2014); Press Release, Brooklyn Defender Services, LEGAL AID SOC'Y & BRONX DEFENDERS, *Joint Statement: Detained Immigrants and NYIFUP Providers Sue ICE* (Feb. 13, 2019), https://perma.cc/Z34R-ET5V (describing a class action lawsuit filed by New York legal services organizations challenging VTC).

14. *See* Denault & Patterson, *supra* note 13, at 5; Bandes & Feigenson, *supra* note 13, at 1296; Leung, *supra* note 13, at 8–9.

15. "Respondents" is the term used in immigration court for the individuals who are the subjects of the proceedings. In this Article, we also use the term "applicants" to describe respondents who have filed

detained in-person litigants, lifting the veil of efficiency to reveal the ill effects of virtual hearings.[16] One aspect of concern, and the topic of this paper, is immigration judges' ability to accurately assess a respondent's credibility through VTC.

In immigration court, claims for international humanitarian protections—asylum, withholding of removal, and protections under the CAT—often turn on whether the applicant is found credible, or believable. By their very nature, claims for humanitarian protections involve individuals who have fled their homes due to fears of persecution or torture. But country instability, treacherous journeys, physical distance, scarcity of resources, and lack of counsel mean that many of these claims cannot be corroborated, nor refuted, by documentary evidence.[17] So immigration judges are often left with the task of determining whether the applicant is telling the truth and thus eligible for protection based on testimony alone. Immigration judges are given extraordinary deference in making credibility findings, which they can base on factors such as an applicant's demeanor, candor, responsiveness, inherent plausibility, and any inconsistencies, inaccuracies, or falsehoods in testimony.[18] Assessments of demeanor[19]—one's outward appearance, look, and behavior—are given particular deference. This deference is grounded on the American legal tradition's belief that assessing demeanor is an accurate way to ascertain the truth and the assumption that trial judges are in the best position to assess demeanor because they observe the applicant in person during live testimony, while the appellate body reviews only the lifeless pages of the written record.[20] Do these assumptions contemplate the challenges inherent in video communication? Are judges hampered in assessing credibility in a culturally competent way through the use of VTC?

This Article examines how VTC impacts demeanor assessments when making credibility determinations in asylum, withholding of removal, and CAT claims and urges us to rethink our deference to these findings in our

applications for asylum, withholding of removal, and protections under the Convention Against Torture in immigration court.

16. *See* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 966–69 (2015); Dane Thorley & Joshua Mitts, *Trial by Skype: A Causality-Oriented Replication Exploring the Use of Remote Video Adjudication in Immigration Removal Proceedings*, 59 INT'L REV. LAW. & ECON. 82 (2019). These studies and their findings are discussed in more depth *infra* Part V.

17. *See* Mitondo v. Mukasey, 523 F.3d 784, 788 (7th Cir. 2018) (noting that countries that persecute their citizens do not often keep or publish reliable records).

18. REAL ID Act, Pub. L. No. 109-13, § 101(a)(3), 119 Stat. 231 (2005) (codified at 8 U.S.C. § 1158 (b)(1)(B)(iii)).

19. *See Demeanor*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Outward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions."); *Demeanor*, MERRIAM-WEBSTER, https://perma.cc/B7YW-MBTM (last visited Mar. 11, 2022) ("[B]ehavior towards others: outward manner.").

20. 8 C.F.R. § 1003.1(d)(3)(i) (stating credibility findings are factual findings reviewed under the deferential "clearly erroneous" standard of review); Shrestha v. Holder, 590 F.3d 1034, 1041–42 (9th Cir. 2010) (explaining the "healthy measure of deference" given to an immigration judge's credibility assessment because they "see the witness and hear them testify" and can observe all aspects of the witness's demeanor, while reviewing courts "look only at the cold record").

new virtual world. In Part I, we explore the expansion of VTC technology in immigration courts and some of the attendant benefits. In Part II, we discuss the legal framework that puts credibility at center stage in asylum, withholding of removal, and CAT cases and gives immigration judges almost unreviewable authority to make adverse credibility findings based on demeanor. In Part III, we examine the social science that shows why demeanor-based credibility assessments in immigration removal proceedings are inherently unreliable. In Part IV, we posit that using VTC for any evidentiary hearing where credibility is a determining factor exacerbates the already tenuous relationship between demeanor and truthfulness. In Part V, we explain why current agency policies and legal remedies are insufficient to safeguard against fallible demeanor findings in VTC hearings. Part VI offers recommendations for moving forward. We propose an immediate prohibition on demeanor-based adverse credibility findings in hearings conducted by VTC and urge the United States to join the international community in dropping demeanor as a credibility criterion in all immigration cases. Additional recommendations include requiring a party's consent for virtual merits hearings, increasing transparency and accuracy in EOIR data collection, and recording VTC hearings to facilitate accountability and appellate review.

The significant investment in resources and promises of greater judicial efficiency ensures the continuation of remote hearings in a post-COVID society. But in our technology pivot, we cannot overlook how video teleconferencing can affect perception and depress engagement among participants, which can lead to inaccurate credibility determinations. Adapting our laws and practices to reflect the reality of virtual hearings will allow us to embrace some of the benefits of technology while increasing confidence in the fairness and reliability of our immigration courts.

I. USE OF VIDEO TELECONFERENCE IN IMMIGRATION COURT

Immigration courts began using VTC long before the EOIR shuttered courtrooms due to the spread of COVID-19. In 1993, EOIR launched a VTC pilot project that connected the Chicago Immigration Court to a federal facility in Lexington, Kentucky that held detained immigrants. Following this six-month pilot project, EOIR expanded the use of VTC to three immigration courts in Baltimore, Maryland; Dallas, Texas; and Oakland, California. In 1996, Congress amended the Immigration and Nationality Act (INA) to authorize the use of VTC in all immigration proceedings.[21] Under INA § 240 (b)(2)(A), immigration judges could now conduct VTC hearings to the same extent that they conducted in-person hearings, without obtaining consent from the parties.[22] Congress still required consent of the immigrant

21. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 304, 110 Stat. 3009-589 (1996) (codified at 8 U.S.C. § 1229a(b)(2)(A)(iii)).

22. 8 U.S.C. § 1229a(b)(2)(A); 8 C.F.R. § 1003.25(c).

respondent for merits hearings by telephone, but gave immigration judges broad authority to conduct hearings by video, even if both parties objected.[23] By 1997, EOIR was conducting remote hearings by VTC in seven different immigration courts around the country.[24] Things proliferated rapidly from there, and in 2004, forty out of fifty-three immigration courts had installed VTC.[25] By 2015, nearly one-third of detained immigrants had appeared via VTC for their hearings.[26] Between 2007 and 2017, there was a 185 percent increase in the use of VTC.[27]

In June 2018, the U.S. Immigration Customs Enforcement (ICE) New York field office announced that it would stop transferring detained immigrants to the Varick Street Immigration Court, and instead removal proceedings for detained immigrants would be conducted exclusively by VTC through a video feed from the county jails at which they were held.[28] As a result, a federal class action lawsuit was brought on behalf of all detained immigrants in the New York City area challenging ICE's seemingly unilateral decision to deny in-person hearings by refusing to bring immigrants to court.[29] ICE explained that the change in procedure was due to the increase in the number of immigration proceedings at the Varick Street Immigration court, cost savings, and the logistical challenges of transporting detained immigrants to the court for in-person hearings.[30] The district court judge acknowledged plaintiffs' claims that VTC interfered with the detained immigrants' ability to proceed with their cases and prolonged their detention. Specifically, the court noted, "The implementation of the VTC policy has been plagued by numerous technological and scheduling challenges including but not limited to: poor connections, technological failures, over-scheduling, and a limited number of VTC lines. Due to these issues, removal proceedings have had to be adjourned or delayed, often prolonging immigrants' time in detention."[31] In June 2019, the lawsuit was dismissed on procedural grounds due to a lack of subject matter jurisdiction.

In the final months of 2019, approximately one out of every six determinative hearings were conducted by VTC.[32] According to data compiled by the

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23. 8 U.S.C. § 1229a(b)(2)(B); 8 C.F.R. § 1003.25(c).

24. *See* Exec. Off. for Immigr. Rev., Office of the Chief Immigration Judge Staffing and Video Technology Analysis (June 26, 1997) (on file with the Am. Immigr. Council).

25. *EOIR's Video Teleconferencing Initiative*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST. (Mar. 13, 2009), https://perma.cc/YKR2-8SKA.

26. Lauren Markham, *How Trial by Skype Became the Norm in Immigration Court*, MOTHER JONES (May–June 2018), https://perma.cc/6T6Z-867S.

27. *Id*.

28. P.L. v. U.S. Immigr. & Customs Enf't, No. 1:19-CV-01336 (ALC), 2019 WL 2568648, at *1 (S. D.N.Y. June 21, 2019).

29. *Id*. at *1–2.

30. *Id*. at *1.

31. *Id*.

32. TRAC 2020 *Use of Video in Place of In-Person Immigration Court Hearings*, *supra* note 9 (this data includes any hearing in which a final decision was made, including final individual hearings and master calendar hearings).

Transactional Records Access Clearinghouse (TRAC), video hearings were most likely for individuals held in immigration detention. During October–December 2019, approximately three of every four (77 percent) of detained master calendar hearings in which a final decision was made and over one-third (35 percent) of detained individual hearings in which a final decision was made were held by VTC.[33] The use of video for non-detained cases was significantly less: only 7 percent of non-detained masters and 2 percent of non-detained individual hearings in which final decisions were made were conducted by VTC during this same period.[34]

In March 2020, on the eve of the pandemic, EOIR launched a new pilot project in Houston, Texas in which all cases of detained unaccompanied minors would be conducted via VTC by immigration judges sitting in Atlanta, Georgia.[35] The move came less than a month after EOIR issued a directive that immigration judges complete cases involving unaccompanied minors within sixty days.[36] Attorneys and child advocacy groups decried the pilot as a "disaster."[37] Advocates described technical glitches, confusion, and young children who did not comprehend that the image on the monitor was their court hearing or mistook the interpreter, who was in the room with them, for the judge.[38]

With the outbreak of COVID-19 in the spring of 2020, immigration courts quickly escalated the use of VTC. According to statistics published by EOIR on October 19, 2021, there was a 73.75 percent increase in the use of VTC in 2020. Among the cases completed in 2020, approximately 27.47 percent had at least one hearing conducted by VTC compared with 15.81 percent of completed cases in 2019.[39] The Office of the Director of EOIR guided this

33. *Id.*

34. *Id.*

35. Lomi Kriel, *New Trump Administration Policies Fast-Track Some Children's Immigration Court Hearings, Including Video Pilot in Houston*, HOUS. CHRON. (Mar. 3, 2020), https://perma.cc/JZE2-6NNN.

36. *KIND Statement: New Trump Administration Policies Eviscerate Protections for Children Alone*, KIDS IN NEED OF DEF. (Mar. 3, 2020), https://perma.cc/3K7M-LWJX; Priscilla Alvarez, *Trump Administration Puts Pressure on Completing Deportation Cases of Migrant Children*, CNN (Feb. 12, 2020), https://perma.cc/NW3G-9GM6.

37. Jennifer Podkul, *Remote Hearings for Unaccompanied Children Proves a Disaster*, HILL (Mar. 16, 2020), https://perma.cc/292H-BRAA; *New Video Hearings Prevent Fair Hearings for Immigrant Children*, YOUNG CTR. FOR IMMIGRANT CHILDREN'S RTS., https://perma.cc/4MPL-2UQ3 (last visited Feb. 5, 2022); Amanda Robert, *Video Teleconference Program for Immigrant Children "Is Contrary to the American Pursuit of Justice*," *ABA Says*, ABA J. (Mar. 5, 2020), https://perma.cc/S6FY-2RWG.

38. *Id.*

39. In *infra* Part V, we discuss the inconsistency and unreliability of some of EOIR's statistics. The numbers included in this section are based on EOIR statics published at the end of Fiscal Year 2021. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS 45 (2021), https://perma.cc/G8R7-HZNR (archived subsection on "Video Teleconference (VTC) Hearings and Appeals" using data generated October 19, 2021, reporting that EOIR completed 43,800 cases "with a VTC hearing" in 2019 and 63,668 cases "with a VTC hearing" in 2020) [hereinafter EOIR October 19, 2021 ADJUDICATION STATISTICS]; *Id.* at 3 (subsection on "New Cases and Total Completions – Historical" using data generated October 19, 2021, reporting 276,993 total cases completed in 2019 and 231,775 total cases completed in 2020). EOIR publishes updated quarterly statistics on its website. *See Workload and Adjudication Statistics*, U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., https://perma.cc/75KY-Z3CX (last visited Feb. 6, 2022).

expansion by issuing policy memoranda in response to the evolving public health crisis. EOIR's March 2020 policy memorandum, PM 20-10, encouraged immigration judges to use VTC for *any* hearing where operationally feasible and to "to the maximum extent practicable in accordance with the law," especially for detained cases.[40] The memorandum extolled VTC as a medium that has been in operation in immigration courts for nearly thirty years, calling it a "proven success."[41] In November 2020, EOIR announced that all immigration courts were now equipped with VTC technology and that it was increasing the capabilities of parties and representatives to appear by VTC through the WebEx platform from a location outside of an immigration court. [42] The policy maintained that immigration judges have discretion to decide whether parties should appear in person or via VTC, but reiterated the claim that VTC was "beneficial to both the immigration courts and the [noncitizen] respondent."[43]

In 2021, the number of cases completed by EOIR dropped by over half, with only 114,751 cases completed compared to the 231,775 in 2020.[44] Many hearings were canceled or rescheduled because of limited staff and frequent court closures due to COVID-19 exposures.[45] The number of individuals in detention and subjected to the faster-moving detained dockets had also dropped by half between 2019 and 2021.[46] Fewer total cases meant fewer VTC hearings—EOIR reported only 13,980 completed cases with "a VTC hearing" in fiscal year 2021.[47]

At present, all signs point to a continued proliferation of video teleconferencing in immigration court. On December 13, 2021, EOIR published a new rule that as of February 11, 2022, all filings in immigration court and the Board of Immigration Appeals (BIA) must be filed electronically through EOIR'S new Courts & Appeals System (ECAS).[48] On January 10, 2022, due to the resurgence of COVID-19 nationwide, EOIR canceled all hearings for unrepresented, non-detained respondents and ordered that all detained cases

40. EOIR PM 20-10, *supra* note 10, at 4.
41. *Id.*
42. EOIR PM 21-03, *supra* note 11.
43. *Id.*, at 3 (quoting *EOIR's Video Teleconferencing Initiative*, *supra* note 25).
44. EOIR October 19, 2021 ADJUDICATION STATISTICS, *supra* note 39, at 3.
45. *See* @DOJ_EOIR, TWITTER, https://perma.cc/Y4YP-CRJB (last visited Mar. 11, 2022), which EOIR uses to update stakeholders and the public about court closures, new policies, decisions, and memos.
46. *See Detention Management*, U.S. IMMIGR. & CUSTOMS ENF'T, https://perma.cc/4TCX-H4ET (last visited Mar. 11, 2022) (providing statistics on detention numbers, including those placed in expedited removal and those placed into removal proceedings, for Fiscal Years 2019, 2020, 2021, and 2022).
47. EOIR October 19, 2021 ADJUDICATION STATISTICS, *supra* note at 39, at 45.
48. Executive Office for Immigration Review Electronic Case Access and Filing, 86 Fed. Reg. 236, 70708 (Dec. 13, 2021) (to be codified at 8 C.F.R. pt. 1001). The final rule is subject to certain exceptions and allows for IJ discretion to grant leave for paper filings under certain circumstances.

and all non-detained cases with attorneys would proceed via telephone or video through the end of January 2022.[49]

To be sure, the increased use of technology in immigration proceedings does promise some benefits.[50] VTC allows judges to review and adjudicate cases rather than having them sit idle on the docket while respondents wait for their day in court during a global public health crisis. Even in non-pandemic times, immigration courts are notoriously backlogged and understaffed. VTC can help alleviate the burden of some of the most backlogged courts by beaming in immigration judges from other jurisdictions to assist.[51] Further, for detained individuals who do not wish to fight their immigration cases or apply for relief, having access to VTC hearings can expedite the process, prevent unnecessary delay, and shorten the time they must languish in a detention center before obtaining a removal order or voluntary departure.

Expanding VTC capabilities can also capitalize on recent efforts to increase access to counsel for a chronically underserved population.[52] In recent years, a variety of technology-based initiatives have expanded access to legal representation in immigration removal proceedings, particularly for immigrants detained in remote, rural detention centers.[53] Legal service entities such as Innovation Law Lab, the Asylum Seeker Advocacy Project, the International Refugee Assistance Project, the Immigrant Legal Resource Center, the Immigrant Defense Project, and others have developed collaborative models of representation and online resource hubs to deliver legal services to people who would otherwise be without access to counsel.[54] Permitting attorneys to appear by VTC or WebEx from locations across the country widens the pool of lawyers able to represent individuals at bond hearings, at credible and reasonable fear review hearings, and handle preliminary,

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49. *EOIR Operational Status*, U.S. DEP'T OF JUST., https://perma.cc/QN3Y-3NTV (last visited Mar. 11, 2022).

50. Assessments of the advantages and disadvantages of increased use of video hearings in the criminal and civil context have noted similar benefits: increased efficiency, cost reduction, reduced detention time, expanded access to the justice system, and improved safety and reduced trauma for victims. *See* Camille Gourdet, Amanda R. Witwer, Lynn Langton, Duren Banks, Michael G. Planty, Dulani Woods & Brian A. Jackson, *Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology*, RAND CORP. (2020), https://perma.cc/KXJ3-XQJ8; Bannon & Keith, *supra* note 4, at 1887, 1889; Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH. L. REV. 197, 224, 239 (2021).

51. EOIR PM 21-03, *supra* note 11, at 3 (according to EOIR, "VTC saves travel time for immigration judges – allowing them greater time to hear more cases. It also promotes effective case management by allowing immigration judges to conduct hearings, on an ad hoc basis, for their counterparts in other immigration courts and thereby assisting with unusually heavy caseloads.") (quoting *EOIR's Video Teleconferencing Initiative*, *supra* note 25).

52. Fatma E. Marouf & Luz E. Herrera, *Technological Triage of Immigration Cases*, 72 FL. L. REV., 515, 533–36 (2020) (discussing how increasing the use of technology in detention centers and immigration courts can benefit both overburdened agencies and underserved litigants).

53. *Id*. at 532–36.

54. *Id*.; *see also* INNOVATION LAW LAB, https://perma.cc/9YE2-C8X9 (last visited Mar. 11, 2022); ASYLUM SEEKER ADVOCACY PROJECT, https://perma.cc/44L4-52JD (last visited Mar. 11, 2022); INT'L REFUGEE ASSISTANCE PROJECT, https://perma.cc/9K3K-43ZM (last visited Mar. 11, 2022); IMMIGRANT LEGAL RESOURCE CTR., https://perma.cc/K8WJ-VAZN (last visited Mar. 11, 2022); IMMIGRANT DEFENSE PROJECT, https://perma.cc/JS82-BBV6 (last visited Mar. 11, 2022).

administrative matters.[55] Lawyers can also take on more detained and non-detained clients if they and their clients are able to appear via WebEx from their offices instead of wasting hours traveling to the nearest immigration court for a five-minute master calendar hearing.[56]

Continued advancement in technology also has the potential to expand beyond the walls of the courtroom. Normalizing video communication may grease the wheels for reticent detention centers to install and allow virtual lawyer-client meetings in addition to in-person meetings, enabling lawyers to more frequently consult with clients detained hundreds of miles away in remote locations.[57] Permitting expert witnesses to testify remotely may reduce representation costs and increase accessibility for experts who are unable to travel to far-away courts. Leveraging VTC capabilities to facilitate legal representation would be a huge step forward in answering the calls to increase legal services for underserved populations.[58]

Technological innovations surely have the potential to improve efficiency and fill a gap in access to legal assistance and resources for immigrants facing removal proceedings. Notwithstanding these benefits, in this technology pivot, we must consider how VTC affects cases for international humanitarian protections. Credibility assessments play a central role in asylum, withholding of removal, and CAT cases, and an immigration judge's ability to accurately gauge an applicant's demeanor can have life-or-death consequences. Demeanor-based credibility assessments are already inherently problematic, even in in-person proceedings. VTC distorts perceptions and depresses engagement of litigants, further undermining the reliability of credibility determinations. Unless or until additional safeguards are implemented to prevent erroneous demeanor findings, evidentiary hearings that allow judges to make findings of fact based on a person's demeanor should not be conducted via video teleconference.

II. LEGAL FRAMEWORK FOR DEMEANOR-BASED CREDIBILITY FINDINGS IN ASYLUM, WITHHOLDING OF REMOVAL, AND CONVENTION AGAINST TORTURE CASES

Credibility—whether someone is capable of being believed, is trustworthy or reliable[59]—plays a pivotal role in applications for asylum, withholding of

55. Marouf & Herrera, *supra* note 52, at 570–73.

56. *See id*. at 558.

57. We echo Professor Fatma Marouf's and Professor Luz Herrera's caution that while video visitation for attorney-client meetings can be a supplement to in-person visits, it should in no way restrict or diminish counsels' ability to meet with clients in person. *See* Marouf & Herrera, *supra* note 52, at 548–52.

58. *See id.* at 517; AMERICAN BAR ASS'N COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 8, 9 (2016), https://perma.cc/4GAD-J9A7; LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, 6, 14 (June 2017), https://perma.cc/493G-FH3X (highlighting populations underserved by legal services).

59. *Credibility*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The quality that makes something (as a witness or some evidence) worthy of belief."); *Credibility*, MERRIAM-WEBSTER, https://perma.cc/6RT8-VLVQ (last visited Feb. 3, 2022) ("[T]he quality or power of inspiring belief.").

removal, and protections under the CAT.[60]

To qualify for asylum, an applicant must show that they cannot return to their home country either because they suffered past persecution or have a well-founded fear of future persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion.[61] If an applicant can prove past persecution, they are entitled to a rebuttable presumption that their fear of future persecution is well-founded.[62] If there is no past persecution, applicants can also establish a well-founded fear of future persecution by showing their fear is both *subjectively genuine* and *objectively reasonable*.[63] For a fear to be "subjectively genuine," the applicant must be found credible.[64] The applicant must also show that they are not barred from asylum by law and that they merit asylum as a matter of discretion.[65] Withholding of removal has similar elements to asylum, with a few twists. There are fewer *per se* bars to relief, but the standard of proof is more stringent: asylum requires a well-founded possibility of persecution (equated to roughly 10 percent), while withholding of removal requires a "clear probability" of persecution (greater than 50 percent).[66] Withholding of removal is not discretionary and does not require an explicit finding that fear is "subjectively genuine," but applicants generally still must be found credible to meet their burden of proof.[67] For protections under the regulations implementing the Convention Against Torture, an adverse credibility finding does not preclude protections if objective evidence and country conditions demonstrate it is more likely than not that an applicant will be tortured if returned to their home country.[68] But in practice, applicants for CAT protections who are

60. Asylum may be sought affirmatively and adjudicated through an asylum officer prior to the commencement of removal proceedings, or defensively by filing an application with an immigration judge in removal proceedings. For the purpose of this paper, we are discussing applications for asylum, withholding of removal, and protections under the regulations implementing the Convention Against Torture submitted defensively in the context of adversarial removal proceedings. Though imprecise, we are also using the term "removal proceedings" to include asylum-only proceedings and withholding-only proceedings. Our concerns about the impact of VTC on an immigration judge's ability to accurately assess demeanor also applies to credible fear and reasonable fear review hearings. The specific differences between these types of adversarial immigration proceedings are beyond the scope of this Article.

61. 8 U.S.C. § 1158(b); 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 1208.13.

62. 8 C.F.R. § 1208.13(b)(1).

63. 8 C.F.R. § 1208.13(b)(2); INS v. Cardoza-Fonseca, 480 U.S. 421, 430–31 (1987).

64. 8 U.S.C. § 1158(b)(1)(B)(ii) (applicants can meet their burden of proof through testimony, but only if the immigration judge finds the testimony credible). *But see* Matter of J-R-R-A-, 26 I&N Dec. 609 (BIA 2015) (in cases where mental competency issues impact the reliability of an applicant's testimony, immigration judges are encouraged to find that the applicant meets the subjective prong by finding that their beliefs are subjectively genuine and then focus on whether the applicant can meet their burden of proof based on other objective evidence).

65. Bars to asylum are listed at 8 U.S.C. § 1158(a)(2) (time and number bars) and 8 U.S.C. § 1158(b)(2) (criminal, persecutor, terrorist, and firm resettlement bars).

66. *Cardoza-Fonseca*, 480 U.S. at 440; Al-Harbi v. INS, 242 F.3d 882, 888 (9th Cir. 2001).

67. 8 U.S.C. § 1231(b)(3)(C).

68. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, prohibits states from returning individuals to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." 1465 U.N.T.S. 85,

found not credible have difficulty carrying their burden of proof.[69]

Credible testimony is vital in these cases because the burden of proof lies with the applicant, yet frequently those seeking protection had to flee their homes and their countries for safety. Country instability, treacherous journeys, physical distance, scarcity of resources, and lack of counsel mean that many of these cases cannot be corroborated, nor refuted, by documentary evidence.[70] Acknowledging this difficult reality, the UN Handbook on the Procedures and Criteria for Determining Refugee Status encourages that "if an applicant's account appears credible," and if their statements are "coherent and plausible" considering generally known facts, they should be given the "benefit of the doubt," even if documentary evidence is not available.[71]

Early U.S. asylum regulations agreed that "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."[72] But prior to 2005, the United States did not have a set standard for *how* judges were to determine credibility. In the absence of clear statutory or regulatory guidance, standards developed inconsistently through case law from the BIA and federal courts.[73] Generally, adverse credibility determinations would be based on factors such as the applicant's demeanor, inconsistencies within the applicant's testimony or between testimony and other evidence, including omissions or falsehoods that went to the heart of the applicant's claim, country conditions, or other evidence that showed an applicant's testimony was inherently implausible.[74] While the BIA maintained that corroborating evidence should be submitted if it were reasonably

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113, S. Treaty Doc. No. 100-20 (1988). The United States implementing regulations for the Convention Against Torture are found in 8 C.F.R. §§ 1208.16–18.

69. *See* Mansour v. INS, 230 F.3d 902, 908 (7th Cir. 2000) (criticizing the BIA for allowing a negative credibility determination in the asylum context to "wash over" a torture claim); Kamalthas v. INS, 251 F.3d 1279, 1283–84 (9th Cir. 2001) (same); Guan v. Barr, 925 F.3d 1022, 1034–36 (9th Cir. 2019) (same).

70. *See* Mitondo v. Mukasey, 523 F.3d 784, 787 (7th Cir. 2018) (noting that countries that persecute their citizens do not often keep or publish reliable records).

71. UN High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/1P/4/ENG/REV. 4, ¶¶ 196, 203–04 ("After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements . . . . [I]t is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.").

72. 8 C.F.R. § 1208.13(a).

73. Michael John Garcia, Margaret Mikyung Lee & Todd Tatelman, *Immigration: Analysis of the Major Provisions of the REAL ID Act of 2005*, CRS REPORT FOR CONGRESS (May 25, 2005), https://perma.cc/8DTJ-7ACN (summarizing the Immigration and Nationality Act provisions pre and post 2005); CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW & PROCEDURE, § 34.02[9] (2004) (discussing case law concerning different evidentiary standards).

74. Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998) (discussing inconsistencies and omissions that were central to the respondent's persecution claim and his "very halting" and "hesitant" demeanor); Matter of S-M-J-, 21 I&N Dec. 722, 729 (BIA 1997) ("Adverse credibility determinations are appropriately based on inconsistent statements, contradictory evidence, and inherently improbable testimony; and where these circumstances exist in view of the background evidence on country conditions, it is appropriate for an immigration judge to make an adverse credibility determination on such a basis.").

available,[75] in the Ninth Circuit, an applicant's credible testimony alone was sufficient to sustain their burden of proof if it was "unrefuted and credible, direct and specific."[76]

In 2005, Congress created a single standard for credibility assessments, enshrining both subjective and objective credibility markers developed through case law into statutes. In a series of laws passed under the auspices of fighting terrorism, the REAL ID Act of 2005 amended the INA to make it more difficult for terrorists (and everyone else) to be granted asylum or withholding of removal.[77] The REAL ID Act heightened the standard of proof for asylum and withholding of removal claims, amended the requirements for corroborating evidence, and expanded the bases on which immigration judges could find applicants not credible.[78] Under REAL ID, considering the totality of the circumstances and all relevant factors, judges may base credibility determinations on:

> the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record [. . .], and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility [. . .].[79]

This new standard made it easier for an immigration judge to find an applicant not credible and therefore deny their application for asylum or withholding. By rejecting the long-held "heart of the claim" standard, immigration judges were given broader authority to use any inconsistency, inaccuracy, or falsehood, or any other relevant factor, to find an applicant not credible.[80]

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75. *Matter of S-M-J-*, 21 I&N Dec. at 726 (holding that credible testimony may be sufficient but requiring corroborating evidence where it is reasonably available).

76. Ladha v. INS, 215 F.3d 889, 901 (9th Cir. 2000) (disapproving *Matter of S-M-J-*, 21 I&N Dec. 722).

77. *See* Melanie Conroy, *Real Bias: How REAL ID's Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 BERKELEY J. GENDER, L. & JUST. (2009) (provides a legislative history of the REAL ID Act and how the controversial bill was pushed through the House and Senate as a rider to an emergency, necessary spending bill to provide funds for tsunami relief, the wars in Afghanistan and Iraq, and increased death benefits for soldiers and foreign service workers).

78. Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 TEX. INT'L L.J. 185, 195 (2008).

79. 8 U.S.C. § 1158(b)(1)(B)(iii) (corresponds to the Real ID Act of 2005, Pub. L. No. 109-13, § 101 (a)(3), 119 Stat. 302, 303).

80. *See, e.g.*, Jibril v. Gonzales, 423 F.3d 1129, 1133–38, 1139 n.1 (9th Cir. 2005) (reversing adverse credibility finding that was based on trivial or minor inconsistencies, demeanor, and evasive testimony using pre-REAL ID case law, but acknowledging that had the application been controlled by the REAL ID Act, the Court would likely have been obliged to deny the petition); Kaur v. Gonzales, 418 F.3d 1061,

Further, endorsing credibility findings based on "demeanor, candor, or responsiveness," encouraged life-or-death decisions based on highly subjective factors.[81] Explicitly stating that there is "no presumption of credibility," distanced the United States from the international "benefit of the doubt" standard, setting the tone for immigration judges to view applicants with increased skepticism.

U.S. law affords these credibility findings a high degree of deference on appeal. Credibility findings are considered "factual findings" reviewed under the deferential "clearly erroneous" standard of review.[82] This means the Board of Immigration Appeals *must* defer to an immigration judge's credibility finding so long as it is "plausible in light of the record," even if the reviewing court is "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."[83] If the BIA finds no "clear error," review by federal courts of appeals is further limited because "the administrative findings of fact are *conclusive* unless any reasonable adjudicator would be *compelled* to conclude to the contrary."[84] As the Ninth Circuit has observed, "[a]n adverse determination of [the credibility] issue, by reason of our highly deferential standard of review, [is] almost insurmountable."[85]

Within this highly deferential legal framework, immigration judges may assess an applicant's demeanor—their outward appearance, look, and behavior—and everything is fair game. According to Congress:

> All aspects of the witness's demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of

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1064 n.1 (9th Cir. 2005) (noting that under the REAL ID Act, the court's review of a credibility finding is "significantly restricted").

81. *See, e.g.*, Wang v. Holder, 569 F.3d 531, 535, 539–40 (5th Cir. 2009) (upholding adverse credibility finding based on an immigration judge's characterization that a Chinese woman's testimony was "vague, hesitant and evasive" and "lack[ed] emotion" despite Petitioner's argument that she had difficulty with the interpreter).

82. 8 C.F.R. § 1003.1(d)(3)(i).

83. Anderson v. City of Bessemer, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."); *see also Wang*, 569 F.3d at 539 (holding that where there are two possible views of the evidence—that Petitioner feigned difficulty understanding the interpreter or really didn't understand the interpreter—the court has no basis to set aside the immigration judge's adverse credibility finding); Matter of J-R-G-P-, 27 I&N Dec. 482, 486 (BIA 2018) (noting that under a clear error review a "finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern") (citing Cooper v. Harris, 137 S. Ct. 1455, 1465 (2017)).

84. 8 U.S.C. § 1252(b)(4)(B) (emphasis added). REAL ID also extended this highly deferential standard to the question of corroborating evidence: "[n]o court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable." Real ID Act of 2005, Pub. L. No. 109-13, § 101(e), 119 Stat. 302, 305, codified at 8 U.S.C. § 1252(b)(4).

85. Kaur v. INS, 237 F.3d 1098, 1101 (9th Cir. 2001); *see also* Abdulrahman v. Ashcroft, 330 F.3d 587, 598 (3d Cir. 2003) (admonishing an immigration judge whose "commentary was not confined to the evidence in the record and smacked of impermissible conjecture," yet still upholding the adverse credibility determination due to the "overriding consideration" of the "extraordinarily deferential standard" in reviewing the credibility determinations of immigration judges).

> his speech and other non-verbal communication—may convince the observing trial judge that the witness is testifying truthfully or falsely.

For example, courts can make adverse demeanor findings based on an applicant being "agitated," "visibly nervous," or when their speech becomes "notably faster" or has an "almost a desperate tone" when responding to difficult questions.[86] Courts can point to a "lack of emotion" when discussing traumatic events like incarcerations and beatings to support an adverse credibility finding.[87] Lack of eye contact can be a basis for an adverse credibility finding.[88]

Under the law, these demeanor considerations are afforded extraordinary deference—*greater deference than any other credibility indicator*.[89] This "special deference" is premised on two assumptions. First, it assumes that the immigration judge is uniquely able to assess an applicant's demeanor because they observe the applicant's behavior "in person" during "live testimony."[90] Second, it assumes that appellate bodies are unable to assess an applicant's demeanor on appeal. The BIA has explained, "Because an appellate body may not as easily review a demeanor finding from a paper record, a credibility finding which is supported by an adverse inference drawn from [an individual's] demeanor generally should be accorded a high degree of

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86. *See* Manes v. Sessions, 875 F.3d 1261, 1263 (9th Cir. 2017) (respondent was "visibly nervous" and his speech was "notably faster" and "had an almost desperate tone" when responding to difficult questions); Matter of J-Y-C-, 24 I&N Dec. 260, 264 (BIA 2007) (affirming dismissal of applicant's explanation due to discrepancies between testimony and corroborating evidence and because the applicant's "rapid manner" of testimony and "agitated" demeanor suggested that the explanation was fabricated).

87. *See, e.g.*, *Wang*, 569 F.3d at 535, 540 (upholding adverse credibility determination based in part on Petitioner's "lack of emotion" when discussing incarceration and beatings).

88. *See* Castaneda-Castillo v. Gonzales, 488 F.3d 17, 28 (1st Cir. 2007) (overturning an adverse credibility finding based in part on demeanor due to respondent "blinking his eyes in an unusually rapid rate," but only because the other adverse credibility reasons were also overturned as flawed or mischaracterized the record); *see also* Matter of B-, 21 I&N Dec. 66 (BIA 1995) (noting that the adverse demeanor assessment was based on the respondent not looking at the judge, but looking at the table or at the wall behind the interpreter, and reversing the decision because every other adverse indicator articulated by the judge —inconsistency, implausibility, and lack of corroboration—was not supported by the record).

89. *See* Cordero-Trejo v. INS, 40 F.3d 482, 487 (1st Cir. 1994) (holding that credibility findings based on demeanor deserve more deference than those based on testimonial analysis); Paredes-Urrestarazu v. INS, 36 F.3d 801, 818–21 (9th Cir. 1994) (holding that credibility findings based on demeanor deserve "special deference" when compared to those based on testimonial analysis); Scott Rempell, *Gauging Credibility in Immigration Proceedings: Immaterial Inconsistencies, Demeanor, and the Rule of Reason*, 25 GEO. IMMIGR. L.J. 377, 403 (2011) (describing this "special deference" or "extreme deference" as an "exception to the level of scrutiny the courts of appeals typically apply to credibility determinations").

90. Lizhi Qiu v. Barr, 944 F.3d 837, 843 (9th Cir. 2019); *see also* Matter of A-S-, 21 I&N Dec. 1106, 1109 (BIA 1998) ("[B]ecause the Immigration Judge has the advantage of observing the [noncitizen] as the [noncitizen] testifies, the Board accords deference to the Immigration Judge's findings concerning credibility and credibility-related issues."); Manes v. Sessions, 875 F.3d 1261, 1263–64 (9th Cir. 2017) ("Given the IJ's unique ability to assess first-hand a petitioner's demeanor, 'it would be extraordinary for a reviewing court to substitute its second-hand impression of the petitioner's demeanor . . . for that of the IJ.'") (quoting Jibril v. Gonzales, 423 F.3d 1129, 1137 (9th Cir. 2005)); Tu Lin v. Gonzales, 446 F.3d 395, 400–01 (2d Cir. 2006) ("Demeanor is virtually always evaluated subjectively and intuitively, and an IJ therefore is accorded great deference on this score . . .").

deference."[91] The result is that appellate courts generally feel obligated to defer to an immigration judge's demeanor findings, absent exceptional circumstances.[92]

Generally, the only circumstances under which appellate courts deviate from this special deference is where a demeanor finding is the sole basis for an adverse credibility finding on an otherwise blemish-free record,[93] or where the immigration judge fails to provide "specific examples" of non-credible aspects of the person's demeanor.[94] However, where a demeanor finding is coupled with any other adverse credibility indicator,[95] including even minor, irrelevant inconsistencies, it becomes an almost unreviewable death-knell to any asylum or withholding claim.[96]

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91. *Matter of A-S-*, 21 I&N Dec. at 1111; *see also* Shrestha v. Holder, 590 F.3d 1034, 1041–42 (9th Cir. 2010) ("The deference that the REAL ID Act requires makes sense because IJs are in the best position to assess demeanor and other credibility cues that we cannot readily access on review . . .Weight is given [to] the administrative law judge's determinations of credibility for the obvious reason that he or she sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records.") (internal quotation omitted); Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1395 (9th Cir. 1985) ("An immigration judge alone is in a position to observe [a noncitizen's] tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence. He is, by virtue of his acquired skill, uniquely qualified to decide whether [a noncitizen's] testimony has about it the ring of truth. The courts of appeals should be far less confident of their ability to make such important, but often subtle, determinations.").

92. *See* Jianli Chen v. Holder, 703 F.3d 17, 24 (1st Cir. 2012) ("A trial judge sees and hears the witnesses at first hand and is in a unique position to evaluate their credibility. In the absence of special circumstances—not present here—reviewing courts ordinarily should defer to such on-the-spot judgments.").

93. *See* Raimi v. Barr, 822 F. App'x 543, 545 (9th Cir. 2020) (remanding after finding no inconsistencies and that demeanor finding lacked identifiable support, stating "we have never upheld an adverse credibility finding based on demeanor alone [and] we see no reason to do so in this case"); Yi Shu Chen v. Sessions, 751 F. App'x 119, 123 (2d Cir. 2018) ("[T]he only other finding supporting the adverse credibility determination—demeanor—is not fully supported by the record, and we have never held that a demeanor finding alone can constitute substantial evidence for an adverse credibility determination."); *Castaneda-Castillo*, 488 F.3d at 28 (overturning adverse credibility finding based in part on demeanor because all of the other adverse credibility reasons were flawed); Matter of B-, 21 I&N Dec. 66 (BIA 1995) (reversing adverse demeanor finding based on lack of eye contact after finding the other adverse indicators articulated by the judge were not supported by the record).

94. Kin v. Holder, 595 F.3d 1050, 1056 (9th Cir. 2010) ("Although an IJ's determination regarding demeanor is given special deference, the IJ must still provide specific examples of a petitioner's demeanor that would support this basis for an adverse credibility determination."); *Shrestha*, 590 F.3d at 1042 (immigration judge must "specifically point out the noncredible aspects of the petitioner's demeanor").

95. An assessment of negative credibility findings appealed to federal circuit courts in 2010 found that adverse demeanor findings are almost always coupled with other credibility indicators. Of those cases assessed, demeanor was specifically referenced in nearly one out of every five cases. *See* Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 477 (2016).

96. *See* Yali Wang v. Sessions, 861 F.3d 1003, 1007 (9th Cir. 2017) (holding adverse credibility finding based on demeanor and concerns about the reliability of corroborating documents was supported by substantial evidence, "given the healthy measure of deference to agency credibility determinations required by the REAL ID Act" (internal quotation omitted)); Qing Hua Lin v. Holder, 736 F.3d 343, 349 (4th Cir. 2013) (upholding adverse credibility finding based on inconsistencies, omissions during airport interview, contradictions, and demeanor, because "even the existence of only a few such inconsistencies can support an adverse credibility determination"); Lin v. U.S. Dep't of Just., 453 F.3d 99, 109 (2d Cir. 2006) (noting the "particular deference" afforded to an adjudicator's observations of the applicant's demeanor and "[w]e can be still more confident in our review of observations about an applicant's demeanor where, as here, they are supported by specific examples of inconsistent testimony"); *see also Matter of A-S-*, 21 I&N Dec. at 1111–12 (pre-REAL ID case upholding demeanor-influenced negative credibility determination coupled with inconsistencies and vagueness).

To be sure, the extraordinary deference to demeanor assessments is not unique to immigration law. Rather, it is an outgrowth of America's long tradition of weighing face-to-face interactions between the trier of fact and witnesses as the "most accurate method of ascertaining the truth."[97] The American reliance on demeanor is enshrined in the Constitution itself, through the Sixth Amendment Confrontation Clause, which guarantees individuals accused of crimes the right to a face-to-face courtroom encounter with their accusers.[98] From its earliest case interpreting the Sixth Amendment, the Supreme Court declared that an important function of the Confrontation Clause was "compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[99] Similarly, the Federal Rules of Evidence, and by association many states' rules of evidence, reflect the belief that "[the demeanor of the witness traditionally has been believed to furnish trier and opponent with valuable clues."[100] Legal scholars observe that no specific rule of evidence directly governs demeanor, yet it is considered particularly relevant, widely admissible, and the foundation of the rule of hearsay.[101] And extreme deference to demeanor in immigration proceedings aligns with the Federal Rules of Civil Procedure, which state that appellate courts must afford a trial court's findings of fact the deferential "clear error" standard of review and "give due regard to the trial court's opportunity to judge the witnesses' credibility."[102] Scholars have observed that this high deference to a trial court's in-person observations of demeanor, coupled with the seeming legal and literal impossibility of the appellate judge—who never sees the witness—to second guess these findings, effectively "works to insulate credibility findings from meaningful appellate review."[103]

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97. Frank M. Walsh and Edward M. Walsh, *Effective Processing or Assembly-Line Justice—The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 265 (2008) (quoting United States v. Raddatz, 447 U.S. 667, 697 n.3 (1980)).

98. U.S. CONST. amend VI; California v. Green, 399 U.S. 149, 156 (1970).

99. Mattox v. United States, 156 U.S. 237, 242–43 (1895); *see also* Crawford v. Washington, 541 U. S. 36 (2004) (reaffirming a commitment to face-to-face courtroom confrontation when the admissibility of pre-recorded inculpatory statements from Defendant's wife was held to have violated the accused's Sixth Amendment confrontation right).

100. FED. R. EVID. art. VIII (advisory committee's notes) (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 495–96 (1951)).

101. *See* JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 946 (2d ed., 1923); Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, AM. U. L. REV. 1331, 1346–48 (2015) (summarizing the historical origins of demeanor evidence); Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158 (2020) (discussing the historical importance of demeanor evidence and the challenges, and opportunities, posed by mask mandates during the COVID-19 pandemic that prevented judges and juries from reading facial cues and expressions of defendants).

102. FED. R. CIV. P. 52(a)(6).

103. Simon-Kerr, *supra* note 101, at 163; *see also* Bennett, *supra* note 101, at 1350 ("[J]ury determinations of witness credibility receive extreme deference from the courts. Federal appellate courts overturn credibility determinations only where a witness's testimony is impossible under the laws of nature or incredible as a matter of law—an extraordinarily high standard.").

Yet, despite demeanor-based credibility assessments being at the core of several American legal principles, academic and legal scholars—spurred by social science—have increasingly challenged the reliability of demeanor evidence, questioning what, if any, role demeanor should play in credibility assessments in our modern world.[104]

III. DEMEANOR IS AN UNRELIABLE METRIC FOR CREDIBILITY ASSESSMENTS, PARTICULARLY IN IMMIGRATION PROCEEDINGS

The Honorable Judge Richard A. Posner, a vociferous critic of demeanor findings, astutely observed that "Immigration judges often lack the 'cultural competence' to base credibility determinations on an immigrant's demeanor."[105] This is because demeanor findings are not only generally unreliable, but in immigration court, judges are asked to assess demeanor by interpreting cultures, and more often than not the actual words, of individuals who may have experienced significant trauma.

In this section, we explore why demeanor assessments, even in in-person hearings, are problematic and unreliable in asylum, withholding, and CAT cases. First, empirical studies show that our assumptions about demeanor evidence are flawed. Second, the specific population involved—non-U.S. citizens—can lead to cross-cultural misunderstandings of nonverbal cues. Third, most of these cases are conducted via an interpreter, and demeanor, quite literally, gets lost in translation. Fourth, these hearings frequently involve people who have suffered significant trauma or torture, which can have profound psychological consequences on their ability to relay their story in a way that the adjudicator expects. The combination of these factors has led many scholars, refugee experts, and countries to conclude that demeanor assessments in humanitarian protection cases, even for in-person hearings, are dubious at best.

A. *Empirical Studies Show Demeanor Assessments are Unreliable*

Despite the United States' enduring emphasis on demeanor to determine credibility, empirical studies have long shown that humans, including judges, are typically not very good at accurately sensing deception from strangers.[106]

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104. Bennett, *supra* note 101, at 1371–76 (proposing amendments to model jury instructions that synthesize and incorporate cognitive psychological research to caution against reliance on perceived confidence and physical demeanor cues to determine witness credibility); Simon-Kerr, *supra* note 101, at 170–74 (discussing how mask mandates offer an opportunity to reassess the role of demeanor in credibility assessments).

105. Kadia v. Gonzales, 501 F.3d 817, 819 (7th Cir. 2007).

106. *See* Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, *in* PERS SOC. PSYCH. REV. 214–34 (2006); Valerie Hauch, Siegfried L. Sporer, Stephen Michael & Christian A. Meissner, *Does Training Improve the Detection of Deception? A Meta-Analysis*, 43 COMMC'N RSCH. 43 (2016) (reviewing research on lay persons' and presumed professionals' ability to correctly differentiate deception and truth in strangers and assessing whether specific training can improve the ability to detect deception); Bennett, *supra* note 101, at 1364–71 (discussing the divide between what judges and juries assume and what social science shows about demeanor evidence).

Decades of research by social scientists have shown that the nonverbal "cues" commonly associated with deception are based on false assumptions.[107] Contrary to beliefs, stereotypical visual cues like not maintaining eye contact, facial expressions, hand gestures, and body movements *do not* occur significantly more when an individual is lying compared to when they are telling the truth.[108] Some of these visual "cues," including fidgeting and shifting postures, in fact *decrease* during actual deception.[109] Further, the number of "cues" people associate with deception are greater than those that are actually indicative of deception, resulting in false positives.[110] As one scholar summarized:

> Empirical findings demonstrate that the behavioral cues used by jurors and other observers to perceive and measure deceptive discourse are more strongly associated with *judgments of deception* than with *actual deception*. In other words, a wipe of the hand, a lick of the lips, or a stammer in a witness's speech will yield a judgment of deception far more often than a deception on the part of that witness actually occurs.[111]

The result is that the ability of humans to distinguish truth from lies based on a speaker's behavior is "only slightly better than flipping a coin."[112] A comprehensive meta-analysis on the accuracy of deception detection based on behavioral cues found that people average only 54 percent deception detection accuracy, correctly classifying 47 percent of lies as deceptive and 61 percent of truths as nondeceptive.[113] Individuals who are presumed experts in lie detection—law enforcement, judges, psychiatrists, job

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107. *See, e.g.*, Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1189–97 (1993) (reviewing research); Miron Zuckerman, Bella M. DePaulo & Robert Rosenthal, *Verbal and Nonverbal Communication of Deception*, 14 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 1 (1981) (reviewing research).

108. Blumenthal, *supra* note 107, at 1192–95; Bella M. DePaulo, Julie I. Stone & G. Daniel Lassiter, *Deceiving and Detecting Deceit*, *in* THE SELF AND SOCIAL LIFE 323–370, 339 (Barry R. Schlenker ed., 1985) ("[S]ome of our favorite cultural stereotypes about liars do not withstand the test provided by the existing empirical data . . . . [T]he studies that have been conducted so far do not support the notion that liars have shifty eyes-nor even shifty bodies; neither glances nor shifts in posture occur significantly more often when people are lying compared to when they are telling the truth.").

109. Blumenthal, *supra* note 107, at 1192–95; *see* Zuckerman, DePaulo & Rosenthal, *supra* note 107, at 14 (finding through an empirical study that highly motivated deceivers tend to be still and perform fewer body movements, and concluding that "[i]n general, it appears that the highly motivated deceivers tried harder to control their behavior and consequently moved less and displayed more behavioral rigidity [. . .] deception under high motivation was associated with less blinking, less head movement, fewer adaptors, and fewer postural shifts . . . .")

110. Blumenthal, *supra* note 107, at 1193–95.

111. *Id.* at 1162–63 (emphasis added) (internal quotation omitted).

112. Hauch, Sporer, Michael & Meissner, *supra* note 106, at 283–343.

113. Bond Jr. & DePaulo, *supra* note 106, at 214–34.

interviewers, and auditors—fare little better than laypeople.[114] Yet humans continue to be overconfident in their demeanor assessments. Sometimes, people who are the most confident in their ability to judge credibility based on demeanor are the *least likely* to be accurate.[115]

In the context of immigration proceedings, the inaccuracy and unreliability of demeanor findings have drawn the critical attention of legal scholars[116] and federal judges[117] for decades. Notably, the baseline "flip of the coin" accuracy found in empirical studies does not account for the particular challenges of assessing credibility in asylum, withholding, or CAT cases, where immigration judges are tasked with assessing demeanor across cultures, through the cumbersome mediation of an interpreter, and while discussing traumatic events in the strange and unfriendly environment of an immigration court.

B. *Cross-Cultural Misunderstandings Are Endemic to Immigration Hearings*

Cross-cultural misunderstandings are endemic to immigration hearings because asylum seekers by definition are from other countries.[118] Mannerisms, facial expressions, and body language mean different things in different cultures. The most well-recognized difference is the Western association of eye contact with honesty ("look me in the eye and tell me the truth"), while in other cultures averting one's eyes is a sign of respect and deference.[119] People from

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114. *Id*. at 229–30 (comparing expert and nonexpert judgments in nineteen different studies and finding "no evidence that experts are superior to nonexperts in discriminating lies from truths"); *see also* ALDERT VRIJ, DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES (2008) (reviewing studies on deception detection showed 55.91 percent accuracy rate for law enforcement personnel).

115. Stephen Porter, Sean McCabe, Michael Woodworth, & Kristine A. Peace, *Genius Is 1% Inspiration and 99% Perspiration . . . or Is It? An Investigation of the Impact of Motivation and Feedback on Deception Detection*, 12 LEGAL & CRIMINOLOGICAL PSYCH. 297, 297–309 (2007); Bella M. DePaulo, Kelly Charlton, Harris Cooper, James J. Lindsay, Laura Muhlenbruck, *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERSONALITY & SOCIAL PSYCH. REV. 346, 346–357, 351–52 (1997) (finding that people were generally substantially more confident than they were accurate).

116. *See, e.g*., Jenni Millbank, *'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations*, 21 INT'L J. REFUGEE L. 1, 32 (2009) ("In assessing demeanor, consistency and plausibility, decision-makers overestimated their own ability to discern truthfulness, relied upon assumptions and failed to fully articulate reasons for disbelief."); Rempell, *supra* note 89, at 396; Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 378–80 (2003).

117. Morales v. Artuz, 281 F.3d 55, 61 n.3 (2d Cir. 2002) (noting empirical studies have refuted the belief that "demeanor is a useful basis for assessing credibility"); Oshodi v. Holder, 729 F.3d 883, 905–06 (9th Cir. 2013) (Kozinksi, J., Rawlinson, J., Bybee, J., dissenting); Mitondo v. Mukasey, 523 F.3d 784, 784, 788 (7th Cir. 2018); Apouviepseakoda v. Gonzales, 475 F.3d 881, 897 (7th Cir. 2007) (Posner, J., dissenting); Kadia v. Gonzales, 501 F.3d 817, 817, 819 (7th Cir. 2007).

118. *See* Dia v. Ashcroft, 353 F.3d 228 (3d Cir. 2003).

119. Rempell, *supra* note 89, at 403; *Dia*, 353 F.3d at 276 (en banc) (McKee, J., dissenting in part) ("[W]hile the failure to look someone in the eye while speaking is usually interpreted as an indication of deception by people in Western cultures, avoiding eye contact has a very different meaning in some other cultures."); Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 130–317 n.191 (2006) (noting downcast eyes are a signal of respect to authority in certain Asian cultures); Andrew P. Bayliss & Steven P. Tipper, *Predictive Gaze Cues and Personality Judgments: Should Eye Trust You?,* 17 PSYCH. SCIENCE 514, 514–520 (2006).

different cultures may use different facial expressions to convey emotions. For example, one study found that East Asian individuals rely more on the eye area and changes of gaze direction to perceive emotion, whereas Western Caucasians rely on the eyebrows and mouth to read emotion. [120] Other non-verbal expressions such as emotion/non-emotion, hesitation, becoming visibly uncomfortable, or changes in tone, speed, and volume of speech can be misinterpreted between cultures.[121] These differences are stark, and their impact on perception is exacerbated by the general public's lack of awareness of these differences.[122]

Cross-cultural demeanor assessments can be particularly problematic for cases involving sexual minority applicants, where immigration judges attempt to assess sexual orientation and gender expression based on stereotypical expectations shaped by race, class, and culture.[123] Cultural and religious expressions of trauma and shame may be incompatible with adjudicators' expectations of candor and responsiveness.[124] Speculation and culturally-biased assumptions should not be the basis for an adverse credibility determination,[125] yet they may survive appellate review if not explicitly articulated and shrouded in the cloak of an adverse demeanor finding.

Further complicating cultural misunderstandings is the impact of implicit biases—unconscious feelings, beliefs, or stereotypes that permeate decision-makers' thinking without them even knowing it.[126] Scholars have highlighted the deleterious impact of implicit racial or cultural bias in legal proceedings,

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120. Rachael E. Jack, Roberto Caldara & Philippe G. Schyns, *Internal Representations Reveal Cultural Diversity in Expectations of Facial Expressions of Emotion*, 141 J. EXPERIMENTAL PSYCH.: GENERAL 19, 19–25 (2012).

121. Barapind v. Rogers, No. 96–55541, 1997 WL 267881, at *2 (9th Cir. May 15, 1997) (holding immigration judge's belief that Petitioner's "stoic" demeanor indicated dishonesty was the result of cultural bias).

122. Walter Kalin, *Troubled Communication: Cross Cultural Misunderstandings in the Asylum-Hearing*, 20 INT'L MIGRATION REV. 230, 234 (1986) ("[C]ross cultural misunderstandings also can be caused by the official's unintentional bias in interpreting the statements in light of his own legal concepts.").

123. Conroy, *supra* note 77, at 34–35.

124. *Id.* at 35 (quoting Katherine Melloy, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 659 (2007)) (noting that in cases of individuals who have suffered gender-based or sexual violence, a "strong sense of cultural or religious shame may affect the applicant's [testimony]").

125. *Cf.* Cosa v. Mukasey, 543 F.3d 1066, 1069 (9th Cir. 2008) (rejecting adverse credibility finding that was not based on demeanor but on "pure speculation about how [an adherent of the applicant's religion] might look and act"); Mwembie v. Gonzalez, 443 F.3d 405, 413 (5th Cir. 2006) (condemning immigration judge's "incorrect and irrational assumptions about human behavior and especially the behavior of people from foreign cultures, such as her assumptions about a victim's ability to remember phone numbers, about all [asylum seekers'] behavior in saying good-bye to their families before fleeing, or about the 'incomprehensible' brutality of the persecutors").

126. *See* Bandes & Feigenson, *supra* note 13, at 1290–91. Bandes & Feigenson discuss a number of cognitive-emotional biases, including, "fundamental attribution error (the tendency to ascribe the behavior of others to their inherent character, while ascribing one's own behavior to situational factors); naïve realism (people's belief that they see the world as it is, underestimating or ignoring the effect of their own cultural, racial, and other biases on their perceptions and judgments); conversely, an egocentric bias according to which people place undue weight on their own conscious emotional responses in gauging others' emotional states."

including immigration proceedings.[127] Behavior-based credibility assessments are grounded in expectations of how a witness *should* act or behave in a courtroom, which in the United States is a traditionally white and male-dominated space.[128] People whose behavior or speech patterns diverge from expected norms are often viewed as unreadable or unreliable.[129] Studies have shown that "implicit attitudes lead individuals to read unfriendliness or hostility into the facial expressions of blacks but not whites" and "to more negative evaluations of ambiguous actions by racial and ethnic minorities."[130] These unconscious racial or cultural biases are an "artifact of selective empathy—the difficulty we all have attending to and interpreting cues from members of other cultural, racial or ethnic groups."[131] Because they are subconscious, implicit biases are difficult to identify, monitor, or break. They can seep into the reasoning of even well-meaning individuals who self-identify as impartial and fair without them even realizing it.[132] The continuing reliance on demeanor as an indicator of credibility thus "allows the interjection of the subconscious influence of stereotypes and selective empathy, leading scholars to theorize that there is a 'demeanor gap' along lines of culture, race, and gender."[133]

The specific nature and structure of immigration proceedings allow implicit bias to go largely unchecked, due to immigration judges' lack of independence, heavy and complex caseloads, limited opportunity for deliberate thinking, low motivation resulting from high levels of stress and burnout, and low risk of appellate review.[134] This is particularly problematic when

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127. *See* Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 476–77 (2016); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 42, 53–54 (2000); Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 438–39 (2011); Jeanette L. Schroeder, *The Vulnerability of Asylum Adjudications to Subconscious Cultural Biases: Demanding American Narrative Norms*, 97 B.U. L. REV. 315, 328 (2017); Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUM. RTS. L. REV. 1 (2016).

128. *See* Carlin, *supra* note 127, at 450 (utilizing the testimony of Rachel Jeantel in the George Zimmerman trial as a case study to explore how the history of exclusion of people of color from the U.S. legal system created an "invisible baseline of whiteness guiding courtroom behavior [where] nonwhite performance [is] marked as other and inappropriate").

129. *Id.* at 453; *see also* Rand, *supra* note 127, at 34–38 (discussing how familiarity bias and differences in speech patterns can impair cross-racial lie detection); Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 312–17 (1996) (discussing the psychological dynamics of race and credibility assessments).

130. Marouf, *supra* note 127, at 438–39 (citing Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCH. SCI. 640, 640–42 (2003) and Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133, 139–47 (2002)).

131. *See* Bandes & Feigenson, *supra* note 13, at 1290–91.

132. Marouf, *supra* note 127, at 416–17.

133. Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 844 n.1 (Mass. 2021) (Kafker, J., concurring); *see also* Simon-Kerr, *supra* note 101, at 170; Carlin, *supra* note 127, at 476–77; Rand, *supra* note 127, at 53–54.

134. Marouf, *supra* note 127, at 428–41 (highlighting that immigration judges have the "weakest structural and professional norms to remain impartial and independent. Unlike federal judges who derive their authority from Article III of the Constitution and have the highest degree of independence through lifetime appointments, immigration judges are career civil servants within the Department of Justice.

considering the undefined scope of demeanor and the discretion and deference afforded to demeanor findings. In the United States, all that is required is that immigration judges articulate what specific demeanor traits led them to their adverse conclusion—lack of eye contact, aggressive or defensive tone, flat affect. They do not need to dig deep to explain *why* they believe the identified trait indicates untrustworthiness, which invites a "kind of rationalization by which an [immigration judge's] unexpressed feelings towards and assumptions about a particular group, possibly even unknown to the [immigration judge] themselves, can taint their decision-making and result in the denial of asylum."[135] And so long as their decision is a plausible view of the evidence, it will survive appellate review.[136]

Some have argued that increasing training on diversity and cross-cultural competence could help prevent cultural misunderstandings and implicit biases from infecting adjudicator decisions.[137] In the past, U.S. immigration judges have been provided some training on cross-cultural competence—training that was suspended under the Trump Administration but reinstated under the Biden Administration.[138] Yet, unlike the law of other countries, U.S. law does not *require* that immigration judges display any cultural competence when making a demeanor finding.[139] While increased training may be a helpful first step, trainings alone are insufficient if the laws and structures that enable biased considerations remain intact.

C. *Demeanor Assessments Get Lost in Translation*

Demeanor findings in immigration court involve not only translating cultures but often translating actual words, as most immigration hearings are

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They have even less independence than Administrative Law Judges (ALJs), who derive their power through congressional legislation and have a substantial degree of judicial independence under the Administrative Procedure Act.").

135. Nicholas Narbutas, *The Ring of Truth: Demeanor and Due Process in U.S. Asylum Law*, 50 COLUM HUM. RTS L. REV. 348, 365–66 (2018).

136. Wang v. Holder, 569 F.3d 531, 537–39 (5th Cir. 2009).

137. *See* Marouf, *supra* note 127, at 447–48; Gupta, *supra* note 127, at 51 (training "on the impact of bias on their decision making . . . could encourage immigration judges to consciously acknowledge and reject those biases").

138. *See* Tal Kopan, *Justice Department Cancels Diversity Training, Including for Immigration Judges*, SAN FRANCISCO CHRON. (Oct. 9, 2020), https://perma.cc/4FAK-D2NU; Katei Benner, *Justice Dept. Suspends All Diversity and Inclusion Training for Staff*, N.Y. TIMES (Oct. 9, 2020), https://perma.cc/3X3X-2BDQ; Erich Wagner, *Biden Order Rescinds Diversity Training Restrictions, Requires Review of Agency Equity*, GOV'T EXEC. (Jan. 20, 2021), https://perma.cc/JSZ2-2B48.

139. For example, guidance from the European Asylum Support Office (EASO) to EU countries states, "Demeanor is considered a poor indicator of credibility. If used as a negative factor, the judge must give sustainable reasons as to why and how the demeanor and presentation of the applicant contributed to the credibility assessment taking into account relevant capacity, ethnicity, gender and age factors. It should only be used (if at all) in the context of an understanding of an applicant's culture and background. [. . .] [T]he decision-maker should generally avoid placing reliance on demeanor and appearance save in exceptional cases and then only in an evidenced understanding of the relevant culture." *See* EUR. ASYLUM SUPPORT OFFICE (EASO), *Judicial Analysis: Evidence and Credibility Assessment in the Context of the Common European Asylum System* 90 (2018), https://perma.cc/BEZ7-XXY6.

conducted using an interpreter. Again, the Honorable Judge Posner summarized the problem well:

> The fact that [Petitioner] was testifying through an interpreter has a significance that my colleagues do not appreciate when they say that "The IJ spent 6 hours in a hearing room, face to face, with [Petitioner]. We have never met her." I take this to be an allusion to the common though not necessarily correct belief that being present when a witness testifies greatly assists a judge or juror in determining whether the witness is telling the truth. Even if so in general, it cannot be so when the witness is a foreigner testifying through an interpreter, especially if the judge cannot even hear the foreigner, but only the interpreter. Reading the facial expressions or body language of a foreigner for signs of lying is not a skill that either we or [the IJ] possess.[140]

Tone, pace of speech, cultural context, and other nonverbal cues imbue words with meanings that can be lost when testimony is communicated "through the cumbersome intermediation of an interpreter."[141] Many words or concepts defy demands for exact word-for-word translation because language is inherently ambiguous and contextual.[142] Human communication is inextricably tied to culture and shared reference points,[143] as anyone who has ever attempted to verbatim translate a joke or pun can attest. The intended meaning of uttered words and the listener's ability to understand that meaning also depends greatly on "paralinguistic features such as intonation, volume, and speech rate, as well as nonverbal communication like physical gestures."[144] Interpretation that does not adequately convey the tone or pace of the applicant's speech, or omits hesitations and pauses, can affect the perceived credibility of an applicant.[145] Misreading or omitting these paralinguistic cues when using an interpreter not only affects the immigration judge's ability to understand the applicant, but also the applicant's ability to understand questions from the bench, which can lead to answers that appear

140. Apouviepseakoda v. Gonzales, 475 F.3d 881, 897 (7th Cir. 2007) (Posner, J., dissenting).

141. Oshodi v. Holder, 729 F.3d 883, 905–06 (9th Cir. 2013) (Kozinski, C.J., dissenting).

142. Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1031–38 (2007) (discussing how linguistic complexity, cultural context, and the importance of paralinguistic features undermine the conventional belief that interpretation operates mathematically and that each word in one language has an exact, corresponding word in another); *see also* Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 318 (1989) ("[S]poken words are only a 'cue to the meaning entertained by the speaker'" (quoting David R. Olson, *From Utterance to Text: The Bias of Language in Speech and Writing*, 47 HARV. EDUC. REV. 257, 277 (1977))).

143. Ahmad, *supra* note 142, at 1033–38.

144. *Id.* at 1037.

145. SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS 179–83 (1990) (interpreters who change the pace of a witness's speech, omit pauses or hesitations, or otherwise "clean up" a witness's testimony can affect the perceived credibility of the witness).

as dodging the question, hesitation, or being non-responsive.[146] Further, some studies suggest that the interpreter's voice, dress, mannerisms, linguistic competence, age, race, and gender can affect assessments of an asylum applicant's demeanor.[147] The dynamic between the applicant and the interpreter can also present a distorted impression of, or distorted context for, interpreted testimony.[148]

D. *Impacts of Trauma*

Many applicants for humanitarian protections have suffered significant physical and psychological violence. Torture and trauma have profound psychological consequences that impact an applicant's ability to relay their story in the way the adjudicator expects. The brain does not create coherent, linear memories during traumatic events.[149] Further, common symptoms of individuals with Post-Traumatic Stress Disorder (PTSD)—hyperarousal, flashbacks, avoidance, or mental numbing—can impact one's ability to retrieve or express memories of past traumatic experiences.[150]

> Flashbacks often cause extreme anxiety and sometimes a sense of terror in the person and could impact an asylee's credibility if the asylee changes his story or demeanor as a result of reliving the past persecution. Many people suffering from PTSD also form coping mechanisms whereby they try to block certain memories, which can present a problem in asylum application . . . .[151]

Further, the painful process of attempting to reconstruct fragmented or incomplete memories of traumatic events can lead some people to become agitated, and others withdrawn.[152]

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146. Linda Lam, *The REAL ID Act: Proposed Amendments for Credibility Determinations*, 11 HASTINGS RACE & POVERTY L.J. 321, 330 (2014) (citing Walter Kalin, *Troubled Communication: Cross-Cultural Misinterpretation in the Asylum Hearing*, 20 INT'L MIGRATION REV. 230, 233–38 (1986)).

147. Michael Barnett, *Mind Your Language—Interpreters in Australian Immigration Proceedings*, 10 U. W. SYDNEY L. REV. 109, 111–12 (2006); *see also* Matthew Groves, *Interpreters and Fairness in Administrative Hearings*, 40 MELBOURNE UNIV. L. REV. 506 at 512–13 (2016) (observing decision-makers "may struggle to distinguish between the words and demeanor of an interpreter and those of the person being interpreted").

148. *See DVO16 v Minister for Immigration and Border Protection* (2021) 388 ALR 389 (Austl.); Savitri Taylor, *Informational Deficiencies Affecting Refugee Status Determinations: Sources and Solutions,* 13 UNIV. OF TASMANIA L. REV. 43, 69–70 (1994).

149. Paskey, *supra* note 95, at 487 ("In contrast to ordinary memories, traumatic memories are not encoded 'in a verbal, linear narrative that is assimilated into an ongoing life story.' Instead, they leave an 'indelible image' whereby events are 'encoded in the form of vivid sensations and images.' In other words, a survivor's memory is 'imprinted' with the sensory data from the traumatic event—the sights, sounds, smells, and bodily sensations—but without the linguistic narrative structure that gives a person's ordinary memories a sense of logical and chronological coherence.") (internal citations omitted).

150. Maureen E. Cummins, *Post-Traumatic Stress Disorder and Asylum: Why Procedural Safeguards are Necessary*, 29 J. CONTEMP. HEALTH L. & POL'Y 283, 287–88, 306 (2013).

151. *Id*. at 306.

152. Paskey, *supra* note 95, at 488–89.

Individuals also have varying emotional responses to traumatic events. Some trauma survivors may be able to recount their ordeal in detail but have a cold emotional response or flat affect; others may become overwhelmed with emotion in a way that interferes with their ability to recount what happened to them in a logical, linear manner.[153] Finally, applicants may simply be uncomfortable, ashamed, or embarrassed recalling the details of one of the most humiliating experiences of their lives. The result is that they may not behave or speak in a way that the adjudicator presumes someone in their position would act or speak. Immigration judges frequently interpret flat affect, avoidance, inattention, or memory deficits as indications of dishonesty.[154]

In sum, credibility findings based on demeanor are fallible and unreliable even in in-person hearings. The inability to accurately discern truth from lies based on behavioral cues is further compromised where cultural misunderstandings, implicit bias, imperfect interpretation, trauma, and stress muddle already-murky determinations. Demeanor assessments in immigration proceedings are neither probative nor are they fundamentally fair, and thus fail to meet even the minimum standards of evidence in immigration court.[155]

The realization that demeanor is an unreliable indicator of credibility has led legal experts at home and abroad to call for an outright prohibition or diminished reliance on demeanor considerations in credibility assessments in claims for asylum and other international protections.[156] The European Union advises that demeanor-based adverse credibility assessments "should be avoided in virtually all situations," and if it is used as a negative factor, the adjudicator must clearly and objectively explain their decision taking into account the applicant's cultural background, including their capacity, ethnicity, gender, and age.[157] In Canada, demeanor considerations are permitted but "must be approached with a great deal of caution" and demeanor cannot be

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153. Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. 127, 150 (2000) ("Traumatic events produce profound and lasting changes in physiological arousal, emotion, cognition, and memory . . . . The traumatized person may experience intense emotion but without clear memory of the event, or may remember everything in detail but without emotion.") (quoting JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE–FROM DOMESTIC ABUSE TO POLITICAL TERROR 34 (1997)).

154. *See* Wang v. Holder, 569 F.3d 531, 535 (5th Cir. 2009) ("She also found Wang's testimony about her incarceration and beatings incredible due to Wang's lack of emotion that seemed to the IJ more consistent with one who has rehearsed a story, rather than one who lived the events."); Tu Lin v. Gonzales, 446 F.3d 395, 400 (2d Cir. 2006) (observing that evasiveness is "one of many outward signs a fact-finder may consider in evaluating demeanor and in making an assessment of credibility"); Xiao Fang Li v. Rosen, 840 F. App'x 614, 616 (2d Cir. 2021) (finding adverse demeanor based on "flat, hesitant, evasive demeanor" and lengthy pauses).

155. *See* Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 505 (BIA 1980) ("To be admissible in deportation proceedings, evidence must be relevant and probative and its use must not be fundamentally unfair."); Baliza v. INS, 709 F.2d 1231, 1233 (9th Cir. 1983) (clarifying that the test for admissible evidence in a deportation hearing is whether it is "probative and whether its admission [is] fundamentally fair").

156. See Michael Kagan, *supra* note 116, at 380; Narbutas, *supra* note 135, at 389; Simon-Kerr, *supra* note 101, at 170, 174; *see also* Mitondo v. Mukasey, 523 F.3d 784, 788 (7th Cir. 2018); Apouviepseakoda v. Gonzales, 475 F.3d 881, 897 (7th Cir. 2007) (Posner, J., dissenting); Kadia v. Gonzales, 501 F.3d 817, 819 (7th Cir. 2007).

157. EUR. ASYLUM SUPPORT OFFICE, *supra* note 139.

determinative of credibility.[158] Australia similarly warns that reliance on demeanor "requires the exercise of great care, even by the most experienced arbiters," and demeanor considerations can only be used if coupled with other adverse credibility indicators; adverse credibility findings based solely on demeanor are not permitted.[159] The United Nations High Commissioner on Refugees (UNHCR) has stressed that demeanor assessments are not only unreliable, but "inevitably reflect the values, views, experience, prejudices, and cultural norms of the decision-maker and [are], therefore, at odds with the requirement of objectivity and impartiality."[160] In UNHCR's view, "[demeanor] should *not* be relied upon as an indicator of credibility or non-credibility."[161] Where it is used, UNHCR urges adjudicators to "exercise extreme caution, to fully take into account the individual and contextual circumstances of the applicant, and to ensure that demeanor is not determinative of non-credibility."[162]

IV. VTC EXACERBATES THE TENUOUS RELATIONSHIP BETWEEN DEMEANOR AND TRUTHFULNESS

The impact of remote video technology on administrative or judicial hearings has been the subject of ongoing debate and expanding empirical studies, accelerated by the COVID-19 pandemic.[163] Courts and agencies that quickly implemented and expanded access to video hearings as an emergency measure during the pandemic are now evaluating the impact of virtual hearings, considering which rules and policies to make permanent and which to modify in order to leverage the benefits of these new systems while protecting individual constitutional or statutory rights.[164]

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158. *Assessment of Credibility*, IMMIGR. & REFUGEE BD. OF CAN. (Dec. 31, 2020), https://perma.cc/W7SS-W7KK.

159. *WAEJ v. Minister for Immigr. and Multicultural & Indigenous Aff.* [2003] FCAFC 188 (Austl.).

160. UNHCR & EUR. REFUGEE FUND OF THE EUR. COMM'N, BEYOND PROOF: CREDIBILITY ASSESSMENT IN EU ASYLUM SYSTEMS 39 (May 2013), https://perma.cc/7HZ6-8HV8.

161. *Id.* at 190 (emphasis added).

162. *Id.*

163. *See* Holly K. Orcutt, Gail S. Goodman, Ann E. Tobey, Jennifer M. Batterman-Faunce & Sherry Thomas, *Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 L. & HUM. BEHAV. 339 (2001); Legal Assistance Found. of Metro. Chi. & Chi. Appleseed Fund for Just., *Video Conferencing in Removal Hearings: A Case Study of the Chicago Immigration Court*, CHI. APPLESEED CTR. FOR FAIR CTS. 55 (Aug. 2, 2005), https://perma.cc/L73N-F7CV; Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869 (2010); Eagly, *supra* note 16; Thorley & Mitts, *supra* note 16; Denault & Patterson, *supra* note 13; Bandes & Feigenson, *supra* note 13; Gourdet, Witwer, Langton, Banks, Planty, Woods & Jackson, *supra* note 50; Bannon & Keith, *supra* note 4.

164. *See* Bannon & Keith, *supra* note 4, at 1909–12 (describing state court task forces, committees, and judicial association efforts to review the use and impact of virtual proceedings); *Resolutions with Reports to the House of Delegates, 2020 Annual Meeting*, A.B.A. 741 (2020), https://perma.cc/DYF3-F7C7 (calling on federal, state, local, territorial, and tribal governments to form committees to "review the use of virtual or remote court proceedings and make recommendations for procedures, revisions of procedures and best practices"); *see also* Gourdet, Witwer, Langton, Banks, Planty, Woods & Jackson, *supra* note 50.

VTC is not new to immigration courts, but the impact of VTC on the particularities of asylum, withholding of removal, and CAT claims has not been sufficiently studied.[165] Based on what we know from social scientists and communication experts, the mode of communication has a profound effect on both the delivery and understanding of the message.[166] In this next section, we explore the myriad ways in which video conference technology causes barriers to effective communication, which can further undermine the reliability of demeanor-based credibility assessments in humanitarian protection cases. While demeanor-based credibility assessments are highly questionable in in-person hearings, we argue that they are fundamentally incompatible with the realities of virtual hearings.

A. *Studies Find That Immigrants with VTC Hearings Are More Likely to Be Deported*

In 2015, UCLA law professor Ingrid Eagly published an empirical study comparing experiences and outcomes of VTC hearings to in-person removal hearings for immigrants in immigration detention.[167] Analyzing quantitative data from removal proceedings conducted in 2011–2012,[168] Eagly found that detained VTC litigants were overall more likely to be ordered deported than those who appeared in person for their proceedings.[169] However, Eagly was unable to find any statistically significant data showing that immigration judges adjudicated the merits of VTC cases more harshly.[170] Rather, the study attributed the higher removal rate to the fact that VTC litigants displayed "depressed engagement"[171] with the entire court process. For instance, VTC litigants were less likely to retain counsel, less likely to submit applications to request any relief from their deportation or other immigration benefits, less likely to go to trial, and less likely to appeal a negative outcome.[172] Eagly concluded, "Far from a neutral adjudicative tool, televideo should instead be

165. In 2008, Frank and Edward Walsh published the first-ever examination on the impact of VTC specifically on asylum hearings, using data compiled by EOIR. The Walsh brothers highlighted many of the concerns we expound upon in this Article. *See* Walsh & Walsh, *supra* note 97.

166. *See* Leung, *supra* note 13, at 8 ("[T]he medium is the message . . . ."); Mark Federman, *On the Media Effects of Immigration and Refugee Board Hearings via Videoconference*, 19 J. REFUGEE STUD. 433, 434 (2006).

167. Eagly, *supra* note 16.

168. *Id.* at 957–71. Eagly's study used data from 2011–12 removal proceedings only; it excluded credible fear, reasonable fear, asylum-only, and withholding-only proceedings. *See also id.* at 1002 n.320.

169. *Id.* at 937–38.

170. *Id.* at 937.

171. Our collective personal experiences with the pandemic make social science findings regarding a lack of engagement by participants on video teleconference all the more understandable. After nearly two years of working, going to school, and socializing via video conferencing platforms, people around the world have felt the effect of "Zoom fatigue." *See* Jeremy N. Bailenson, *Nonverbal Overload: A Theoretical Argument for the Causes of Zoom Fatigue,* 2 TECHNOLOGY, MIND & BEHAVIOR 1 (2021).

172. Eagly, *supra* note 16, at 969 (when comparing detained VTC litigants and detained in-person litigants in immigration courts that adjudicated at least 1000 televideo and 1000 in-person detained removal cases, Eagly found that detained in-person litigants were 90 percent more likely to submit an application for relief, 35 percent more likely to obtain counsel, and 6 percent more likely to apply only for voluntary departure).

understood as an intentional design element of a rapidly evolving detention-to-deportation pipeline."[173]

In 2019, Dane Thorley and Joshua Mitts replicated and expanded on Eagly's study using an updated, larger dataset from 2011–2016.[174] Thorley and Mitts confirmed Eagly's prior findings of overall depressed engagement and higher rates of deportation for VTC litigants.[175] They found respondents appearing via VTC were 30.6 percent more likely to receive a removal order.[176] Interestingly, unlike Eagly's study, their larger dataset also revealed statistically significant differences in case outcomes on the merits: compared to VTC respondents, in-person respondents were "14.7% more likely to have their removal proceedings terminated, 23.5% more likely to be granted relief (among those who applied for relief), and 14% more likely to be granted voluntary departure (among those who applied only for voluntary departure)."[177]

Courts, legal scholars, and communication experts who have examined the effects of video-mediated communication in courtrooms have found a number of reasons to explain why litigants are prejudiced by VTC.[178] Some of the reasons are endemic to all remote interactions: lack of eye contact, inability to read body language and other nonverbal cues, distorted perceptions, difficulty empathizing over video conference, incongruous and informal settings, and poor connectivity.[179] But asylum, withholding, and CAT hearings involve additional features that affect the adjudicative quality of a VTC hearing, such as cross-cultural dynamics with participants who may be unfamiliar

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173. *Id.* at 939.

174. Thorley & Mitts, *supra* note 16.

175. *Id.* at 88. Similar to Eagly's findings, Thorley and Mitts found that "[i]n-person respondents are 30.7% more likely to procure legal representation, 132.7% more likely to apply for relief, and 9.1% more likely apply for voluntary departure than video respondents." *Id.* These statistical conclusions were obtained using the fuller 2011–2016 dataset while adhering to Eagly's data-cleaning methods. The authors also ran the data through a different, more expansive empirical approach.

176. *Id.*

177. *Id.*

178. *See, e.g.*, Denault & Patterson, *supra* note 13, at 15; Leung, *supra* note 13, at 5–9; Diamond, Bowman, Wong & Patton, *supra* note 163, at 878–80; Cassandra H. Chee, Comment, *Rehabilitating Our Immigration System with the Rehabilitation Act: Rejecting Video Teleconferencing and Presumptively Requiring In-person Court Appearances as a Reasonable Accommodation for Mentally Incompetent Detainees*, 70 AM. U. L. REV. 665, 676–79 (2020); Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 72–78 (2007); Vazquez Diaz v. Commonwealth, 167 N.E.3d 822 (Mass. 2021) (Kafker, J., concurring) (offering a thoughtful assessment and words of caution on the "subtle and not so subtle distorting effects on perception and other potential problems presented by virtual evidentiary hearings" in the criminal context).

179. An analysis of over 645,000 felony bond hearings in Cook County between 1991 and 2007 found that bond hearings conducted by video resulted in a 51 percent increase in bail amounts, with the bond amounts for some offenses increasing by as much as 90 percent. The authors of this study considered a number of explanations for the disparity: camera setup prevented eye contact, remote hearings interfered with attorneys' ability to gather evidence and consult with clients, poor video quality made it difficult to see the faces of litigants with darker skin, and they questioned whether appearing in person impacted their perceived believability. Diamond, Bowman, Wong & Patton, *supra* note 163, at 887–900; *see also* Bandes & Feigenson, *supra* note 13, at 1292–93; Carolyn McKay, *Video Links from Prison: Court "Appearance" within Carceral Space*, 14 L. CULTURE & HUMANS. 242, 256–61 (2018); Leung, *supra* note 13, at 5–9; Eagly, *supra* note 16, at 977–78; Sara Landström, Pär Anders Granhag & Maria Hartwig, *Witnesses Appearing Live Versus on Video: Effects on Observers' Perception, Veracity Assessments and Memory,* 19 APPLIED COGNITIVE PSYCH. 913, 928–29 (2005).

with video platforms, the need to use interpreters to communicate, and applicants' emotional pleas for protection from persecution. These aspects exacerbate the invalidity of demeanor findings in cases conducted via video teleconference because they further prevent applicants from communicating fully and effectively, which affects how judges perceive their testimony and ultimately their credibility.

B. *Eye Contact Is a Vital Part of Assessing Truthfulness in Western Culture and Impossible to Achieve over VTC*

Both early assessments of the use of VTC and recent commentators on virtual hearings have highlighted one issue that anyone who has ever had a video call knows: it is impossible to make eye contact while also looking at the people displayed on the screen.[180] In order to make eye contact, one needs to look directly into the camera, but by doing so one cannot simultaneously see the faces of those depicted on the monitor. Naturally, attention turns to the screen with the individual squares depicting the other people in the conference. These human images draw the speaker's attention far more than a camera mounted atop or to the side of a computer. Even for those familiar with video teleconferencing, looking at a little green light at the top of the monitor as opposed to the faces of those on the screen is counterintuitive.[181] In a physical courtroom (as opposed to a virtual courtroom) the witness knows where to look to meet the gaze of the decision-maker.

Particularly in U.S. culture, where failure to make eye contact is often interpreted as a sign that the speaker is dishonest, avoidant, or uncertain, video creates a barrier to one of the most vital elements of Western nonverbal communication.[182] Studies on the impact of video-mediated communication show that video which facilitates or simulates eye contact engenders more perceived trust compared to video communication with no eye contact.[183] Similarly, studies exploring the reasons why interviewees receive lower performance ratings in video teleconferenced interviews compared to

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180. Walsh & Walsh, *supra* note 97, at 268–69; Diamond, Bowman, Wong & Patton, *supra* note 163, at 989; Bandes & Feigenson, *supra* note 13, at 1294; *see also Vazquez Diaz,* 167 N.E.3d at 845 (Kafker, J., concurring).

181. *See* Haas, *supra* note 178, at 76.

182. *See id.*; Walsh & Walsh, *supra* note 97, at 268–69; Cormac T. Connor, Note, *Human Rights Violations in the Information Age*, 16 GEO. IMMIGR. L.J. 207, 218 (2001); s*ee also Vazquez Diaz*, 167 N.E.3d at 845 n.6 (Kafker, J., concurring).

183. *See* Leanne S. Bohannon, Andrew M. Herbert, Jeff B. Pelz & Esa M. Rantanen, *Eye Contact and Video-mediated Communication: A Review*, 34 DISPLAYS 177, 182–83 (2013). The importance of eye contact for effective communication and trust-building is so widely accepted that virtual meeting software companies are rapidly investing in research and development of different eye-tracking technologies to simulate face-to-face interactions. *See* Zhenyi He, Ruofei Du & Ken Perlin, *LookAtChat: Visualizing Eye Contacts for Remote Small-Group Conversations*, ASS'N FOR COMPUTING MACH. (2021), https://perma.cc/2L3S-Z9RY (discussing a web-based video conferencing system that uses eye-tracking technology to track users' gaze direction, identify who is looking at whom, and provide corresponding spatial cues to improve conversation quality).

face-to-face interviews cite poor eye contact as one of the primary factors for the adverse results.[184]

Not only does eye contact promote trust and increase perceptions of sincerity, but it also simultaneously allows the speaker to read the listener's facial expressions to gauge how and whether their message is being received. Humans relate and react to the non-verbal cues of their audience. In a VTC hearing, it is not possible for the respondent to look at the camera and simultaneously see the judge, thereby depriving the respondent of important nonverbal feedback from the trier of fact that would normally be available at an in-person hearing. The absence of that feedback inherently affects one's emotional expressions.[185] Hence, a person speaking to a live individual will deliver the same testimony differently when speaking to an inanimate object.[186]

C. *Body Language Cues Are Unavailable, Perceptions Are Distorted over VTC*

A 2017 EOIR-commissioned report assessing EOIR workloads, case processing, and infrastructure recommended that VTC be limited to procedural matters, astutely observing that it was "difficult for judges to analyze eye contact, nonverbal forms of communication, and body language over VTC."[187] Indeed the video's partial view of the participants and close-up focus on faces restricts the ability to see and decipher body language and important nonverbal information that facilitates communication and understanding between all parties, whether it be the immigration judge's, DHS attorney's, or an interpreter's understanding of the applicant, or vice versa.[188] Depending on camera location, angle, lighting, and space constraints, a respondent's physical features and body language may be distorted or completely invisible.

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184. Johannes M. Basch, Klaus G. Melchers, Anja Kurz, Maya Krieger & Linda Miller, *It Takes More Than a Good Camera: Which Factors Contribute to Differences Between Face-to-Face Interviews and Videoconference Interviews Regarding Performance Ratings and Interviewee Perceptions?*, 36 J. BUS. & PSYCH. 921, 933 (2021) (finding that lower interview performance ratings for interviews conducted by video conference were in part attributed to perceived lack of eye contact); *see also* Rodd McColl & Marco Michelotti, *Sorry, Could You Repeat the Question? Exploring Video-Interview Recruitment Practice in HRM*, 29 HUM. RES. MGMT. J. 637, 646 (study in which interviewers reported that poor eye contact affected their perception of candidates' sincerity).

185. Bandes & Feigenson, *supra* note 13, at 1295 ("This ongoing sense of uncertainty about whether they are truly being paid attention to and understood may be reflected in witnesses' demeanor while testifying, which decision-makers may then construe as a lack of confidence or lack of interactivity, either of which may be misread to indicate diminished credibility.").

186. Walsh & Walsh, *supra* note 97, at 268–69.

187. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., LEGAL CASE STUDY: SUMMARY REPORT 23 (2017), https://perma.cc/C52W-QPU6 [hereinafter EOIR 2017 LEGAL CASE STUDY].

188. Researchers note that body language can be challenging to interpret or even be aware of over video-teleconference, which may affect credibility determinations. For instance, in a drug and alcohol court, an assessment of whether the defendant was intoxicated was constrained. *See* ERINN FLANDREAU, HANNAH HYATT & WALTER PULTINAS, REMOTE SPANISH INTERPRETING IN THE MASSACHUSETTS COURT SYSTEM DURING COVID-19 16 (2020) (on file with author).

In a separate 2017 study by the Government Accountability Office, immigration judges from three of the six courts visited admitted that they had changed a credibility assessment initially made during a VTC hearing after holding a subsequent in-person hearing.[189] One judge reported that they were unable to perceive a person's cognitive disability over VTC, but "the disability was clearly evident when the person appeared in person at a subsequent hearing, which affected the judge's interpretation of the respondent's credibility."[190] Another described a case in which they were initially inclined to make an adverse credibility determination and deny asylum after a VTC hearing with poor audio quality, but changed their mind after a subsequent in-person hearing and granted asylum.[191] In the case of *Eke v. Mukasey*, an immigration judge found a Nigerian was not credible in his claim of fearing persecution based on being homosexual, and since he did not submit any documentary evidence corroborating his sexuality, the judge denied him protection.[192] Mr. Eke argued that the VTC format prevented the judge from fully and accurately perceiving him and that had the hearing been in person, the immigration judge would have recognized that he was in fact a homosexual, yet the Court denied his claim.[193]

Body language and non-verbal cues play a central role in communication and understanding. Previous articles discussing VTC's impact on immigration proceedings have highlighted UCLA psychologist Albert Mehrabian's decade-long study on nonverbal communication, which found that body language accounted for over half (55 percent) of meaning and understanding, while words alone accounted for only seven percent (7 percent) and tone of voice for thirty-eight percent (38 percent) of meaning/understanding.[194] Nonverbal communication facilitates understanding because it "provides . . . feedback to coordinate and manage in-person exchanges on a moment-by-moment basis."[195] It allows one to unconsciously encode information, feelings, intentions, and reactions into one's own behavioral expression and decode the behavior of others.[196] Specifically, a large body of research shows

189. GAO, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 55 (2017), https://perma.cc/LQK3-UNWX [hereinafter GAO 2017 Report].

190. *Id.*

191. *Id.*

192. Eke v. Mukasey, 512 F.3d 372, 382 (7th Cir. 2008).

193. *Id.* While such an argument may play into stereotypes relating to gay men, an accurate perception of Mr. Eke's physical presence is also relevant to particular social group analysis which asks how a given society would—stereotypically or otherwise—perceive him and whether they would recognize him as a member of the claimed group. *See* Matter of M-E-V-G-, 26 I&N Dec. 227, 242 (BIA 2014) (explaining that whether a social group is recognized for asylum purposes is "determined by the perception of the society in question").

194. *See* Walsh & Walsh, *supra* note 97, at 268.

195. Denault & Patterson, *supra* note 13, at 4.

196. Miles L. Patterson, *A Parallel Process Model of Nonverbal Communication*, 19 J. NONVERBAL BEHAV. 3, 6 (1995).

how integral hand gestures are to communication and understanding.[197] Hand gestures "can reduce demand on working memory and facilitate speech production, provide information on their own, and improve the listener's understanding of the speaker's verbal information."[198]

Images over video conferences can also distort the physical reality of a person. The camera's narrow focus and size of the display will show most participants from the shoulders upward, depending on how close the participant is sitting to the camera. The proximity and angle of the camera can make a person appear much larger or smaller than they actually are.[199] An inaccurate perception of a person's features, size, and physical build can skew a fact finder's assessment of their behavior and testimony.[200] Whether consciously or unconsciously, humans evaluate a person's physical stature to assess the credibility of their claims about their experiences.[201]

As most of us quickly learned in our in-person-to-Zoom transitions, lighting, camera angle, and video quality affects how we perceive each other. The Internet is flush with advice for how to look competent, reliable, and credible during Zoom interviews and work meetings.[202] Too much light, too little light, or shadows can obfuscate facial expressions and impact credibility.[203]

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197. Denault & Patterson, *supra* note 13, at 5; *see* MICHAEL ARGYLE, BODILY COMMUNICATION 197 (2d ed. 1988) (one research study found that when viewers could see the hand gestures of the speaker they had a very different perception of her than when they could not); Susan Goldin-Meadow & Martha Wagner Alibali, *Gesture's Role in Speaking, Learning, and Creating Language*, 64 ANN. REV. PSYCH. 257 (2013) (hand gestures provide information of their own and improve the listener's understanding of the speaker's verbal information).

198. *See* Denault & Patterson, *supra* note 13, at 5 (internal citations omitted).

199. Bandes & Feigenson, *supra* note 13, at 1302–03 ("Varying camera angles may also bias judges' and jurors' evaluations of witnesses and parties. Standard filmmaking texts teach that high angle shots tend to make the person depicted appear smaller or weaker, while low angle shots make the person seem more significant and powerful, and experimental studies have found that faces seen from below are perceived more positively than faces seen from above.").

200. *See* Ann Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1121–22 (2004).

201. Brandon F. Terrizzi, Elizabeth Brey, Kristin Shutts & Jonathan S. Beier, *Children's Developing Judgments About the Physical Manifestations of Power,* 55 DEVELOPMENTAL PSYCH. 793, 794 (2019) (Study reveals a strong correlation between impressions of strength and authority and facial features and body structure. For instance, researchers noted that "When adults encounter new people, they infer power from multiple aspects of appearance. They view people with a more mature, masculine facial structure (e.g., a pronounced brow or jawline) as both physically stronger and more socially dominant. Adults also recognize that body posture both reflects a person's current feelings of power and that people may communicate their assumed status to others through expansive poses.") (internal citations omitted).

202. *See, e.g.*, Bryan Lufkin, *Five Tips to Look Your Best on Video Calls,* BBC (Apr. 8, 2020), https://perma.cc/3582-SFW4; Jason Aten, *5 Ways to Look Your Best on Your Next Zoom Meeting,* INC. (Apr. 13, 2020), https://perma.cc/LJ86-VVM8; *Adjust Settings to Look Your Best on Zoom*, HARV. UNIV. INFO. TECH. (updated Feb. 1, 2022), https://perma.cc/YG7M-ZU6R.

203. Fredric I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 VAND. J. ENT. & TECH. L. 301, 333 (2021) (discussing the importance of lighting, camera angle, and image size). Much of the current research on the impact of angle and lighting on facial expressions and assessments of emotion and credibility is in the field of machine learning. *See, e.g.*, Eylül Ertay, Zhanna Sarsenbayeva, Hao Huang & Tilman Dingler, *Challenges of Emotion Detection Using Facial Expressions and Emotion Visualisation in Remote Communication*, 21 UBICOMP-ISWC 230, 231 (2021) ("Not being able to correctly recognize key facial points can . . . result in less reliable prediction of emotions. Moreover, if the luminosity is too high or the brightness is too low in a video, parts of the user's face can be unclear or not visible enough. This constrains the emotion detection software from producing

Studies show that camera angle impacts credibility and suggest that faces viewed straight-on are viewed with more trust than those viewed from above or from the side.[204] Poor image quality can affect impressions of credibility, particularly for those who have been accustomed to high-resolution images.[205] Technical quality and stylistic factors like the placement of images on the screen, blurriness, and flickering can affect the persuasiveness of the message more than the quality of the content.[206] Those who appear at a court hearing from an attorney's office or other private space can adjust these settings to ensure they appear in their best light. But respondents appearing via VTC from a detention center, particularly those without the benefit of counsel at their side, are subject to the preexisting placement of the camera and the ill effects discussed herein.[207]

Finally, the mere presence of a camera affects how we present ourselves and how we are perceived. People behave differently in front of a camera—for instance, some people become more gregarious, some more shy, some better behaved.[208] People feel less in control of how others perceive them when communicating by video and feel less "social presence"—the energy

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the most accurate deductions."). The question of whether poor lighting and shadows in video disproportionately impact credibility assessments of people with darker skin warrants further research.

204. Lederer, *supra* note 203, at 333 (citing Thomas A. McCain & Jacob J. Wakshlag, *The Effect of Camera Angle and Image Size on Source Credibility and Interpersonal Attraction* (1974), https://perma.cc/KX9Y-SYAM (paper presented at the International Communication Association Convention).

205. Bandes & Feigenson, *supra* note 13, at 1302–03 (citing Arvid Kappas, Ursula Hess, Carol L. Barr & Robert E. Kleck, *Angle of Regard: The Effect of Vertical Viewing Angle on the Perception of Facial Expressions,* 18 J. NONVERBAL BEHAV. 263 (1994) and Ernst Bekkering & J.P. Shim, *Trust in Videoconferencing*, 49 COMMC'NS ACM 103, 106–07 (2006)).

206. Julia Hautz, Johann Füller, Katja Hutter & Carina Thürridl, *Let Users Generate Your Video Ads? The Impact of Video Source and Quality on Consumers' Perceptions and Intended Behaviors*, 28 J. INTERACTIVE MKTG. 1, 1–4 (2014); *see also* R. Glenn Cummins & Todd Chambers, *How Production Value Impacts Perceived Technical Quality, Credibility, and Economic Value of Video News*, 88 JOURNALISM & MASS COMMC'N Q. 737, 747 (2011) (explaining that newer generations are becoming more accustomed to high-quality video, and image resolution helps to sway their impressions of credibility).

207. An immigrant detainee at the Varick Street Detention Center in Manhattan told his lawyer that during his VTC hearing he could not see the judge's face, only his hands. His lawyer told him it was due to the way the camera was positioned. The client told him that he wanted to look the judge in the eye because "if he really did believe me, I'm a good person – you need to see somebody face to face." *See* Beth Fertig, *Do Immigrants Get a Fair Day in Court When It's by Video?*, WNYC (Sept. 11, 2018), https://perma.cc/EZ64-CASM.

208. *See, e.g.*, Jiaxin Yu, Philip Tseng, Neil G. Muggleton & Chi-Hung Juan, *Being Watched by Others Eliminates the Effect of Emotional Arousal on Inhibitory Control*, 6 FRONTIERS PSYCH. 1, 4–5 (2015) (finding that those who knew they were being watched through a webcam modified their behavior in a way not observed in those who were not being watched through a camera); Ethan Bernstein, *How Being Filmed Changes Employee Behavior*, HARV. BUS. REV. (Sep. 12, 2014), https://perma.cc/5B8F-B9QX (explaining, in the context of employee management, how camera surveillance can result in changes in employee behavior as a result of knowing they are being filmed); Barak Ariel, Alex Sutherland, Darren Henstock, Josh Young, Paul Drover, Jayne Sykes, Simon Megicks & Ryan Henderson, *Paradoxical Effects of Self-Awareness of Being Observed: Testing the Effect of Police Body-Worn Cameras on Assaults and Aggression Against Officers*, 14 J. EXPERIMENTAL CRIMINOLOGY 19 (2018) (explaining, in the context of body cameras worn by police, that people who are aware they are being watched or filmed behave differently than they would have had they not been observed or filmed due to changes in their self-awareness).

given off by the presence of one's conversation partner—which leads to poorer performance in interviews.[209]

Video also impacts the perception and cognitive processing of the viewer. Early simulated studies on the impact of video on the perception of a child's credibility in sexual abuse cases found that jurors perceived children to be less believable when testifying via video as opposed to in-person.[210] One scholar attributed this to what they called the "vividness effect," meaning in-person testimony was perceived as more emotionally interesting in a sensory, temporal, or spatial way and therefore perceived as more credible and easier to remember.[211] Contemporary scholars exploring "Zoom fatigue" discuss how close-up video, the discord between speaker message and nonverbal cues caused by video medium, and the distraction of seeing your own face on a screen leads to cognitive overload.[212] And while some researchers have found that the smaller images on video create less emotional impact,[213] others suggest that video provides *more* visual information as close-up images of a witness allow for increased scrutiny of subtle facial expressions.[214] As discussed in previous sections, over-emphasis on our alleged ability to accurately detect deception based on non-verbal cues can lead to false positives, meaning deception is perceived more often than it actually occurs.[215]

D. *Remoteness and the Carceral Setting Diminish the Formality of the Proceeding, Reduce Engagement, Trust, and Rapport*

Another aspect of VTC hearings that adversely affects credibility determinations is the way in which remote participation diminishes the gravity of the proceeding. VTC hearings lack the grandeur and solemnity that is palpable

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209. *See* Basch, Melchers, Kurz, Krieger & Miller, *supra* note 184 (explaining that impaired "impression management" (i.e., the ability to use verbal and non-verbal tactics to emphasize, downplay, be responsive, or otherwise influence how one perceives you) and diminished "social presence" (i.e., social cues and the feeling of physical awareness of one's conversation partner) were associated with decreased performance in interviews conducted by video compared to in person).

210. *See* Gail S. Goodman, Ann E. Tobey, Jennifer M. Batterman-Faunce, Holly Orcutt, Sherry Thomas, Cheryl Shapiro & Toby Sachsenmaier, *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 L. & HUM. BEHAV. 165, 195–96 (1998); Orcutt, Goodman, Tobey, Batterman-Faunce & Thomas, *supra* note 163; Sara Landström, Pär Anders Granhag & Maria Hartwig, *Children's Live and Videotaped Testimonies: How Presentation Mode Affects Observers' Perception, Assessment and Memory*, 12 LEGAL & CRIMINOLOGICAL PSYCH. 333, 344–45 (2007).

211. Landström, *supra* note 210, at 335.

212. *See* Bailenson, *supra* note 171.

213. Andrea De Cesarei & Maurizio Codispoti, *Effects of Picture Size Reduction and Blurring on Emotional Engagement*, 5 PLOS ONE 1, 1 (2010); Bandes & Feigenson, *supra* note 13, at 1299 (citing Byron Reeves, Annie Lang, Eun Young Kim & Deborah Tatar, *The Effects of Screen Size and Message Content on Attention and Arousal*, 1 Media Psych. 49 (1999)).

214. Bandes & Feigenson, *supra* note 13, at 1298 (discussing how, in one respect, video offers better access to demeanor evidence because the close-up of the witness occupies more of the observer's visual field than they would have in the physical courtroom).

215. *See* Blumenthal, *supra* note 107, at 1162–63, 1193–95; Zuckerman, DePaulo & Rosenthal, *supra* note 107. As the Honorable Judge Easterbrook said, "if you want to find a liar you should close your eyes and pay attention to what is said, not how it is said or what the witness looks like while saying it." Mitondo v. Mukasey, 523 F.3d 784, 788 (7th Cir. 2018).

when one is physically present in a courtroom.[216] From the décor to the etiquette, the tone and tenor of an in-person proceeding take on a formality commensurate with its importance.[217] Universally, remote appearances are by their nature less formal and respondents are less engaged.[218] As one immigration judge commented, "I think with television there is always the screen —there is always the disconnect of it being something other than your actual reality."[219] Eagly concurs, noting from her many interviews with immigrants in removal proceedings that "[s]everal interviewees emphasized that the televideo court process seems less 'real.'"[220] As a clinical law professor who regularly practices in immigration courts explained:

> [Videoconferencing] completely dehumanizes the process for the person going through it . . . [It] reduces the weight of what the hearing is about . . . . [R]emoval decisions can have this tremendous effect on all aspects of your life . . . . [Yet] the fact that we don't bother having the person in the room to make those decisions . . . [reflects] the [low] level of dignity that [is] give[n] to the respondents in videoconferenced removal cases].[221]

For those in immigration detention, the carceral environment of the detention center contributes to the disengagement and dilution of the importance of the proceeding.[222] As Professor Eagly's study revealed:

> Some of the hearing locations appeared to be broom closets equipped with a television and monitored by a guard sitting in the hallway. Others were larger utility-style conference rooms with gleaming concrete floors where respondents wearing prison-issued jumpsuits sat in

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216. Advisory Committee notes to Rule 43 of the Federal Rules of Civil Procedure, which permits contemporaneous transmission of testimony from a different location for "good cause in compelling circumstances and with appropriate safeguards," cautions, "[t]he importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling." *See* FED. R. CIV. P. 43 advisory committee's note to 1996 amendment; *see also* Vazquez Diaz v. Commonwealth, 167 N.E.3d 822, 843 (Mass. 2021) (Kafker, J., concurring); *see also* Eagly, *supra* note 16, at 978.

217. Patricia Raburn-Remfry, *Due Process Concerns in Video Production of Defendants*, 23 STETSON L. REV. 805, 834 (1994) ("Traditionally, courtrooms have been deemed consecrated spaces, akin to church sanctuaries, where the accused is brought before an impartial magistrate who, in a neutral and detached manner, informs the accused of the charges against him, or listens to the nature of the prisoner's complaints.").

218. *See* FLANDREAU, *supra* note 188, at 17 (researchers noted that professionalism was reduced as evinced by lawyers dressing more casually for remote court proceedings and participants smoking a cigarette on screen). Forty-four percent of respondents in a 2020 study that surveyed workers who had pivoted to remote work during the pandemic reported that they did not find it necessary to get dressed up for a remote meeting. In the same study, top concerns for managers included difficulty creating cohesiveness and a significant lack of employee engagement. *See State of Remote Work*, OWL LABS (2020), https://perma.cc/84HR-9HY5; David Armano, *Emerging Date Suggests Remote Employees are Less Engaged*, FORBES (June 15, 2021, 7:06 AM), https://perma.cc/U44C-ZTBQ.

219. Eagly, *supra* note 16, at 979.

220. *Id.*

221. *Id.* at 980 (all brackets and ellipses in original).

222. *See* McKay, *supra* note 179, at 259–60.

> rows of plastic lawn chairs—always in the presence of a guard rather than court staff.[223]

Applicants may not feel comfortable disclosing personal or sensitive issues via videoconference in such environments and may have concerns regarding the confidentiality of communications.[224] Because asylum, withholding, and CAT hearings can involve personal accounts of horrific and traumatic events, feeling that a physical space is safe and confidential is paramount in order to obtain complete, detailed, and authentic testimony.

Testifying from a distant physical environment also impedes the respondent's ability to make an emotional connection with the judge.[225] "Immigrants in the video appearance rooms often strained to figure out what was happening in the real courtroom. At times it was almost impossible to decipher from the fuzzy panoramic courtroom view on the screen whether it was the judge or someone else speaking."[226] UNHCR has acknowledged that video interviews in these types of environments "[m]ay hinder rapport building and interfere with the ability of the [Adjudicator] to obtain a full and truthful account from the Applicant."[227]

Moreover, the austere backgrounds behind the participants on video can influence the way a judge perceives the testimony of the applicant. Judges may be unaware of how cognitive externalities—the sterile environment of the detention center, the applicant dressed in a facility-issued jumpsuit, suboptimal lighting, and unflattering camera angle—influence their decision-making and perception.[228] Researchers have found that viewers cannot cognitively differentiate between screen images and reality; in social science parlance this is referred to as the "media equation."[229] What this means in the immigration context is that judges will unconsciously attribute the factors they see on the VTC display to the applicant. In other words, through a process of psychological transference, the emotion conjured up by the perception of the image along with the background on the screen will be unconsciously attributed to the applicant.[230] So carceral settings, suboptimal lighting, and poor camera angle dehumanize the applicant in the eyes of the judge without the judge even knowing it.[231]

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223. Eagly, *supra* note 16, at 979.

224. *See* UNHCR, Procedural Standards for Refugee Status Determination Under UNHCR's Mandate 145–49 (Aug. 2020), https://perma.cc/9Z5T-R8MW.

225. Cognitive dissonance occurs in precisely these types of remote distance situations where a judge does not feel empathy from hearing a story that objectively is emotionally evocative.

226. Eagly, *supra* note 16, at 979.

227. UNHCR, *supra* note 224, at 146.

228. *See* Bandes & Feigenson, *supra* note 13, 1288–89, 1293 n.48, 1296, 1300–01.

229. *See* Walsh & Walsh, *supra* note 97, at 270.

230. *Id*.

231. *See id*. ("[S]tudies have shown that interaction between the viewer and the image that viewer is observing is so intense that a viewer cannot cognitively differentiate between the screen images and reality—humans tend to equate media images and reality. This 'media equation' means that viewers will respond to screen images as if they are real and will attribute the attributes of the image onto real life.").

E. *Technical Malfunctions Are Pervasive and Cause a Loss of Physical and Emotional Connectedness between Respondent and Judge*

Stakeholders of immigration cases agree that problems with technology are pervasive. According to a 2019 report from the National Association of Immigration Judges (NAIJ), "Immigration Judges routinely report technical problems with the use of VTC, such as pixelated screens, sound quality issues, and dropped Internet reception."[232] NAIJ noted that "it is impossible to measure whether technical problems have subtly diminished the accuracy or tone of interpretation or adversely impacted a credibility determination."[233] Similar findings were reported in the 2017 EOIR-commissioned study, which found that "[f]aulty VTC equipment, especially issues associated with poor video and sound quality, can disrupt cases to the point that due process issues may arise."[234]

Eagly's interviews with immigration attorneys revealed common problems in the transmission of the video feed, awkward delays, blackouts in the video screen, and difficulties understanding courtroom interpreters.[235] One judge explained that the worst part about using video is that it "breaks down" and "that's what interferes with the hearing."[236] Such breakdowns cause all parties considerable frustration and interrupt the flow of the proceedings.[237]

Despite significant improvements and investments in technology over the past few years, these problems persist. Even in early 2022, some immigration judges continued to complain of "bandwidth" issues and opted to turn their cameras off during VTC hearings, instructing DHS attorneys and respondents' counsel to do the same.[238] In October 2021, the American Immigration Lawyers Association (AILA) reported "technological glitches such as weak connections, poor camera positions, and bad audio," and that "[i]nterruptions

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232. *National Assn. of Immigration Judges Say DOJ's "Myths v. Facts" Filled with Errors and Misinformation: DOJ Document Demonstrates the Need for an Independent Immigration Court Say Judges*, NAT'L ASS'N OF IMMIGR. JUDGES (May 13, 2019), https://perma.cc/5R8Y-4GTR [hereinafter NAIJ Press Release]; *see also* Letter from Nat'l Ass'n of Immigr. Judges to José Enrique Serrano, Chairman, House Appropriations Comm., Com., Just., Sci. and Related Agencies Subcom., and Robert Aderholt, Ranking Member, House Appropriations Comm., Com., Just., Sci. and Related Agencies Subcom. 5 (Mar. 12, 2019), https://perma.cc/T7LY-MLXL [hereinafter NAIJ Letter] (noting IJs report "rampant problems with dropped connections, difficulty hearing or seeing individuals on the screens, extremely problematic issues with interpretation and coordination between telephonic interpreters and the VTC units.").

233. *See* NAIJ Press Release, *supra* note 232.

234. EOIR 2017 LEGAL CASE STUDY, *supra* note 187, at 23.

235. Eagly, *supra* note 16, at 993.

236. *Id.*

237. *Id.*

238. A practitioner representing a detained client in front of the Baltimore Immigration Court reported that during her remote master calendar and individual hearings, in which she appeared via WebEx, the immigration judge and DHS attorney frequently kept their cameras off due to "bandwidth" issues and the judge requested counsel do the same. Email from Immigration Attorney to Liz Bradley (Feb. 10, 2022, 10:45 AM) (on file with author). Another practitioner representing detained individuals in the Chicago Immigration Court, which has been using VTC for years, reported that one judge was currently holding individual hearings telephonically because the judge apparently had "too many tech issues with VTC so he decided to conduct all hearings via phone instead." Email from Immigration Attorney to Liz Bradley (Nov. 16, 2021, 12:02 PM) (on file with author).

of WebEx hearings due to technological failures are distracting and disrupt respondents' ability to set forth their cases fully and accurately."[239] In November 2021, a law school clinical professor reported that a judge threatened to order her client deported because he was being "noncooperative," "extremely difficult," and "refusing to answer" questions, when in reality the video had just frozen.[240] When the clinical law students pointed out that the client apparently hadn't blinked in over two minutes the judge responded, "He's just a dot on my screen, so I didn't notice."[241]

Notably, federal court decisions upholding the use of VTC in immigration hearings have acknowledged the significant technological difficulties with the VTC systems. For example, a recent unpublished case, *Leke v. Garland*, described how the faulty video connection of an individual hearing for a detained respondent resulted in "several interruptions" during direct examination, requiring the respondent to be moved to a different hearing room mid-testimony.[242] The Court noted that technical issues were documented in approximately 20 percent of the total hearing transcript.[243] In *Rusu v. INS,* a three-hour VTC hearing was "plagued by communication problems" and conducted in a truly "haphazard manner."[244] There were technical problems with the video conference equipment, the petitioner's "damaged mouth and missing teeth [made him] . . . unable to speak clearly," the immigration judge had difficulty comprehending testimony, the petitioner couldn't understand questions from his lawyer, and the court reporter had to write "indiscernible" a total of 132 times in the transcript.[245] Similarly, in *Garza-Moreno v. Gonzales*, the Sixth Circuit upheld the use of VTC despite acknowledging there were problems with the volume of the video and there were sixty-seven notations of "indiscernible" in the transcript.[246]

A 2020 study commissioned by the Massachusetts Trial Court to examine the efficacy of remote court proceedings revealed a similar multitude of technical difficulties during virtual hearings.[247] Researchers found that in almost every remote session there was some type of connection problem that would

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239. *AILA Position on the Use of Virtual Hearings in Removal Proceedings*, AM. IMMIGR. LAWS. ASS'N (Oct. 20, 2021), https://perma.cc/6GRL-UT9S [hereinafter *AILA Position*].

240. @sshermanstokes, TWITTER (Nov. 18, 2021, 9:45 AM), https://perma.cc/377T-GTKU.

241. *Id.*

242. Leke v. Garland, 861 F. App'x 518, 520 (4th Cir. 2021).

243. *Id.* at 520 n.2.

244. Rusu v. INS, 296 F.3d 316, 318–19 (4th Cir. 2002).

245. *Id.* at 319.

246. Garza-Moreno v. Gonzales, 489 F.3d 239, 241–42 (6th Cir. 2007); *see also* Samet v. Att'y Gen. of the U.S., 840 F. App'x 701, 703–04 (3d Cir. 2020) (transcript noted "feedback," "echoing," and contained 93 "indiscernible" notations); Miller v. Att'y Gen. of the U.S., 397 F. App'x 780, 784 (3d Cir. 2010) (transcript omitted indiscernible or inaudible words); Deng Ming Li v. Holder, 478 F. App'x 884, 887 (5th Cir. 2012) (Petitioner complained that the hearing was plagued by communication and technical problems).

247. JASON GAYLORD, JIANI HOU, BECCA MAYFIELD, CHRISTINA MUTH & DEMETRIOS KARIS, BENTLEY UNIVERSITY, UNDERSTANDING AND IMPROVING REMOTE COURT PROCEEDINGS: RESEARCH FOR THE MASSACHUSETTS TRIAL COURT 23–24 (2020) (cited in Vazquez Diaz v. Commonwealth, 167 N.E.3d 822 (Mass. 2021)) (on file with author).

delay proceedings, and, if not resolved, the matter was simply continued.[248] Access to reliable Internet connection magnified the disparity among participants. Some participants chose to dial in from their phones rather than their computers, which affected connectivity and background noise, while other participants simply did not have a strong enough bandwidth to maintain a constant presence during the hearing. Another cause for delay in the proceedings was unfamiliarity with the technology. One researcher noted one delay occurred because "a lawyer could not figure out how to use the screen share feature in Zoom."[249]

Researchers who have examined the psychological effect technological malfunctions have on decision-makers have found that when technical issues make it difficult for judges to watch and listen to witnesses, judges may unconsciously misattribute their negative feelings to their assessment of the evidence.[250] This phenomenon is called "cognitive fluency."[251] While some technological problems are temporary, what may be underappreciated are the immeasurable ways these disruptions may affect the perceived demeanor and engagement of a respondent. At an in-person hearing, when there is a technology malfunction, all parties are aware of it at the same time. Respondents are generally told of the problem and informed when it is resolved. In virtual hearings, the experiences on the judge's side of the screen may not be the same as those of the respondent in a detention center, and the judge won't know whether there is feedback, static, or delay in the video or audio output for the respondent. For respondents alone in a video room in a detention center, interrupting the judge or DHS counsel to complain of communication issues is a daunting expectation. Where a technology problem results in abrupt disconnection, the detained respondent is not informed when the issue began and when the hearing will resume. Quite literally, the respondent can be cut off from the proceeding mid-testimony and left with no idea when or how his hearing will proceed.

F. *Remote Interpretation Is Not Equivalent to In-Person Interpretation*

Approximately 92 percent of all immigration hearings require an interpreter.[252] In those cases, because judges cannot hear and understand applicants in their native language, eye contact and body language become even more salient. Spoken interpretation can occur simultaneously or consecutively. Simultaneous interpretation means that the interpreter is literally interpreting every word as it is being spoken. During an in-person proceeding, the

248. GAYLORD, HOU, MAYFIELD, MUTH & KARIS, *supra* note 247, at 17.

249. *Id.*

250. *See* Eryn Newman, Madeline Jalbert & Neal Feigenson, *Cognitive Fluency in the Courtroom, in* THE ROUTLEDGE INTERNATIONAL HANDBOOK OF LEGAL AND INVESTIGATIVE PSYCHOLOGY 102 (Ray Bull & Iris Blandón-Gitlin eds., 2019).

251. *Id.*

252. EOIR October 19, 2021 ADJUDICATION STATISTICS, *supra* note 39, at 46 (subsection on "Hearing Language" using data generated October 19, 2021).

interpreter is sitting beside the non-English speaking respondent and simultaneously interpreting the words into the party's native language in real time using headphones or quietly speaking into their ear. The other means of interpreting is consecutive interpretation. In this mode the interpreter listens to a segment of the conversation before the speaker takes a pause and the interpreter summarizes what was said in the party's native language. Consecutive interpretation can extend the length of the proceeding, sometimes making it twice as long, because the interpreter has to listen to the statement in the source language and then interpret it into the target language.[253]

A research study on remote Spanish interpretation across Massachusetts courts conducted by Bentley University during the COVID-19 pandemic found obstacles to effective interpreting, specific burdens on court interpreters, and pressure points on case management generally. Three interpreters were selected for the study and observed by researchers in twenty-five remote hearings, nearly all of which used consecutive interpretation due to technological challenges with simultaneous interpreting.[254] The study suggests that interpreting over VTC is less accurate than in-person interpreting because interpreters have difficulty perceiving facial expressions and body language over video and have difficulty getting speakers to slow down or pause for interpretation.[255] Other studies have found that remote communication through screens demands higher cognitive functioning.[256] Court interpreters who appear remotely via videoconference report becoming tired faster and suffer inferior performance.[257]

Unlike in-person hearings where a co-located interpreter speaks softly and directly into the respondent's ear, simultaneous interpretation over VTC is often transmitted at the same volume as the English speaker's voice, making it difficult for the respondent to distinguish who is speaking.[258] For in-person hearings where co-located interpreters are not available, consecutive

253. *See AILA Position*, *supra* note 239; Phoebe Taylor Vuolo, Aurora Ferrer & Victoria Cheng, *Immigration Court Interpreters Say Video Teleconferencing Makes It Difficult to Do Their Jobs*, GOTHAMIST (July 23, 2019), https://perma.cc/3CK6-QTK2.

254. *See* FLANDREAU, *supra* note 188, at 9. It should be noted that this was a small sample of court appointed interpreters selected by their supervisor. Given the small sample size, these experiences should be considered in the context of the similar interpretation problems reported by immigration judges. *See* NAIJ Letter, *supra* note 232.

255. FLANDREAU, *supra* note 188, at 15–16; *see also* Vuolo, Ferrer & Cheng, *supra* note 253 (interpreters from the New York Immigration Court reported that during VTC hearings, an immigrant's gestures or facial expressions are often missed, and VTC made motioning for an immigrant to slow down or stop speaking extremely difficult).

256. Eagly, *supra* note 16, at 982.

257. *See* FLANDREAU, *supra* note 188, at 15–16 (researchers observed that "Zoom fatigue" was an issue among all hearing participants and interpreters were frequently interpreting for consecutive hearings without a break).

258. *See* EOIR 2017 LEGAL CASE STUDY, *supra* note 187, at 25; Vuolo, Ferrer & Cheng, *supra* note 253 (one immigration attorney who has had many hearings conducted over VTC said, "The interpreter normally would go lean into their ear, speaking to them quietly, instead of at the same volume . . . . Imagine if you're hearing—from a jail, on a video screen, where sometimes you can't even see anyone—Spanish and English at the same volume. That would be hard for anyone, that would be hard for an English speaker.").

interpretation is broadcast on speakerphone, making it easy for the respondent to distinguish who is speaking and allowing for counsel to monitor the accuracy of interpretation.[259] In contrast, consecutive interpretation over video can be difficult to hear or understand over the equipment, particularly in cases where the interpreters are not even visible on the screen.[260] Further, the more interpreters involved in a VTC hearing, the greater possibility for complication. In cases where applicants speak an uncommon language, such as an indigenous language, immigration courts sometimes use relay interpretation—where an interpreter translates an applicant's testimony from the indigenous language to Spanish and then a second interpreter translates from Spanish to English.[261]

Video platforms such as Zoom do have a simultaneous interpretation feature. In the Massachusetts study, researchers discovered that clerks often did not know how to use the feature and would default to consecutive interpreting.[262] Interpreters who were interviewed for the study also reported that background noise interfered with their ability to hear and interpret correctly. Often this was due to clerks losing the ability to mute non-speaking participants and the combination of some participants dialing in from a phone conference line.[263] All of these obstacles compromise the accuracy of the immigration judge's assessment of an applicant's demeanor as they strain to comprehend the disembodied voices emitting from the monitor. As discussed previously, technological disruptions that make adjudicating a case more difficult for the judge can unconsciously affect their assessments of a respondent and the outcomes of their case.[264]

V. CURRENT AGENCY POLICIES AND LEGAL FRAMEWORKS ARE INSUFFICIENT TO SAFEGUARD AGAINST FALLIBLE DEMEANOR FINDINGS IN VTC HEARINGS

Grafting technology onto a legal system that continues to permit highly fallible demeanor assessments further undermines the reliability of credibility determinations in humanitarian protection cases. Yet both agency policy and appellate challenges do not provide sufficient mechanisms to safeguard against erroneous demeanor assessments in VTC hearings.

One reason is that the Department of Justice's Executive Office of Immigration Review (EOIR) cannot be relied upon to implement policies to self-correct because its own statistics are unreliable and inconsistent, and it

259. Class Action Complaint at 19, P.L. v. ICE, No. 1:19-CV-01336, 2019 WL 2568648 (S.D.N.Y. June 21, 2019).

260. *See id*. (complaint against the use of VTC in New York where a mentally ill and cognitively disabled respondent had difficulty hearing the interpretation due to poor sound quality, complicated by the fact that the interpreter was not visible on the screen).

261. GAO 2017 Report, *supra* note 189, at 55; *see* EOIR 2017 LEGAL CASE STUDY, *supra* note 187, at 25 (noting difficulty to relay multiple lines over VTC).

262. FLANDREAU, *supra* note 188, at 12–13.

263. *Id*. at 14–15.

264. *See* Newman, Jalbert & Feigenson, *supra* note 250, at 102.

refuses to recognize that VTC impacts demeanor assessments. Second, due process challenges brought via direct appeal to the Board of Immigration Appeals and petitions for review to federal appellate courts pose a nearly impossible dilemma of needing to prove "substantial prejudice" in a hearing that is conducted by video when appellate review is limited to the written record.

A. *EOIR Data on the Impact of VTC Is Inconsistent, Incomplete, and Unreliable*

EOIR repeatedly recycles the unsubstantiated claim that VTC is a "proven success,"[265] but it has yet to conduct a comprehensive internal assessment of the impacts of VTC.[266] EOIR's claim that VTC does not affect the fairness of the proceedings contradicts governmental studies,[267] immigration judges,[268] and experts.[269] In this section, we discuss what data EOIR appears to collect and the reasons why EOIR's data is unreliable and insufficient to facilitate meaningful discussion about the impact of VTC on immigration proceedings.

First, EOIR data is inconsistent. EOIR has a webpage titled "Workload and Adjudication Statistics" on which it regularly publishes data on a variety of topics relating to immigration court.[270] On April 19, 2021, EOIR published statistics on VTC hearings.

265. *See* EOIR PM 20-10, *supra* note 10, at 4 n.4; Memorandum from James R. McHenry III, Dir., Exec. Off. of Immigr. Rev., to Exec. Off. of Immigr. Rev. on EOIR Practices Related to the COVID-19 Outbreak (June 11, 2020), 6 n.11 [hereinafter EOIR PM 20-13]; EOIR PM 21-03, *supra* note 11, at 3.

266. *See* Jurisdiction and Venue in Removal Proceedings, 72 Fed. Reg. 14,494 (Mar. 22, 2007) (to be codified at 8 C.F.R. pt. 1003). This is the source of the "proven success" quotation in the policy memos cited in the previous footnote. The 2007 proposed rule did not cite any data to support its claim. EOIR PM 21-03 did cite to a 2017 internal report assessing the use of VTC by the Social Security Administration, but EOIR itself conducted no such internal study. *See* EOIR PM 21-03, *supra* note 11, at 3 n.3. The only publicly available EOIR-commissioned study is the DOJ EOIR 2017 Legal Case Study which generally assessed the workload, staffing, case processing, and infrastructure, including technology. The report noted several issues with VTC, recommended that EOIR "limit the use of VTC to procedural matters," and it conducted a thorough review of the VTC system. *See* EOIR 2017 LEGAL CASE STUDY, *supra* note 187, at 23.

267. *See* GAO 2017 Report, *supra* note 189; EOIR 2017 LEGAL CASE STUDY, *supra* note 187.

268. *See* NAIJ Letter, *supra* note 232; NAIJ Press Release, *supra* note 232.

269. Eagly, *supra* note 16, at 966–69 (finding VTC litigants were overall more likely to be ordered deported than those who appeared in person for their proceedings); Thorley & Mitts, *supra* note 16, at 88 (finding respondents appearing via VTC were 30.6 percent more likely to receive a removal order).

270. *See Workload and Adjudication Statistics*, *supra* at 39.

TABLE 1: VIDEO TELECONFERENCE (VTC) HEARINGS AND APPEALS[271]

FY	Completed Cases with a VTC Hearing	Case Appeals Filed	Appeals of Completed Cases with a VTC Hearing	Appeals of Completed Cases with a VTC Hearing Alleging a VTC Hearing Issue
2019	134,023	51,902	23,235	46
2020	164,089	42,221	31,243	82
2021 (Second Quarter)	38,581	7,982	8,431	0

According to this April 19, 2021 data, 48.38 percent of completed cases in 2019 and in 70.83 percent of completed cases in 2020 were "with a VTC hearing."[272] Further, 44.77 percent of appeals filed in 2019 had a VTC hearing, and about .197 percent of those alleged a "VTC hearing issue."[273] In 2020, about 74 percent of appeals filed had a VTC hearing, but only about .26 percent of those alleged a "VTC hearing issue."[274]

However, on July 8, 2021, less than three months later, EOIR published VTC data that was drastically different.

TABLE 2: VIDEO TELECONFERENCE (VTC) HEARINGS AND APPEALS[275]

FY	Completed Cases with a VTC Hearing	Case Appeals Filed	Appeals of Completed Cases with a VTC Hearing	Appeals of Completed Cases with a VTC Hearing Alleging a VTC Hearing Issue
2019	43,801	51,928	5,516	8
2020	63,667	42,245	7,583	10
2021 (Third Quarter)	12,688	12,569	2,155	7

271. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS 99 (2021), https://perma.cc/N3L5-55JD [hereinafter EOIR July 8, 2021 ADJUDICATION STATISTICS] (archived subsection on "Video Teleconference (VTC) Hearings and Appeals" using data generated July 8, 2021).

272. *See id.* at 109 (reporting 276,970 total cases completed in 2019 and 231,659 total cases completed in 2020).

273. *Id.* at 160.

274. *Id.*

275. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS 160 (2021), https://perma.cc/WPC3-UST9 (archived subsection on "Video Teleconference (VTC) Hearings and Appeals" using data generated April 19, 2021).

According to the July 8, 2021 statistics, which were substantially similar to the updated statistics published at the end of Fiscal Year 2021,[276] only 15.81 percent of completed cases in 2019 and in 27.48 percent of completed cases in 2020 were "with a VTC hearing."[277] Further, 10.62 percent of appeals filed in 2019 had a VTC hearing, and only about .145 percent of those alleged a "VTC hearing issue."[278] In 2020, about 17.95 percent of appeals filed had a VTC hearing, but again only about .13 percent of those alleged a "VTC hearing issue."[279]

While EOIR's Workload and Adjudication Statistics website does contain a disclaimer that EOIR staff continuously updates information in the case database so "statistics provided are subject to change," and that data for FY 2020 and FY 2021 "may have been affected by operational disruptions caused by COVID-19,"[280] that disclaimer is insufficient to explain why EOIR data on VTC hearings and appeals for the completed years of FY 2019 and FY 2020 dropped so dramatically. If anything, one would assume that continuous updates to the data would increase the numbers recorded.[281]

Second, even if taken at face value, there are a few notable concerns about the reliability of these statistics. EOIR statistics of the number of cases that were completed "with a VTC hearing" appear to capture both those cases that only had one initial or master calendar hearing and those that were completed entirely by VTC.[282] This dataset falls short of Congress's December 2019 directive that EOIR track when master calendar hearings and individual merits hearings are conducted via VTC and report on the breakdown numbers of each.[283] To date, EOIR has not published data showing how many individual hearings have been conducted via VTC. Further, according to the 2017 GAO report, immigration court staff were previously not *required* to indicate the hearing medium in the case management system.[284] The GAO explained that within the EOIR computer system "the data field for the hearing medium [was] automatically populated as 'in-person' unless court staff manually

276. *See* EOIR October 19, 2021 ADJUDICATION STATISTICS, *supra* note 39, at 45.

277. *See* EOIR July 8, 2021 ADJUDICATION STATISTICS, *supra* note 275, at 99; *id.* at 55 (reporting 276,984 total cases completed in 2019 and 231,718 total cases completed in 2020).

278. *Id.* at 99.

279. *Id.*

280. *See Workload and Adjudication Statistics*, *supra* at 39.

281. For example, the above-excerpted charts show that EOIR's statistics on "Total Case Appeals" went up only slightly between the April 19, 2021 publication and the July 8, 2021 publication, which appears more consistent with the idea that statistics are subject to change as EOIR catches up on its data entry.

282. EOIR October 19, 2021 ADJUDICATION STATISTICS, *supra* note 39, at 45.

283. *See* H. COMM. ON APPROPRIATIONS, 116TH CONGRESS, JOINT EXPLANATORY REPORT ACCOMPANYING H.R. 1158, CONSOLIDATED APPROPRIATIONS ACT 145 (2020) (Comm. Print 2019) ("The Committees direct EOIR to collect real-time data indicating each time a master calendar or individual merits hearing is conducted via VTC to allow for better statistical data collection to help determine whether VTC has an outcome determinative impact. This information is to be provided in the quarterly reports submitted to the Committees and should include the number and type of hearings conducted by VTC, including data on appeals cases related to the use of VTC, and the number of in-person hearing motions filed.").

284. GAO 2017 Report, *supra* note 189, at 53.

select[ed] an alternative medium on a drop-down menu."[285] EOIR's previous failure to collect accurate, comprehensive data on the use of VTC has stunted oversight and meaningful debate.

Further, regarding appeals data, EOIR does not define what it means by a "VTC hearing issue" or explain how it collects this data.[286] When the GAO previously asked EOIR why it was not tracking the number of appeals or motions objecting to VTC, EOIR officials explained that they do not track that data because, "due to the complexity of appeals and motions, it would require additional training for legal assistants and would compel EOIR to begin tracking reasons for other appeals and motions as well."[287] EOIR's new data tracking on this issue does not explain how it overcame this seemingly insurmountable task.[288] GAO also noted that EOIR does not comply with the Administrative Conference of the United States (ACUS) best practices because it does not actively solicit systematic feedback on its use of VTC.[289] Currently, the only mechanism for submitting feedback about issues related to VTC hearings (aside from a motion or direct appeal) is via email or postal mail.[290] This information is not made available to immigrants in detention centers and is only available via a somewhat hidden link on the EOIR website.[291]

Finally, EOIR's claims of rare technological malfunctions have been rebutted by immigration judges themselves. According to EOIR statistics, less than one-tenth of one percent of VTC hearings are adjourned "due to video malfunction."[292] EOIR included this claim in two "fact sheets" published in 2019 and 2020[293] and the NAIJ quickly debunked it, calling EOIR statistics "highly unreliable."[294] The NAIJ explained that EOIR's data was

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285. *Id.*

286. *See* EOIR October 19, 2021 ADJUDICATION STATISTICS, *supra* note 39, at 45.

287. GAO 2017 Report, *supra* note 189, at 54.

288. *See* H. COMM. ON APPROPRIATIONS, *supra* note 283, at 145 (Congress instructed that EOIR "shall make publicly available all policies and procedures related to EOIR's use of VTC" but EOIR has yet to comply).

289. GAO 2017 Report, *supra* note 189, at 57.

290. *See Video Teleconferencing Hearing Feedback*, U.S. DEP'T OF JUST., https://perma.cc/Y679-WGXR (last updated Dec. 7, 2017).

291. *Id.*

292. EOIR October 19, 2021 ADJUDICATION STATISTICS, *supra* note 39, at 44 (subsection on "Video Teleconference (VTC) Hearings and Adjournments" using data generated October 19, 2021).

293. In May 2019 and December 2020, EOIR issued two factsheets called "Myths v. Facts about Immigration Proceedings." *See Myths vs. Facts About Immigration Proceedings*, EXEC. OFF. FOR IMMIGR. REV. (May 2019), https://perma.cc/6WTU-H722; *Myths vs. Facts About Immigration Proceedings*, EXEC. OFF. FOR IMMIGR. REV. (Dec. 2020), https://perma.cc/DEJ9-EHA7 [hereinafter EOIR Dec. 2020 *Myth vs. Facts*]. These "fact sheets" were quickly discredited as political propaganda. *See* Letter from Roundtable of Former Immigr. Judges, to James McHenry, Dir., Exec. Off. for Immigr. Rev., EOIR "Myth vs. Fact" Memo (May 13, 2019) (Retired IJs and former BIA members called the alleged fact sheet "wildly inaccurate and misleading" and viewed it as "political pandering."); NAIJ Press Release, *supra* note 232; *see, e.g.*, Salvador Rizzo, *Fact-Checking the Trump Administration's Immigration Fact Sheet*, WASH. POST (May 10, 2019), https://perma.cc/8PVR-9RVQ.

294. NAIJ Press Release, *supra* note 232. Despite the rebuke from the NAIJ and multiple other fact-checking sources, EOIR issued another "Myths and Facts" sheet in December 2020, in the waning days of the Trump Administration, in which it repeated this skewed "less than one-tenth of one percent" assertion. *See* EOIR Dec. 2020 *Myth vs. Facts*, *supra* note 293; *see also* Isabel Dias, *"Misleading" and*

flawed because EOIR's case management system restricts immigration judges to selecting only one reason for why a case is continued; a case with VTC technical issues may be coded as continued due to inadequate time to complete the hearing, while both VTC and inadequate time were the reasons for the continuance.[295] Further, AILA attorneys report that WebEx hearings are frequently interrupted due to failed technology without immigration judges adjourning the hearings.[296]

Therefore, EOIR's policy assertion that VTC does not affect the fairness of the proceedings is both unsupported and contradicts available data. Until EOIR complies with Congress's directive to provide detailed reporting on the use of VTC, breaking down the type of hearing and type of case involved, and makes publicly available all policies and procedures related to the use of VTC and its data collection practices, the agency cannot be relied upon to implement safeguards to prevent against the potentially deleterious impacts of the video systems it uses.

B. *Appellate Challenges to Adverse Demeanor Findings in VTC Hearings Acknowledge Problems but Provide Little Remedy*

The likelihood of successfully challenging an adverse credibility determination on appeal is incredibly low. One assessment found that federal courts affirm immigration judges' negative credibility findings approximately 96 percent of the time.[297] The likelihood of successfully challenging detrimental impacts of VTC and erroneous adverse demeanor findings is even lower. Currently, the only legal mechanism to challenge problems incident to VTC is via a claim of a violation of due process—a procedure ill-suited to meaningfully safeguard against fallible demeanor findings in asylum, withholding, and CAT cases conducted via VTC. This appears to be the result of a combination of three factors: (1) an incredibly high standard of proof to succeed in due process challenges, (2) the specific obstacles faced by detained and unrepresented respondents in asylum/withholding/CAT cases, and (3) the nearly impossible task of showing that something about a video medium prejudiced the respondent, using only the written record to make their case on appeal.

To date, neither the BIA nor any federal appellate court has specifically addressed the complications or opportunities of reviewing demeanor findings

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"*Propaganda*"*: Advocates Slam DOJ's New* "*Myths and Facts*" *Immigration Report*, MOTHER JONES (Dec. 30, 2020), https://perma.cc/FBL4-BXNP.

295. NAIJ Press Release, *supra* note 232

296. *AILA Position*, *supra* note 239.

297. In 2010, federal circuit courts affirmed 96 percent of all negative credibility findings in asylum cases. *See* Paskey, *supra* note 95, at 476. Of 369 cases, only fifteen were remanded, twelve of which were from the Ninth Circuit, where 86 percent of cases were affirmed. *Id.* at 524. The Eleventh Circuit remanded two cases and the Second Circuit one. All other circuit courts affirmed every single case. *Id.* EOIR publishes data on the number of appeals completed by the BIA per year but does not publish comprehensive data on the issues raised or the outcome of case appeals. *See Workload and Adjudication Statistics*, *supra* note 39.

in hearings conducted via VTC. However, the Board and circuit courts have considered a handful of facial challenges to the constitutionality of VTC generally and have repeatedly upheld VTC as authorized by statute and regulation and not a *per se* violation of due process.[298] These cases illustrate how difficult it is to bring a successful due process challenge against an adverse demeanor finding in hearings conducted by VTC.

In 2020, the BIA published *Matter of R-C-R-*, 28 I&N Dec. 74 (BIA 2020), reiterating its belief that VTC hearings generally afford a full and fair hearing. While holding that VTC did not "*per se* violate due process," it did recognize that VTC has the *potential* to violate due process rights in some circumstances.[299] Although *Matter of R-C-R-* did not involve a credibility determination, the facts of the case provide a good illustration of the substantial difficulties of challenging VTC on appeal. Mr. R-C-R- was a detained, unrepresented indigenous Guatemalan asylum seeker who failed to file his asylum application by a judicially-set deadline before his next VTC hearing.[300] A week after the missed deadline, the immigration judge issued a written order finding his asylum application abandoned and ordered him removed, without holding a hearing or providing Mr. R-C-R- with the opportunity to explain *why* he missed the deadline.[301] Mr. R-C-R- appealed, arguing that the VTC hearing was confusing and that ordering him removed before his next scheduled hearing violated his due process rights and prevented him from creating a complete record for meaningful appellate review. His due process arguments were unpersuasive. The Board found that because there was nothing *in the record* to indicate he had trouble communicating with the immigration judge or evidence that the VTC equipment malfunctioned, Mr. R-C-R- did not "me[e]t his burden of establishing that he was denied a full and fair hearing as a result of the use of video conferencing."[302]

Mr. R-C-R-'s case reflects three substantial impediments to challenging problems with VTC in cases involving adverse credibility and demeanor findings. First, the standard of proof in due process challenges to VTC is

298. Matter of R-C-R-, 28 I&N Dec. 74 (BIA 2020) (no due process violation in VTC hearing where the respondent failed to submit asylum application by deadline); Aslam v. Mukasey, 537 F.3d 110 (2d Cir. 2008) (admission of videoconference testimony of a witness did not violate Petitioner's due process rights in immigration hearing); Rusu v. INS, 296 F.3d 316 (4th Cir. 2002) (no due process violation caused by VTC despite numerous communication problems); Eke v. Mukasey, 512 F.3d 372, 382 (7th Cir. 2008) (no due process violation caused by VTC in a case where homosexual petitioner was found not credible and lacking corroboration of sexual orientation); Garza-Moreno v. Gonzales, 489 F.3d 239 (6th Cir. 2007) (VTC did not violate due process in cancellation of removal case); Vilchez v. Holder, 682 F.3d 1195, 1198 (9th Cir. 2012) (no due process violation in discretionary denial of cancellation of removal case for lawful permanent resident in a case conducted via VTC). *But see* Rapheal v. Mukasey, 533 F.3d 521 (7th Cir. 2008) (rejecting claims that VTC violated right to counsel and right to present evidence but finding that VTC violated right to cross-examine the Record of Sworn Statement which was central to the adverse credibility finding).

299. *Matter of R-C-R-*, 28 I&N Dec. at 80–81 (emphasis added); *see Vilchez*, 682 F.3d at 1199; *Aslam*, 537 F.3d at 114; *Rapheal*, 533 F.3d at 531.

300. *Matter of R-C-R-*, 28 I&N Dec. at 75–76.

301. *Id.*

302. *Id.* at 82–83.

incredibly high. Courts will consider due process challenges on a case-by-case basis to determine whether VTC infringed on an immigrant's statutory rights to access counsel, present evidence, and examine evidence against them.[303] To successfully challenge VTC's detrimental impact on a credibility assessment, applicants must meet a two-prong requirement: (1) show that it was specifically the video medium, and not some other factor, that interfered with their right to present testimony and deprived them of a full and fair hearing, and (2) establish prejudice, meaning that they must show that the outcome of their hearing likely would have been different if not for the video medium.[304] In many cases, immigrants may succeed on the first prong but fail on the second. Even if there are substantial technical problems or communication barriers with VTC, courts will still uphold adverse credibility determinations and denials of asylum, withholding, or CAT *unless* the applicant can show that better procedures or in-person hearings may have changed the outcome of their case.[305]

To date, no petitioner has been successful in a due process challenge to VTC interfering with their ability to present testimonial evidence, despite many cases acknowledging communication and technical difficulties.[306]

For example, we return to *Rusu v. INS*, where the Fourth Circuit acknowledged that VTC may be particularly problematic in asylum proceedings because "video conferencing may render it difficult for a factfinder . . . to

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303. *Id.*; *Vilchez*, 682 F.3d at 1199–1200 ("Whether a particular video-conference hearing violates due process must be determined on a case-by-case basis, depending on the degree of interference with the full and fair presentation of petitioner's case caused by the video conference, and on the degree of prejudice suffered by the petitioner."); *Rapheal*, 533 F.3d at 530–34 (denying a facial challenge to the constitutionality of VTC hearings and limiting its consideration to the as-applied challenges regarding whether VTC hearings violated Petitioner's statutory rights to counsel, to present evidence, and to examine evidence against her).

304. *See Matter of R-C-R-*, 28 I&N Dec. at 81–82 (citing cases).

305. Rusu v. INS, 296 F.3d 316, 324 (4th Cir. 2002); *see Vilchez*, 682 F.3d at 1199–1200. Notably, the standard for "substantial prejudice" varies by circuit. For example, in the Fifth Circuit, "Proving substantial prejudice requires [a noncitizen] to make *a prima facie showing that the alleged violation affected the outcome* of the proceedings." Okpala v. Whitaker, 908 F.3d 965, 971 (5th Cir. 2018) (emphasis added). In the Eleventh Circuit, substantial prejudice requires a showing that "in the absence of the alleged violations, the outcome of the proceeding would have been different." Alhuay v. U.S. Att'y. Gen., 661 F.3d 534, 548 (11th Cir. 2011). In contrast, in the Ninth Circuit, "[s]ubstantial prejudice is established when 'the outcome of the proceeding *may have been* affected by the alleged violation.'" Grigoryan v. Barr, 959 F.3d 1233, 1240 (9th Cir. 2020) (emphasis added) (internal citation omitted). Similarly, in the Third Circuit, substantial prejudice means a petitioner must show that the infraction has "*the potential for affecting* the outcome of [the] deportation proceedings." Serrano-Alberto v. U.S. Att'y Gen., 859 F.3d 208, 213 (3d Cir. 2017) (emphasis added) (internal citations omitted).

306. The only circuit court to uphold a due process challenge to VTC was where the VTC format interfered with an immigrant's statutory right to review evidence against them. In *Rapheal v. Mukasey*, the Seventh Circuit denied claims that VTC interfered with Ms. Rapheal's ability to present testimony and consult with counsel, but found that the VTC format did violate her statutory right to review evidence against her because the adverse credibility finding was largely based on a sworn statement that contained hand-written notations that Ms. Rapheal was unable to review during the hearing. *Rapheal*, 533 F.3d. The Court found Ms. Rapheal's inability to view and respond to the document clearly "ha[d] the potential for affecting the IJ's view of her credibility and in turn the outcome of this case" and remanded for a new hearing. *Id.* at 533–34. The Court did not reach Ms. Rapheal's argument that the IJ abused her discretion in denying her an in-person hearing in the first round but did "encourage the IJ to consider anew Rapheal's request for an in-person hearing" on remand. *Id.* at 534.

make credibility determinations and to gauge demeanor."[307] Despite this recognition, the Court denied Mr. Rusu's due process challenge in a VTC case that was "plagued by communication problems,"—Mr. Rusu's mouth was damaged, the immigration judge had difficulty hearing and seeing him on camera, and Mr. Rusu could not see everyone in the remote hearing room on the screen, meaning he was forced to converse with individuals who were not visible to him on camera.[308] Yet the Fourth Circuit found Mr. Rusu was not able to establish sufficient prejudice to prevail in his due process challenge because the immigration judge was still able to "glean the asserted factual basis" of his claim, which did not meet the criteria for asylum.[309] Since, in the Court's view, Mr. Rusu wouldn't have won his asylum claim anyway, it didn't matter that his hearing was conducted in a truly "haphazard manner."[310]

Similarly, the Ninth Circuit rejected a due process challenge to VTC in *Vilchez v. Holder*, a case involving a lawful permanent resident who was denied a discretionary grant of cancellation of removal.[311] Mr. Vilchez argued that the video equipment made some testimony difficult to hear, that he was unable to adequately demonstrate his severe eye injury because the video camera was "never fully focused on him," and that his credibility was "erroneously compromised" because he was "uncomfortable with the video conferencing process" and "appeared nervous."[312] But the Ninth Circuit found that the technological problems were addressed by participants "[speaking] up" when others couldn't hear and that the record reflected the immigration judge did consider the hardship arising from his still-fresh eye injury.[313] Further, because there was no explicit adverse credibility finding—only skepticism based on inconsistencies that, in the Court's view, would likely have been present even if he testified in person—Mr. Vilchez failed to

307. *Rusu*, 296 F.3d at 322.
308. *Id.* at 319, 323.
309. *Id.* at 319–20, 324–25.
310. *Id.* at 325. Similarly, in unpublished decisions, the Third and Sixth Circuits found no due process violations in VTC cases where transcripts contained dozens of "indiscernible" or "inaudible" words, holding that Petitioners failed to establish *how* the indiscernible words might have established their eligibility for asylum, withholding, or CAT protections. *See* Samet v. Att'y Gen. of the U.S., 840 F. App'x 701, 704 (3d Cir. 2020) (finding no due process violation in a case involving a denial of a discretionary waiver of criminal inadmissibility grounds where IJ noted "feedback" and "echoing" in VTC hearing and the transcript contained ninety-three "indiscernible" notations, holding "the IJ did absorb" his arguments for a waiver and "the sheer fact that Samet's transcript contains 'indiscernibles' at certain points or that his lawyer's examination was in some ways hindered does not mean that a better transcript or hearing would have changed the outcome of his case"); Miller v. Att'y Gen. of the U.S., 397 F. App'x 780, 783–84 (3d Cir. 2010) (no due process despite transcript omitting indiscernible words because IJ assumed Petitioner's testimony was true but determined that he was legally ineligible for protections, holding that Petitioner did not "identify a single incident of indiscernible or inaudible testimony in the transcript that might have established his eligibility for CAT protection"); Garza-Moreno v. Gonzales, 489 F.3d 239, 241–42 (6th Cir. 2007) (no due process violation in a case where the IJ seemed to question the volume of the video and where the transcript contained sixty-seven notations of "indiscernible" because Petitioners failed to show *how* the "indiscernible" notations precluded them from advancing their case).
311. Vilchez v. Holder, 682 F.3d 1195, 1121 (9th Cir. 2012).
312. *Id.* at 1199–1200.
313. *Id.* at 1200.

show how the outcome of his hearing may have been different had he appeared in person.[314]

Second, like Mr. R-C-R-, many applicants for humanitarian protection are detained and unrepresented, creating additional barriers to presenting their cases and creating a record necessary for meaningful appellate review. Of asylum claims adjudicated by EOIR in 2020, 17,933 asylum applicants (23 percent) went without any representation.[315] The representation rate for all appeals completed by the BIA in 2020 was only 72 percent, meaning 11,153 immigrants were unrepresented on appeal.[316]

Given the nature of the challenge, the presence or absence of counsel is often determinative in due process claims against VTC. The first step in raising a due process challenge is to recognize that something about the VTC procedure strayed from the norm. But unrepresented individuals whose cases are conducted solely by VTC have no point of comparison and are therefore less likely to recognize when VTC violates their rights. Unlike in-person immigration hearings, where master calendar hearings are generally open and respondents can observe each other's hearings, hearings conducted via VTC are generally isolated, reducing a respondent's opportunity to observe what is "normal," how to make objections, or create a record.[317]

Identifying and explaining cultural misunderstandings or subtle miscommunications inherent in video dialogue also requires an incredible amount of insight. For a *pro se* respondent to successfully argue prejudice for an inaccurate demeanor finding in a VTC hearing they would need to (1) understand their own cultural norms, trauma responses, and video presentation style, (2) understand the cultural norms of the immigration judge, and (3) be able to specifically identify where the misinterpretation occurred. But few humans have the self-awareness to understand how culture and technology influence their own actions. The ability to meaningfully understand an applicant's cultural nonverbal cues, the immigration judge's cultural nonverbal expectations, and then to bridge the gap and artfully articulate (in writing, in English) the misunderstanding is difficult to master even for experienced lawyers. It is an entirely unreasonable requirement to place on *pro se* asylum seekers, particularly those who are held in detention for the entirety of their proceedings and have not yet had the opportunity to learn about U.S. cultures and norms.

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314. *Id.*

315. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS 222 (2020), https://perma.cc/N3L5-55JD (archived subsection on "Current Representation Rates" using data generated October 13, 2020).

316. *Id.* The representation rate for 2020 appeals, an unusual year in all senses of the word, was only slightly lower than previous years. According to the EOIR Statistics Yearbook for 2018, representation rates for BIA appeals varied from 76 percent to 80 percent between 2014 and 2018. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., STATISTICS YEARBOOK, FISCAL YEAR 2018 38 (2018), https://perma.cc/G53J-CP54.

317. *See* Eagly, *supra* note 16, at 988–89 (discussing how VTC disrupts the "courtroom workgroup" and denies respondents the opportunity to be part of the courtroom audience and learn about the court process or the role of an advocate in the process by observing the hearings of other respondents as they await their turn before the judge).

Finally, due process challenges to demeanor findings in VTC hearings present the ultimate Catch-22: to prevail on a due process challenge to VTC, one must show something went wrong due to the video medium while relying only on a written record to make their case. The trouble is that, even for hearings conducted by VTC, appellate review is limited to review of the written record; but interruptions caused by technical issues will not always be reflected in the record unless the immigration judge, DHS, or applicant (or their lawyer if they have one) orally raise them. Further, nonverbal demeanor cues go entirely unrecorded and are omitted from appellate review. Misunderstandings of these nonverbal demeanor cues continue to plague appellants because demeanor findings still enjoy extraordinary deference based on the assumption that they are unreviewable, that the immigration judge is the only one who can observe the respondent.[318] However, this is a faulty premise, since video *could* be reviewed by appellate bodies, if they were permitted to do so.

VI. PROPOSALS FOR REFORM

Recognizing Congress's and EOIR's interest in increasing confidence in the fair and impartial adjudication of immigration cases, we join the international community and the chorus of legal scholars who have long urged the United States to either prohibit or diminish reliance on demeanor considerations in all credibility assessments in claims for humanitarian protections. A first and necessary step in this shift is to immediately prohibit demeanor-based adverse credibility findings in asylum, withholding of removal, and CAT cases conducted via VTC. The standard of admissible evidence in immigration court is whether the evidence is (1) probative and (2) fundamentally fair[319]—demeanor assessments in immigration hearings fail on both prongs. Demeanor considerations, particularly through the distorting lens of video technology, are empirically unreliable and inherently problematic in cases involving cross-cultural communication, interpretation, and victims of trauma. An immediate prohibition on adverse demeanor findings in VTC hearings would help us adapt to our new virtual realities and pave the way for increased dialogue about the (un)reliability and fairness of such considerations in all cases moving forward.

In addition to an absolute prohibition on demeanor-based adverse credibility findings in cases conducted by VTC, there are other ways to safeguard against abuses and increase confidence in our immigration adjudications. First, immigration courts should only hold individual hearings or evidentiary

318. *See* Matter of A-S-, 21 I&N Dec. 1106, 1121 (BIA 1998).

319. *See* Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 505 (BIA 1980); Baliza v. INS, 709 F.2d 1231, 1233 (9th Cir. 1983); Tashnizi v. INS, 585 F.2d 781, 782–83 (5th Cir. 1978).

hearings via VTC with the express consent of the respondent, as is currently required for telephonic hearings.[320] Many applicants and attorneys may find that conducting hearings via WebEx or VTC increases access to representation and facilitates broader participation by lay and expert witnesses. But considering the ways in which VTC alters verbal and non-verbal communication in a cross-cultural context, applicants should be given a choice before being forced into a video hearing with life-or-death consequences. Second, EOIR should immediately heed Congress's and the Government Accountability Office's call for EOIR to increase transparency and accurate data collection of VTC cases to facilitate meaningful future debate. Third, all VTC hearings should be recorded, and the videos should be made available to respondents, their attorneys, and appellate bodies to facilitate accountability and appellate review. If demeanor-based adverse credibility findings continue to be permitted, appellate courts should either be able to review the videotape of the hearing or cease to blindly extend extraordinary deference based on the false premise that such findings are unreviewable. Fourth, just as we all have had a steep learning curve in navigating remote school and work, adjusted our lighting and backgrounds, and trained ourselves on virtual platforms during a global pandemic, programs and training should be provided to better prepare applicants to successfully engage with this new technology. Finally, allowing detained immigrants to communicate with their lawyers and family members through high-quality video, as a supplement to in-person visits, would increase access to counsel, familiarize applicants with the platform, and possibly address issues of isolation and depressed engagement.

CONCLUSION

The pandemic has been and still is a test of our resiliency and adaptability in the face of tragedy and unchartered technological engagement. As we struggle to return to "normalcy," we have the opportunity to consider how VTC impacts cases involving international humanitarian protections, where an immigration judge's ability to accurately gauge an applicant's demeanor and credibility can have life-or-death consequences. The assumptions that underpin the extraordinary deference afforded to U.S. immigration judges' assessments of an applicant's demeanor are incongruous with the realities of virtual hearings. Demeanor assessments, even in in-person hearings, are fallible and unreliable. Video distorts how we interact and further strains the

320. This recommendation is in line with AILA's position that VTC should be limited to procedural matters and should *only* be used for merits hearings at a respondent's specific request. "While we understand circumstances might require that some master calendar hearings be held virtually, if a respondent requests an in person master calendar hearing, EOIR should generally grant that request. However, individual hearings should be scheduled as in-person hearings unless a virtual hearing is specifically requested by the respondent." *See AILA Position*, *supra* note 239. It also echoes the DOJ EOIR 2017 Legal Case Study's recommendation of limiting the use of VTC to procedural matters. *See* EOIR 2017 LEGAL CASE STUDY, *supra* note 187, at 23.

tenuous relationship between demeanor and truthfulness. The current legal framework is ill-suited to safeguard against erroneous demeanor findings. A prohibition on demeanor-based adverse credibility findings for hearings conducted via VTC would embrace the benefits of our technological advancements while instilling greater confidence in the fair adjudication of humanitarian protection claims.