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## A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario

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## A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario

### Abstract

The state of courtroom technology in Ontario is increasingly capturing the attention of both the public and the legal profession. This article seeks to contribute to the conversation on this issue by focusing on one particular technology in Ontario's courtrooms: the use of video conferencing to receive witness testimony in civil trials. The central claim is that the approach to video conferencing that dominates the policy discourse reflects an overly narrow, instrumentalist view of technology that fails to adequately take account of possible broader political and social implications as well as this technology's transformative potential. This argument is developed by exploring two different sources of risk associated with the implementation of video-conferencing technology in civil trials: (1) how video conferencing, as a mediating technology, may unintentionally interfere with credibility assessments and emotional connections between courtroom participants; and (2) the ways in which video conferencing, by disrupting the physical geography of adjudication, threatens the solemnity associated with, and respect given to, the civil justice system. A detailed consideration of these risks reveals that video conferencing engages fundamental questions about our civil justice system and implicates democratic values in ways that require more nuanced consideration in conversations about its use. Rather than offer a final verdict on the use of video conferencing in civil trials in Ontario, this article concludes by calling for deeper and broader discourse on this issue. This discussion should include all stakeholders in a conversation about if and how video-conferencing technology should be incorporated into our civil justice system.

### Keywords

Videoconferencing; Courts--Information technology; Witnesses; Ontario

## A New Lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario

AMY SALYZYN \*

The state of courtroom technology in Ontario is increasingly capturing the attention of both the public and the legal profession. This article seeks to contribute to the conversation on this issue by focusing on one particular technology in Ontario's courtrooms: the use of video conferencing to receive witness testimony in civil trials. The central claim is that the approach to video conferencing that dominates the policy discourse reflects an overly narrow, instrumentalist view of technology that fails to adequately take account of possible broader political and social implications as well as this technology's transformative potential. This argument is developed by exploring two different sources of risk associated with the implementation of video-conferencing technology in civil trials: (1) how video conferencing, as a mediating technology, may unintentionally interfere with credibility assessments and emotional connections between courtroom participants; and (2) the ways in which video conferencing, by disrupting the physical geography of adjudication, threatens the solemnity associated with, and respect given to, the civil justice system.

A detailed consideration of these risks reveals that video conferencing engages fundamental questions about our civil justice system and implicates democratic values in ways that require more nuanced consideration in conversations about its use. Rather than offer a final verdict on the use of video conferencing in civil trials in Ontario, this article concludes by calling for deeper and broader discourse on this issue. This discussion should include all stakeholders in a conversation about if and how video-conferencing technology should be incorporated into our civil justice system.

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L'état de la technologie dans les salles d'audience de l'Ontario retient de plus en plus l'attention du public et des juristes. Cet article se penche sur cette question en mettant l'accent sur une technologie particulière employée dans les salles d'audience ontariennes, l'utilisation de la vidéoconférence pour entendre des témoignages lors de procès civils. Notre argumentation prétend que l'approche envers la vidéoconférence qui a fini par dominer le discours en matière de politiques considère de manière trop étroite et instrumentale la technologie et ne prend pas en compte de manière adéquate la possibilité de plus importantes répercussions politiques et sociales, ni le potentiel de transformation inhérent à cette technologie. Nous examinons pour ce faire deux risques découlant de la mise en œuvre de la technologie de la vidéoconférence lors de procès civils : 1) comment la vidéoconférence, à titre de technologie d'appariement, peut interférer sans le vouloir avec l'évaluation de la crédibilité et les liens émotifs des participants de la salle d'audience et 2) la manière dont la vidéoconférence, en éparpillant géographiquement le processus de décision, perturbe la solennité du système de justice civil et le respect qui lui est dû.

Un examen détaillé de ces risques révèle que la vidéoconférence soulève des questions fondamentales au sujet de notre système de justice civile et met en cause les valeurs démocratiques d'une manière qui exige une réflexion plus nuancée lors des discussions touchant son utilisation. Plutôt que d'offrir un verdict final sur l'utilisation de la vidéoconférence lors de procès civils en Ontario, cet article arrive à la conclusion que notre discours sur cet enjeu devrait s'approfondir et s'élargir. Ce discours doit inclure tous les intervenants dans une discussion pour savoir dans quelle mesure et de quelle manière il est souhaitable d'incorporer la technologie de la vidéoconférence dans notre système de justice civile.

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*We make our technologies, and they, in turn, shape us. So of every technology we must ask, Does it serve our human purposes?—a question that causes us to reconsider what these purposes are. Technologies, in every generation, present opportunities to reflect on our values and direction.*

- Sherry Turkle<sup>1</sup>

**THE STATE OF COURTROOM TECHNOLOGY** in Ontario is an issue that has captured the attention of both the public and the legal profession. In 2011, a Canadian Press article described the many ways that Ontario's courts fail to adopt otherwise widely used technologies and raised the provocative question, "[a]re Ontario's courts the place technology forgot?"<sup>2</sup> A few weeks later, *The Lawyers Weekly* published an article entitled "E-trials seen as 'essential' for justice in the future," reporting on a specialized courtroom in Toronto outfitted for "electronic trials" and lamenting that "for all their promise, e-courtrooms have yet to reach a tipping point."<sup>3</sup> Despite popular interest, however, there is little scholarly work in Canada on the issue of courtroom technology. This article seeks to fill this gap by focusing on one particular technology in Ontario's courtrooms: the use of video-conferencing technology to receive witness testimony in civil trials.

For over a decade, the Ontario *Rules of Civil Procedure* have allowed for witnesses in civil trials to testify remotely using video-conferencing technology. To date, however, judges have exercised caution and this technology has not become a routine fixture in this province's civil courts. As is later discussed, policy discourse encouraging the use of new technologies in Ontario's civil justice system suggests that this should change. Video-conferencing technology, in particular, has been increasingly characterized as a positive development, offering a cheaper, more flexible way to receive evidence in court. Efficiency is the guiding norm, with improved access to justice being the stated policy goal. From this perspective, judicial resistance to more widespread use of video-conferencing technology appears to be obstructing easily obtainable improvements to the civil justice system.

In this article, I argue that the approach to video conferencing that has come to dominate the policy discourse reflects an overly narrow, instrumentalist view

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1. *Alone Together: Why We Expect More from Technology and Less from Each Other* (New York: Basic Books, 2011) at 19.
  2. Allison Jones, "No Internet, no BlackBerrys. Are Ontario's courts the place technology forgot?" *The Canadian Press* (15 March 2011), online: <<http://www.citynews.ca/2011/03/15/no-internet-no-blackberrys-are-ontarios-courts-the-place-technology-forgot/>>.
  3. Luigi Benetton, "E-trials seen as 'essential' for justice in the future," *The Lawyers Weekly* (22 April 2011), online: <[http://www.lawyersweekly.ca/index.php?section=article&article\\_id=1396](http://www.lawyersweekly.ca/index.php?section=article&article_id=1396)>.

of technology. I critique this approach as failing to take into account potential unintended effects of video conferencing and broader social and political implications of using this technology. I develop this argument by exploring two different sources of risk: (1) how video conferencing, as a mediating technology, may unintentionally interfere with credibility assessments and emotional connections amongst courtroom participants; and (2) the ways in which video conferencing, by disrupting the geography of adjudication, threatens the solemnity associated with, and respect given to, the civil justice system. These risks, in my view, require caution in introducing video-conferencing technology and a more nuanced, collective conversation about its use that meaningfully engages with these risks and with the transformative potential of this technology. Moreover, as I will analyze in more detail, these risks engage fundamental questions about our civil justice system and democratic values. As such, this reframed conversation requires the attention not only of policy makers, but of all stakeholders.

This article proceeds in five parts. In Part I, I introduce Rule 1.08 of the Ontario *Rules of Civil Procedure*, which governs the use of trial testimony received through video conferencing. The cautious approach taken by Ontario courts is revealed and contrasted with policy statements that encourage greater use of technology in the province's civil justice system. Part II introduces the philosophical accounts of technology that guide my critique. Parts III and IV examine the potential consequences of using video-conferencing technology that are not accounted for in the dominant policy approach. In Part III, I examine these effects from the perspective of video conferencing as a mediating technology, while in Part IV I focus on the ways in which video conferencing may disrupt the geography of adjudication. Finally, in Part V, I revisit the case for caution in using video-conferencing technology, arguing that discourse regarding the use of video-conferencing technology should be broadened and deepened so that all stakeholders take part in a discussion of whether to further incorporate video-conferencing technology into our civil justice system.

## I. THE STATE OF PLAY: THE CURRENT TREATMENT OF VIDEO-CONFERENCING TECHNOLOGY IN THE CASE LAW AND IN POLICY

### A. RULE 1.08 AND ITS JUDICIAL APPLICATION

First introduced in 1999, Rule 1.08 of the Ontario *Rules of Civil Procedure* provides, *inter alia*, that a witness's oral evidence at trial may be received by video conference if the parties consent; and that in the absence of consent, evidence may

be received by video conference upon motion or on the court's own initiative.<sup>4</sup> Even if the parties consent, the receipt of evidence through video conferencing is not permitted as a matter of right, but is always subject to the discretion of the court. In exercising its discretion, the court is required to take the following seven factors into account:

1. The general principle that evidence and argument should be presented orally in open court;
2. The importance of the evidence to the determination of the issues in the case;
3. The effect of the telephone or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;
4. The importance in the circumstances of the case of observing the demeanour of a witness;
5. Whether a party, witness or lawyer for a party is unable to attend because of infirmity, illness, or any other reason;
6. The balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and
7. Any other relevant matter.<sup>5</sup>

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4. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 1.08.

5. *Ibid.* In Ontario, the Civil Rules Committee has statutorily delegated power to make civil rules of procedure, but the Committee's agendas and minutes are not publicly available. See *Courts of Justice Act*, RSO 1990, c C-43, s 66(1); Coulter A Osborne, *Civil Justice Reform Project: Summary of Findings and Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007) at 128 [*Osborne Report*]). Accordingly, there is no legislative history that provides an official rationale for the introduction of Rule 1.08. Prior to the introduction of Rule 1.08, however, video conferencing had been used to receive both motion and trial evidence. See *e.g. Guarantee Co of North America v Nuythen* (1997), 119 ACWS (3d) 510, OJ No 5183 (QL) (Gen Div) (granting the plaintiff's request to cross-examine the defendant, resident in British Columbia, on his affidavit in relation to a pending summary judgment motion); and *Freeswick v Forbes* (1996), 62 ACWS (3d) 910, OJ No 1266 (QL) (Gen Div) at para 17 (reporting that one of the medical witnesses "testified at the trial by way of video conference.")). Moreover, there was express policy support for the adoption of video-conferencing technology in civil cases (see *e.g. Ontario Civil Justice Review, First Report* (Toronto: Ontario Ministry of Attorney General, 1995) at 18.4 [*Ont CJR First Report*]; and *Ontario Civil Justice Review, Supplemental and Final Report* (Toronto: Ontario Ministry of Attorney General, 1996) at 4.5 [*Ont CJR Final Report*]). Notwithstanding the fact that video-conferencing technology had been successfully used in a number of civil cases prior to 1999, the absence of a specific rule permitting evidence to be received in this manner led at least one judge to conclude that he did not have the discretion to admit such evidence at trial over the objections of one of the parties (see *Richard v Doell* (1998), 77 ACWS (3d) 526, OJ No 660 (QL) (Gen Div)). The introduction of Rule 1.08 in 1999 served to clear up

There have only been a handful of reported cases interpreting Rule 1.08, and the rule has not yet been subject to review by the Court of Appeal for Ontario.<sup>6</sup> One of the earliest reported cases that considered Rule 1.08, *Pack All Manufacturing Inc v Triad Plastics Inc*,<sup>7</sup> involved a plaintiff seeking an order under Rule 1.08 to receive, by way of video conference, the trial evidence of a witness who worked and resided in Virginia. The defendant had consented to the receipt of evidence of other trial witnesses through video conferencing but took the position that this particular witness needed to appear live at trial because of crucial credibility issues. In considering the plaintiff's motion, Justice Rutherford spoke favourably of the available technology, commenting that,

In my experience, a trial judge can see, hear and evaluate a witness' testimony very well, assuming the video-conference arrangements are good. Seeing the witness, full face on in colour and live in a conference facility is arguably as good or better than seeing the same witness obliquely from one side as is the case in our traditional courtrooms here in the Ottawa Court House.<sup>8</sup>

However, notwithstanding his positive view of video-conferencing technology, Justice Rutherford ultimately dismissed the plaintiff's motion. In reaching this conclusion, he noted that taking evidence by video conference "is not a manner of taking evidence available to the parties as a matter of right."<sup>9</sup> He further stated that, despite his sympathy for time and cost savings associated with taking this particular witness' evidence through video conferencing, he was not convinced that there was "enough to be gained to overcome the conventional rule that evidence be given by a witness, in person, in court, and the contention by counsel for the defendant that cross-examination of this important witness whose credibility is important to the trial may be rendered less effective."<sup>10</sup> In reaching this decision, Justice Rutherford accorded considerable weight to the fact that there was no evidence that the witness in question was "unable or unwilling for any reason to come to Ottawa and testify of her own volition."<sup>11</sup>

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any confusion regarding the authority of the court to allow witnesses to give trial testimony through video conferencing.

6. In the category of reported cases, I include those cases electronically reported in the Quicklaw and Westlaw commercial databases, the CanLII electronic collection, and those published in official reporters.

7. (2001), 119 ACWS (3d) 240, OJ No 5882 (QL) (Sup Ct) [*Pack All*].

8. *Ibid* at para 6.

9. *Ibid* at para 11.

10. *Ibid*.

11. *Ibid*.



Following Justice Rutherford's decision in *Pack All Manufacturing*, Ontario courts have been hesitant to grant motions pursuant to Rule 1.08.<sup>12</sup> In the reported cases in which courts have permitted video-conferenced evidence, strong evidence of the unavailability of a witness to attend at trial appears to operate as a dominant factor. For example, in *Archambault v Kalandi Anstalt*,<sup>13</sup> the court allowed a witness residing in Austria to testify at trial through video conferencing notwithstanding the witness' admission that the reason she refused to attend the trial was that she had an outstanding Ontario judgment against her for more than 9 million dollars. In granting the motion, Master Beaudoin stated that his "ultimate concern is that there will be a full adjudication of the issues in this dispute"<sup>14</sup> and found that there was "no evidence of prejudice" if the witness was permitted to give her evidence through video conferencing.<sup>15</sup>

In two recent decisions, Ontario courts have granted orders allowing video-conferenced testimony where it was not contended that such witnesses would be unavailable. In these cases, however, the relevant witnesses lived far from Canada. In *Paiva v Corpening*,<sup>16</sup> a decision released in February 2012, Justice

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12. See *Feeney v Labatt* (2007), 154 ACWS (3d) 831 at para 12, OJ No 258 (QL) (Master). The court denied the defendant's motion to have the evidence of a Belgian resident received by video conference notwithstanding the court's acceptance of Justice Rutherford's comments regarding the minimal effect of video-conference testimony on credibility assessments. The witness in this case was said, through an affidavit of one of his lawyers, to be scheduled to be on holidays and then in board meetings during the two weeks of trial. In rejecting the defendant's motion, Master Brott stated that she was "not convinced that [the defendant] should be able to overcome the general principle that evidence is to be given in person in a courtroom, simply because [the witness] has a busy schedule and wants to spend time with his family." See also *Lynch v Segal*, [2005] OJ No 1275 at para 4 (QL) (Sup Ct). The court denied a motion to have a witness' testimony received through video-conferencing on the basis that his testimony would be important and involve serious issues of credibility and, therefore, "should be presented in open court in the presence of the trial judge."

13. (2006), 150 ACWS (3d) 811 at para 18, OJ No 3428 (QL) (Sup Ct), aff'd (2007), 154 ACWS (3d) 831, OJ No 258 (QL) (Sup Ct).

14. *Ibid* at para 27.

15. *Ibid* at para 26. Other cases evidence a similar focus on the unavailability of witnesses. See e.g. *Maggio Holding Inc v Carrier Canada Ltd*, [2003] OJ No 1810 (QL) (Sup Ct) at para 3 (permitting the evidence of a witness residing in Texas to be received through video conferencing under Rule 1.08 after the witness "made it clear he [would] not voluntarily attend at trial"); *Yunger v Zolty*, 2011 ONSC 5943 at para 120, OJ No 4459 (QL) (ordering the grandfather of children involved in a family law dispute to give his testimony remotely through Skype™ or another video-conferencing technology after he refused to travel from Switzerland, where he lived, to Toronto for questioning).

16. [2012] ONCJ No 88, OJ No 771 (QL).

Murray granted a request by an applicant mother in a family law dispute to allow for her and her spouse, who lived in Denmark, to be cross-examined via video conferencing (using Skype™ technology) at trial. She argued that requiring her and her spouse to travel to Toronto to testify would be financially burdensome and would create child-care problems. A month later, in *Aly v Halal Meat Inc.*,<sup>17</sup> Justice Ricchetti considered a pre-trial motion by the plaintiffs to call two witnesses at trial via live Skype™ video link. The witnesses resided in Egypt and China, respectively, and cited travel time and cost as the basis for requesting the order. Ultimately, Justice Ricchetti granted an order allowing only one of the witnesses—who was to give brief evidence that was not central to any of the issues to be tried—to testify via Skype™. Notwithstanding his expressed confidence in Skype™ technology and in the ability of the court to assess demeanour in the case of video-conferenced evidence, Justice Ricchetti rejected the request to have the evidence of the second witness presented by way of video conferencing, noting that the evidence could be central to one of the issues to be decided.

It is difficult to draw generalizations from the handful of reported cases under Rule 1.08. This difficulty is compounded by the existence of a number of reported cases in which courts have received video-conferenced trial evidence, but which are not accompanied by a reported motion under Rule 1.08 and do not include a discussion in the reported judgment of the circumstances under which the decision was made to admit the video-conferenced evidence.<sup>18</sup> Nevertheless, it seems clear from the reported cases interpreting Rule 1.08 that the courts have given significant weight to the first factor listed in the Rule: “the general principle that evidence and argument should be presented orally in open court.”<sup>19</sup> With this principle as the baseline, video conferencing is treated as a technological tool to be used sparingly. Overall, the approach is one of caution.

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17. [2012] ONCJ No 199 at para 30, ONSC 2585.

18. See e.g. *Korea Data Systems Co v Aamazing Technologies Inc*, 2012 ONSC 3922 at para 154, OJ No 3202 (QL) (reporting that witness from Taiwan gave his evidence through video conferencing); *Braafhart v Braafhart*, 2011 ONSC 270 at para 15, OJ No 1132 (QL) (reporting that one witness “provided his evidence by way of video conference over the internet utilizing the services of Skype”); *Malenfant v Laverne*, 2010 ONSC 2894 at para 3, OJ No 2669 (QL) [*Malenfant*] (reporting that “[d]uring the trial, the evidence of the witnesses in London and Victoria were heard by video link”); *Billings v Mississauga (City)*, 2010 ONSC 3101 at para 50, OJ No 3304 (QL) (reporting that one witness “testified at this trial by video link”).

19. *Rules of Civil Procedure*, supra note 4.

## B. THE DOMINANT POLICY APPROACH TO COURTROOM TECHNOLOGIES

The courts' cautious approach to video conferencing is difficult to reconcile with expressed policy objectives encouraging the use of new technologies in Ontario's civil justice system. Embracing innovative technological solutions as a means of improving the effectiveness of the civil justice system has long been a stated policy goal of the Ontario government and judiciary. Even prior to the introduction of Rule 1.08, both the 1995 First Report of the Ontario Civil Justice Review ("First Report") and the 1996 Supplemental and Final Report ("Final Report") were enthusiastic about the use of video-conferencing technology. The First Report recommended, under the heading "The Need For Video Conferencing," that "a pilot project be established to test the utility of video conferencing technology in civil matters."<sup>20</sup> The First Report took the position that "there is little doubt that video conferencing technology creates the potential for reduced costs and greater flexibility in the system."<sup>21</sup>

In response to the First Report, several pilot projects were established. The evaluations of these projects in the 1996 Supplemental and Final Report of the Civil Justice Review focused on cost savings and convenience, reporting that "[i]n several civil matters, including a civil jury trial, witnesses have been examined and cross-examined by video with positive results—and in the process, saving substantial travel costs to the parties and allowing scheduled trials to proceed as planned."<sup>22</sup> The endorsement of video-conferencing technology in these reports was one manifestation of a broader recognition that there was "a need to modernize" Ontario's civil justice system and leave behind "outdated approaches to conducting business."<sup>23</sup>

Roughly a decade later, the Civil Justice Reform Project headed by Justice Coulter Osborne also addressed technology issues. The 2007 Osborne Report recommended, among other things, that "[t]he judiciary and courts administration should make every reasonable effort to accommodate requests for the use of technology in individual cases, where possible."<sup>24</sup> Moreover, it specifically recommended that Rule 1.08 be amended to provide express authority for the court to order that a matter be heard by video conference on its own initiative.<sup>25</sup> Although there was no elaboration of the rationale for this recommendation,

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20. *Ont CJR First Report*, *supra* note 5 at 18.4.

21. *Ibid.*

22. *Ont CJR Final Report*, *supra* note 5.

23. *Ont CJR First Report*, *supra* note 5 at 18.1.

24. *Osborne Report*, *supra* note 5 at xxi.

25. *Ibid.*

the underlying assumption seemed to be that video conferencing is a positive development and that courts should have greater autonomy to direct its use. Ultimately, the recommended amendment was made in 2008 alongside a series of other reforms to the Ontario *Rules of Civil Procedure*. The Osborne Report also referred positively to initiatives undertaken by the Court Services Division (the branch of Ontario's Ministry of the Attorney General responsible for technology issues in the courts) since 2001, including the installation of video-conferencing equipment in fifty-one court locations and the creation of a model electronic courtroom in Toronto "to service a high-volume commercial court and support large volumes of evidence, electronic evidence presentation and remote witness testimony, particularly in multi-jurisdictional hearings."<sup>26</sup>

In a speech marking the opening of the courts for 2008, Ontario's then Attorney General echoed the Osborne Report's call for reform in the province's justice system, commenting: "We have the opportunity to take the same reformist approach that we apply to others, and apply it to ourselves. Society has gone from the encyclopedia to Google, from fax to Facebook, in less than five years. Time is moving on. The challenges are now."<sup>27</sup> Similar sentiments are evident in Chief Justice Annemarie Bonkalo's speech that marked the opening of the Ontario Court of Justice in 2010, wherein she noted: "The information technology revolution continues to offer new opportunities to improve service, access to justice and transparency."<sup>28</sup>

More recent government publications reveal continuing enthusiasm for video-conferencing technology. The 2010-2011 *Annual Report* of the Court Services Division of the Ministry of the Attorney General reports that "[t]he Court Services Division is committed to continually upgrading and enhancing the use of modern technology in support of the courts" and has "one of the largest high-speed videoconferencing networks in the world," through which "the justice sector in Ontario leverages technology to increase access to justice for those in remote communities as well as within larger urban centres, minimizing the need for travel and effectively reducing the environmental impact of bringing people

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26. *Ibid* at 123.

27. The Honourable Chris Bentley, "Attorney General Addresses Opening of the Courts of Ontario for 2008" (Speech delivered at the Toronto Court House on 9 September 2008), online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/news/2008/20080909-oc-sp.asp>>.

28. Chief Justice Annemarie E Bonkalo, "2010 Opening of the Courts Speech" (Delivered at the Ontario Court of Justice on 14 September 2010), online: Ontario Court of Justice <<http://www.ontariocourts.ca/ocj/ocj/publications/2010-report-of-ontario-court-of-justice>>.

together.”<sup>29</sup> The 2011-2012 *Annual Report* is equally enthusiastic, reporting, among other things, that “[w]ith the Northwest’s unique geographic challenges, video conferencing continues to increase access to justice across the region” and that one “[a]ccomplishment” in 2011-2012 was that the Court Services Division “[c]ommenced the planning phase of a pilot project for mobile video conferencing technology.”<sup>30</sup>

Advocacy bodies for the legal profession have likewise embraced court technologies. In its 1996 *Systems of Civil Justice Task Force Report*, the Canadian Bar Association took the position that “[t]he integration of modern computer, electronic, telephonic, and video technology in court operations is crucial to the creation of a viable multi-option civil justice system.”<sup>31</sup> This report also contended that “[t]here is a large role for technology in assisting reform efforts by increasing access and reducing costs”<sup>32</sup> and that “the courts of the twenty-first century should have the technological capacity to ... incorporate interactive video technology into justice proceedings when warranted.”<sup>33</sup> In 2007, the Ontario Bar Association held a stakeholder summit with the goal of developing recommendations for improving the accessibility of the legal justice system. Among its recommendations, the Association endorsed the continued use of video-conferencing technology in civil cases “to facilitate access to the court, especially in the more remote regions of the province.”<sup>34</sup> The attitude towards video conferencing in these policy documents is captured in an article in the Canadian Bar Association’s *National Magazine*, which referred to video conferencing as “a positive tool that offers efficiencies and opportunities that result in justice better served with less wait time.”<sup>35</sup>

In summary, a review of the policy discourse surrounding video-conferencing technology in particular and court technologies more generally reveals an almost exclusively evaluative focus on the ability of these technologies to perform their intended use. With the assumption that video-conferencing technology can provide cheaper, more convenient presentation of witness evidence at trial,<sup>36</sup> the

29. Ministry of the Attorney General, Court Services Division, *Annual Report 2010-2011* (Toronto: Ministry of the Attorney General, 2011) at 48.

30. Ministry of the Attorney General, Court Services Division, *Annual Report 2011-2012* (Toronto: Ministry of the Attorney General, 2012) at A15.

31. Canadian Bar Association, *Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, 1996) at 60.

32. *Ibid.*

33. *Ibid.*

34. Ontario Bar Association, *Getting It Right: The Report of the Ontario Bar Association Justice Stakeholder Summit* (Edmonton: Canadian Forum on Civil Justice, 2008) at 11, 22.

35. Katya Hodge, “Video Conferencing,” *CBA National Magazine* (September 2011) 11 at 11.

36. It should be noted that the accuracy of this assumption itself (or, at the very least, its

increased use of this technology is treated as a positive development. In this equation, efficiency is the guiding norm and improved access is repeatedly cited as the policy goal driving the desire for greater efficiency through increased use of technology. The overall attitude towards technology is optimistic and there is a sense of inevitability about further integration of technology in the civil justice system. As Ontario's former Attorney General stated in his 2008 speech marking the opening of the courts, "[t]ime is moving on."<sup>37</sup>

## II. TOWARDS AN EVALUATIVE FRAMEWORK: PERSPECTIVES ON TECHNOLOGY

Embedded in the aforementioned policy discourse is an approach to technology that includes certain assumptions about technology and about society's interaction with it. This approach can be seen as reflecting a narrow instrumental view of technology. Much more could be (and, indeed, has been) said about instrumental and other competing perspectives on technology. My account is necessarily brief, highlighting particular features of an instrumental perspective as well as certain critiques of this perspective that assist in situating the remainder of my analysis.<sup>38</sup>

Andrew Feenberg describes the instrumental theories of technology as offering "the most widely accepted view of technology."<sup>39</sup> Under this view, technology is treated as "completely neutral, solely serving the intended purposes held for it by its users"<sup>40</sup> and as indifferent to politics or social contexts.<sup>41</sup> Moreover, the ability of humans to control technological outcomes is emphasized.<sup>42</sup> As a result, our relationship with technology is presumed to be straightforward. Conventional views of technology, as Langdon Winner explains, include the following perspective:

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universal accuracy) is not self-evident. See *Asco Construction Ltd v Epoxy Solutions Inc*, 2011 ONSC 4464 at para 20, OJ No 3406 (QL) (determining "that it was less expensive to have the witnesses attend in person at trial than to have their evidence transmitted via video conference").

37. Bentley, *supra* note 27.

38. As is reflected in the text in this section and the accompanying citations, the framework outlined here draws heavily from work by Andrew Feenberg and Arthur J Cockfield discussing and contrasting instrumental and substantive theories or perspectives of technology.

39. Andrew Feenberg, *Transforming Technology: A Critical Theory Revisited*, 2d ed (Oxford: Oxford University Press, 2002) at 5. See also, Arthur Cockfield & Jason Pridmore, "A Synthetic Theory of Law and Technology" (2007) 8 Minn J L Sci & Tech 475 at 479.

40. *Ibid* at 480.

41. Feenberg, *supra* note 39 at 5, 6. See also *ibid*.

42. See *e.g.* Arthur J Cockfield, "Individual Autonomy, Law and Technology: Should Soft Determinism Guide Legal Analysis?" (2010) 30:1 Bulletin Sci Tech & Soc 4.

Once things have been made, we interact with them on occasion to achieve certain specific purposes. One picks up a tool, uses it, and puts it down. One picks up a telephone, talks on it, and then does not use it for a time. A person gets on an airplane, flies from Point A to Point B, and then gets off. The proper interpretation of the meaning of technology in the mode of use seems to be nothing more complicated than an occasional, limited, and nonproblematic interaction.<sup>43</sup>

Given these features, it is not surprising that those holding an instrumental view “are often optimistic about technology”<sup>44</sup> and often take the position that “technologies should be adopted as long as they promote an instrumental purpose that enhances efficiency.”<sup>45</sup>

Instrumental perspectives form a dichotomy with “substantive” perspectives on technology, which “emphasize the ways in which technological systems (or ‘structure’) can have a substantive impact on individual and community interests that may differ from technology’s intended impact.”<sup>46</sup> Substantive theories of technology reject the proposition that technology is neutral and take a much more skeptical view of our capacity to exercise agency to control technology. The notion of “technological determinism” is often connected with substantive theories, wherein technology is framed “to greater or lesser extents, as inherently possessing a structure that in turn produces a society that must act or exist in certain ways.”<sup>47</sup> For this reason, substantive theories risk criticism for “pay[ing] insufficient heed to the importance of human agency.”<sup>48</sup> A softer view of determinism can be found in Feenberg’s description of substantive theories of technology. He writes, “[T]he issue is not that machines have ‘taken over,’ but that in choosing to use them we make many unwitting commitments.”<sup>49</sup> Similar sentiments, expressed more dramatically, can be found in the following oft-quoted passage written by Winner:

New technologies are institutional structures within an evolving constitution that gives shape to a new polity, the technopolis in which we do increasingly live. For the most part, this constitution still evolves with little public scrutiny or debate. Shielded by the conviction that technology is neutral and tool-like, a whole new

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43. Langdon Winner, “Technology as Forms of Life” in David M Kaplan, ed, *Readings in the Philosophy of Technology* (Oxford: Rowman & Littlefield, 2004) 103 at 104 [Winner, “Technology as Forms of Life”].

44. Cockfield & Pridmore, *supra* note 39 at 482.

45. Arthur J Cockfield, “Towards a Law and Technology Theory” (2004) 30:3 Man LJ 383 at 386, n 10.

46. Cockfield, *supra* note 42 at 4.

47. Cockfield & Pridmore, *supra* note 39 at 489.

48. *Ibid* at 498.

49. Feenburg, *supra* note 39 at 7.

order is built—piecemeal, step by step, with the parts and pieces linked together in novel ways—without the slightest public awareness or opportunity to dispute the character of the changes underway. It is somnambulism (rather than determinism) that characterizes technological politics—on the left, right, and center equally.<sup>50</sup>

To be sure, setting up this dichotomy of instrumental and substantive perspectives is, as Arthur Cockfield acknowledges, “a reductionist way of looking at perspectives on technology, as each of these theoretical frames is far more complex than this dichotomy suggests.”<sup>51</sup> Nonetheless, it is a helpful way to begin to think about what a defensible, nuanced perspective on technology might look like. Both Feenburg and Cockfield use the limitations associated with these two dichotomous perspectives as a jumping-off point to developing their own unique theoretical accounts.

My account jumps off from one of the major criticisms of an instrumental perspective, namely that it “tends to underappreciate the complex interaction between law, technology and human institutions that can lead to unanticipated and adverse social policy outcomes.”<sup>52</sup> In other words, while instrumental perspectives provide “a prediction of the future based on the potentials for and use of new technology ... they rarely problematize the technologies themselves.”<sup>53</sup> However, as Winner observes, “[i]f the experience of modern society shows us anything ... it is that technologies are not merely aids to human activity, but also powerful forces acting to reshape that activity and its meaning.”<sup>54</sup>

The dominant policy discourse described above in Part I fails to problematize video-conferencing technology itself by focusing almost exclusively on the technical capacity of video conferencing to deliver cost and time savings. This is a serious shortcoming, in my view, because it excludes from the conversation potentially significant consequences of the use of video-conferencing technology, including broader social and political implications. As expressed by Winner, “we [need to] pay attention not only to the making of physical instruments and processes ... but also to the production of psychological, social and political conditions as part of any significant technological change.”<sup>55</sup>

With a view to introducing some of these potentially significant consequences into the conversation, in Part III I canvass how video conferencing, as a mediating

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50. Langdon Winner, *Autonomous Technology: Technics-out-of-Control as a Theme in Political Thought* (Cambridge, Mass: MIT Press, 1978) at 324.

51. Cockfield & Pridmore, *supra* note 39 at 494.

52. *Ibid* at 498.

53. *Ibid* at 481-82.

54. Winner, “Technologies as Forms of Life,” *supra* note 43 at 105.

55. *Ibid* at 112.



technology, may unintentionally interfere with assessments of witness credibility and impede emotional connections between courtroom participants. I also explore the potential broader legal and social implications. Following this, in Part IV, I change focus and examine the ways in which video conferencing—by disrupting the geography of adjudication—may threaten the solemnity associated with, and respect given to, the civil justice system.

### III. UNINTENTIONAL INTERFERENCE: EFFECTS ON CREDIBILITY ASSESSMENTS AND EMOTIONAL CONNECTIVITY

As noted above in Part I, the dominant policy discourse with respect to video conferencing reflects the view that video conferencing should be embraced because it enhances the efficiency of witness testimony delivery by reducing cost and increasing convenience. Underlying this view is the implicit assumption that video conferencing performs the task of transmitting remote testimony well. In the past, the idea that this technology could effectively transmit witness testimony was not without controversy. One of the most prominent arguments against video-conferencing technology was that technical issues—such as time delays and poor audio and picture quality—would impede the ability of the court and counsel to interact with and assess witnesses.<sup>56</sup> The underlying concern was that these types of technical issues would affect the integrity of a legal proceeding by interfering with credibility assessments.

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56. See the criminal case of *R v Chapple*, 2005 BCSC 383 at para 17, BCJ No 585 (QL). The court found that the poor quality of evidence received against an accused through a video-link—including a time delay between question and answers and “somewhat difficult” audio—contributed to precluding the accused from making a full answer and defense. See e.g. Lorne Sossin & Zimra Yetnikoff, “I Can See Clearly Now: Videoconference Hearings and the Legal Limit on How Tribunals Allocate Resources” (2007) 25:2 Windsor YB Access Just 247 at 259. The authors note two other cases where these types of problems were manifest: Videoconferencing technology may not always be of a standard high enough to guarantee fairness. In *R. v. Raj*, the court agreed with the defendant’s assertion that the video link made it difficult to assess body language and discern expressions. Furthermore, there was only a single camera angle available, and there was a delay between the questions and the witness’ answers. The court concluded that these defaults in the technology impaired the defendant’s ability to make full answer and defence and rejected the use of videoconferencing in that case. In *R. v. Gates*, the court concluded that video equipment which did not allow the parties to see and speak to each other simultaneously violated s. 650 of the Criminal Code, which requires the accused to be present at all stages of the trial.

However, with improvements to video-conferencing technology in recent years, governments and the courts have expressed greater confidence in the technical quality of the remote testimony received. As mentioned earlier, Justice Rutherford reports in *Pack All Manufacturing* that “a trial judge can see, hear and evaluate a witness’ testimony very well, assuming the video-conference arrangements are good.” He speculates that video conferencing might even provide a better view of witnesses than that available in a traditional courtroom.<sup>57</sup> In a civil case heard in 2010, Justice Ray commented that “the technology for video links has improved enormously over recent years” and that the specific video-conferencing technology used in that case was “of excellent quality.”<sup>58</sup> Likewise, a recent government announcement of a video-conferencing pilot project in Sandy Lake First Nation reports that “you are able to see, hear and carry on a meeting as if you were in the same room.”<sup>59</sup> The impression left is that video-conferencing technology and in-person appearance can now be considered equally acceptable means of receiving evidence.

What these accounts fail to recognize, however, is that beyond easily observable technical issues of picture quality and synchrony, there are good reasons that we should be concerned about using video-conferencing technology to transmit evidence. Notwithstanding technical improvements in the available technology, there remain risks of significant unintended effects on both credibility assessments and on the emotional connections created between courtroom participants. In this Part, I examine these two types of potential unintended effects and canvass their broader legal and political implications.

#### A. CREDIBILITY ASSESSMENTS

Broadly, the concern in relation to credibility assessments is essentially McLuhanian: that the “medium is the message.” In Marshall McLuhan’s own words:

... it is the medium that shapes and controls the scale and form of human association and action. The content or uses of such media are as diverse as they are ineffectual in shaping the form of human association. Indeed, it is only too typical that the ‘content’ of any medium blinds us to the character of the medium.<sup>60</sup>

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57. *Pack All*, *supra* note 7 at para 6.

58. *Malenfant*, *supra* note 18 at paras 2-3.

59. Ontario Ministry of the Attorney General, “Sandy Lake First Nation Video-Conferencing Pilot Project,” online: <[http://sandylake.firstnation.ca/system/files/Sandy Lake First Nation Video Conferencing Pilot Project Feb 2012.pdf](http://sandylake.firstnation.ca/system/files/Sandy_Lake_First_Nation_Video_Conferencing_Pilot_Project_Feb_2012.pdf)>.

60. Marshall McLuhan, *Understanding Media: The Extensions of Man* (Cambridge, Mass: MIT Press, 1994) at 9.

In his analysis of the use of video-conferencing technology in Immigration and Refugee Board hearings, Mark Federman draws on McLuhan's work to explore how video conferencing—as a mediating technology—might affect the receipt and assessment of claimant testimony. Federman highlights a number of factors possibly at play, including “the effects of distortions in experiencing non-verbal communication, or those induced by shifted eye-contact (through non-alignment of viewing screen and camera angle)” and “the effects a video-mediated environment may have on encouraging or detecting deception.”<sup>61</sup> Other research has traced how choice of camera shot—for example, a head shot versus a full body shot—or the lighting in a remote facility can affect how a witness is perceived in court and has outlined the limited ability of video-conferencing technology to capture nonverbal cues.<sup>62</sup> In short, there is compelling evidence that “every technological choice will influence the way ... [a witness] is perceived, often in ways that cannot be precisely predicted or reliably controlled.”<sup>63</sup>

Video conferencing, as a mediating technology, may impede assessments of credibility in subtle, but important ways.<sup>64</sup> In one oft-cited study,<sup>65</sup> the authors

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61. Mark Federman, “On the Media Effects of Immigration and Refugee Board Hearings via Videoconference” (2006) 19:4 J Refugee Stud 433 at 436. Other commentators have raised similar issues. See *e.g.* Michael D Roth, “Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth” (2000) 48:1 UCLA L Rev 185 at 198. Roth observes that, Nobody claims that “[v]ideo images are ... adequate substitutes of live interactions.” Like television, video does not accurately simulate human perceptions. Both mediums can exaggerate certain personal traits that are commonly used to evaluate a witness's demeanor such as blemishes, shadows, and hair growth. Filming can add weight or emphasize scars. “When a person is viewed in the unnatural conditions imposed on him by [a video medium], many of [the] usual clues to his character are [altered]” [footnotes omitted].
62. See Elizabeth Wiggins, “What We Know and What We Need to Know About the Effects of Courtroom Technology,” (2004) 12:3 Wm & Mary Bill Rts J 731 at 737. Wiggins cites the program of research conducted by Daniel Lassiter and his colleagues on videotaped confessions, which concluded that “evaluations of videotaped confessions can be significantly altered by seemingly inconsequential changes in the camera perspective when confessions are initially recorded.” See also, Anne Bowen Poulin, “Criminal Justice and Videoconferencing Technology: The Remote Defendant” (2004) 78:4 Tul L Rev 1089, at 1108-11. For discussion about the possible effects of lighting and background on how a witness will be perceived, see *e.g.* David Tait et al, “Gateways to Justice: Improving Video-mediated Communications for Justice Participants’ Project Progress Update 15 June 2009,” online: <<http://www.justiceenvironments.edu.au/attachments/progress-report-15-june-2009-2.p0.pdf>>. See also, the discussion in Susan J Drucker & Janice Platt Hunold, “Videotaped Depositions: The Media Perspective” (1988) 60:1 Ny St BJ 38, 42-44.
63. Poulin, *supra* note 62 at 1120.
64. *Ibid* at 1114-15.
65. Gail S Goodman et al, “Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions” (1998) 22:2 L and Hum Behav

concluded, among other things, that “[c]hildren who testified via CCTV [closed circuit television] were viewed as less believable than children who testified in regular trials, despite the fact that, if anything, children who testified via CCTV were more accurate.”<sup>66</sup> Based on these observations, the authors recommended that “due to jurors’ negative biases towards child witnesses when CCTV was employed, attorneys may choose to leave closed-circuit testimony for the most extreme circumstances.”<sup>67</sup>

To be sure, other studies have reported more encouraging results when it comes to assessing the credibility of a remote witness. For example, some experiments have shown that juries react similarly to experts who testify remotely as they do to experts who provide their evidence while physically in the courtroom.<sup>68</sup> Moreover, it bears noting that the above-quoted study on child witnesses and CCTV technology also concluded that the technology “generally promoted more accurate testimony in children”<sup>69</sup> and that the findings did not support the proposition that the use of the technology impairs the ability of fact-finders to evaluate the accuracy of child witnesses.<sup>70</sup> Ultimately, however, there remain many questions regarding the unintended effects of video-conferencing technology on credibility assessments. The literature is rife with calls for more research.<sup>71</sup>

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165. This study has been cited repeatedly in the literature relating to video-conferencing technology. See *e.g.* Poulin, *supra* note 62; Shari Seidman Diamond et al, “Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions” (2010) 100 J Crim L & Criminology 869; Molly Treadway Johnson & Elizabeth Wiggins “Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research” (2006) 28 Law & Pol’y 211.

66. Goodman et al, *supra* note 65 at 199.

67. *Ibid.*

68. See Frederic Lederer, “The Legality and Practicality of Remote Witness Testimony” (2009) 20:5 Prac Litigator 19 at 21. Lederer explains:

Insofar as the CLCT has been able to ascertain, remote appearances appear to be treated by courtroom participants just as if those persons were physically in the courtroom. Some years ago we conducted two separate scientifically controlled experiments conducted over two academic years under the supervision of then William & Mary psychology professor Kelly Shaver. They demonstrated that in civil personal injury jury trials in which damage verdicts relied upon the testimony of medical experts, there was no statistically significant difference in verdict whether the experts were physically in the courtroom or elsewhere, at least so long as witness images are displayed life-size behind the witness stand and the witness is subject to cross-examination under oath. Years of non-controlled experiments in criminal Laboratory Trials suggest that the same result applies to merits witnesses in criminal cases.

69. Goodman et al, *supra* note 65 at 197.

70. *Ibid.* at 198.

71. See *e.g.* Johnson & Wiggins, *supra* note 65.

## B. EMOTIONAL CONNECTIONS

A second set of issues relates to the impact of the technology on the ability of courtroom participants to connect emotionally with witnesses. In a study performed outside the courtroom context, researchers concluded that persons form less positive impressions in interactions with colleagues mediated through video-conferencing technology than in face-to-face interactions.<sup>72</sup> As Anne Bowen Poulin reports, “There is ample evidence that one effect of video is to make the person portrayed harder for the audience to relate to.”<sup>73</sup> In the legal context, the concern is, stated generally, that the use of technology risks creating a “dehumanizing”<sup>74</sup> barrier between the remote witness and those physically present in the courtroom. A chilling example can be found in a 2005 report regarding the use of video conferencing to conduct hearings for detained immigrants in removal proceedings in Chicago. One of the trained observers participating in the study noted the indifference displayed by the lawyers and the judges in the video-conference hearings and cited the following example:

[The immigrant on the video] was sobbing. She looked like she was a teenager. No one even noticed how stressed out she was. Everyone was stapling exhibits and passing papers, and then it was over . . . . No one explained why . . . [the case] was being continued. Her usual attorney wasn’t there. It seems like her condition might have had more of an impact had she been in the courtroom, but no one even noticed her.<sup>75</sup>

In addition to qualitative observations like this, a number of quantitative studies suggest that individuals who appear in court via video conferencing are at risk of receiving harsher treatment from judges or other adjudicators. For example, one study on the use of video conferencing in asylum removal hearings reported that the use of this technology “roughly doubles to a statistically significant degree the likelihood that an applicant will be denied asylum.”<sup>76</sup> Similarly, a study

72. John Storck & Lee Sproull, “Through a Glass Darkly: What Do People Learn in Video-Conferences” (1995) 22:2 Hum Comm Res 197.

73. Poulin, *supra* note 62 at 1118.

74. Johnson & Wiggins, *supra* note 65 at 215. See also Aaron Haas, “Videoconferencing in Immigration Proceedings” (2006) 5:1 Pierce L Rev 59 at 74-77; Frank M Walsh & Edward M Walsh, “Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings” (2008) 22:2 Geo Immig LJ 259 at 269-70.

75. The Legal Assistance Foundation Metropolitan Chicago & Chicago Appleseed Fund for Justice, *Videoconferencing in Removal Proceedings: A Case Study of the Chicago Immigration Court* (2005), online: <[http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport\\_080205.pdf](http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf)>. See also Haas, *supra* note 74 at 78.

76. Walsh & Walsh, *supra* note 74 at 259.

analysing a Cook County, Illinois, program mandating that certain bail hearings be held via video conference noted that defence counsel repeatedly criticized the system as “a grossly demeaning ‘cattle call.’”<sup>77</sup> The study reported on empirical research that showed, among other things, that “[f]or all combined offenses that shifted to televised bail hearings, [the change in the average bail amount] ... was an increase of roughly \$20,958 or 51%.”<sup>78</sup> Although the authors of the article note that the possible reasons behind this result are complex—and may include the effects of poor equipment<sup>79</sup>—they also cautioned that there may be “something about the presence of a live individual that cannot be replicated, even with modern technology.”<sup>80</sup>

The potential that video-conferencing technology will impede emotional connections between courtroom participants and foster harsher interactions that impact outcomes is of particular concern in criminal and immigration proceedings where individuals are detained and their liberty is at stake. However, this risk should also concern us in the context of less serious criminal proceedings and in civil proceedings where the stakes are arguably lower. These proceedings are still an integral part of our justice system and impact the lives of individuals.<sup>81</sup>

Judith Resnik and Dennis Curtis explore how the phenomenon of “adjudication can itself be [understood as] ... a kind of democratic practice.”<sup>82</sup> Under this account, public adjudication manifests itself as a democratic practice in several respects. For example, the public nature of adjudication through open court proceedings can be seen as enabling people to observe and contest the exercise of public and

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77. Diamond et al, *supra* note 65 at 885.

78. *Ibid* at 892.

79. *Ibid* at 898-99. Regarding the quality of the equipment, the authors observed, *inter alia*, that “[t]he picture quality and sound available today are far superior to the technology that existed when the equipment was installed in Cook County” and that the placement of the equipment resulted in defendants possibly looking as if they were intentionally avoiding eye contact.

80. *Ibid* at 900.

81. See Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (New Haven: Yale University Press, 2011) at 301: “What is the utility of having a window into the mundane [as well as the dramatic]? That is where people live, and that is where state control can be both useful and yet overreaching. The dense and tedious repetition of ordinary exchanges is where one finds the enormity of the power of both bureaucratic states and private sector actors. That power is at risk of operating unseen. The redundancy of various claims of right and the processes, allegations, and behaviors that become the predicates to judgments can fuel debate not only about the responses in particular cases but also about what the underlying norms ought to be.”

82. Judith Resnik, “Bring Back Bentham: ‘Open Courts,’ ‘Terror Trials,’ and Public Sphere(s)” (2011) 5:1 L & Ethics of Human Rights 1 at 53.

private power as well as participate in the elaboration and reconfiguration of norms. By seeing the law in action, “the public and the immediate participants can see that law varies by context, decisionmakers, litigants and facts ... [and] gain a chance to argue that the governing rules or their applications are wrong.”<sup>83</sup> Importantly for the purposes of the analysis in this section, Resnik and Curtis explore adjudication as a process that can dignify litigants by “engender[ing] participatory obligations and enact[ing] democratic precepts of equality.”<sup>84</sup> Public adjudication, they write, is “an odd moment in which individuals can oblige others to treat them as equals as they argue in public about their disagreements, misbehavior, wrongdoing, and obligations. Litigation forces dialogue on the unwilling (including the government) and momentarily alters configurations of authority.”<sup>85</sup> The aspiration to participatory parity—the exhortation to *audi et alteram partem* (to hear the other side)—is another way, according to these authors, that courts can be “a great leveler.”<sup>86</sup> If video-conferencing technology interferes with emotional connections between courtroom participants, there is good reason to be concerned that it threatens democratic aspirations to such parity. In other words, if those physically present in the courtroom have difficulties relating to remote witnesses and, in turn, those witnesses find the process of testifying dehumanizing, the function of courts as “potentially egalitarian venues” is undermined.<sup>87</sup> In addition to implicating democratic values, the legitimacy of the legal system is possibly at risk. As Daniel Markovits has observed:

[T]here exists substantial evidence that people’s compliance with the law, as it is applied to them, depends significantly on their judgments concerning the legitimacy of authorities who apply it, and that judgments concerning legitimacy, in turn, depend on judgments concerning the procedures that the authorities employ in determining what law requires, and especially in resolving disputes about this.<sup>88</sup>

If this is indeed true and if the use of video-conferencing technology results in participants having a diminished subjective sense of inclusion in the legal process,

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83. Resnik & Curtis, *supra* note 81 at 304. As the authors elaborate, “our argument is that ... [adjudication] offers opportunities for democratic norms to be implemented through the millions of exchanges in courts among judges, the audience and the litigants ... courts are an important component of functioning democracies seeking to demonstrate legitimacy through displaying what qualities of governance are valued.”

84. *Ibid* at 301.

85. *Ibid* at 303.

86. *Ibid*.

87. *Ibid* at 304.

88. Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton: Princeton University Press, 2008) at 189 [footnotes omitted].

then there is good reason to see the use of this technology as a risk vis-à-vis legitimacy accorded to the legal system by the public.

These concerns regarding risks to democratic values and the legitimacy of the legal system are compounded when one considers that video-conferencing technology has been viewed as a panacea for addressing access to justice problems faced by northern Canadian communities.<sup>89</sup> Many of these northern communities include significant Aboriginal populations, members of which face systemic discrimination in the justice system and experience significantly disproportionate levels of illness, poverty, unemployment, and incarceration. Although video-conferencing technology holds promise in making access to the courts more convenient and more affordable for northern populations, the quality of this access is an important consideration that needs to be part of the equation. To the extent that these communities are already marginalized in relation to the exercise of political and legal power in Canada, the fact that these communities may disproportionately experience the possible negative effects of court technologies on the quality of adjudication is a critical concern.<sup>90</sup>

### C. MANAGING RISK

One obvious response to concerns about the unintended effects of video-conferencing technology on assessments of credibility and on the formation of emotional connections is to conduct more research on this issue in order to better understand these phenomena and to allow decision makers to modify their behaviour accordingly, perhaps by developing a series of best practices for different contexts. The studies cited above did not involve a review of the use of video-conferencing technology in Ontario's civil justice system; rather, they studied

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89. I thank Jane Bailey for bringing this particular concern to my attention. In the Australian context, Anne Wallace has helpfully written about the importance of taking into account the specific social and cultural context of using video conferencing in Aboriginal communities in remote Australia. See *e.g.* Anne Wallace, "Virtual Justice in the Bush: The Use of Court Technology in Remote and Regional Australia" (2008) 19:1 J L Inf & Sci 1.

90. See *e.g.* *Ont CJR First Report*, *supra* note 5. This report states:

Finally, we believe that the use of video conferencing has particular potential to benefit members of the public, the Bar, administrators and judges in the northern parts of Ontario. Distances define the North. All of the characteristics which make video conferencing attractive in any environment, make it doubly so for those who must have access to the courts in the North East and North West Regions of the Province.

See also British Columbia Ministry of the Attorney General, "Courts innovate with videoconferencing solutions" (22 December 2011), online: BC Government Online News Source <<http://www.newsroom.gov.bc.ca/2011/12/courts-innovate-with-videoconferencing-solutions.html>>.



very different contexts and different, often inferior, technological equipment.<sup>91</sup> In short, there is much we do not know about the possible effects of using the technology that is available today in this province's civil courts.

The question remains, however, of what to do in the interim while this research is being conducted. Because of the democratic values at play and the potentially vulnerable populations involved, I argue that caution is warranted. In his study on the impact of video-conferencing technology on the Mexican immigrant community in the United States, Eugenio Mollo Jr. bluntly warns that "since we do not know the definite human consequences of [video-conferencing] technology, using immigrants as the guinea pigs of this trial technology distorts our legal history and threatens our commitment to equal justice under the law."<sup>92</sup> We would be well advised, in my view, to heed this warning.

Even with greater study, it is important to acknowledge that there will likely be significant unintended effects of transmitting evidence through video conferencing. As Federman cautions, "[W]hile awareness ... is the first step in mitigating the unperceived influences of a medium's [unintended] effects, awareness alone is not sufficient to eliminate them; indeed it is unlikely in the extreme that they *can* be eliminated from human cognition."<sup>93</sup> Stated more simply, "[n]obody claims that '[v]ideo images are ... adequate substitutes of live interactions."<sup>94</sup> At least with the technology available today, it seems inevitable that the tasks of assessing credibility and providing testimony will be experienced differently when video-conferencing technology is used. Moreover, as Kathryn Leader points out, "As long as jurors and legal practitioners *believe* the ideal means to obtain the best evidence is 'live', [the use of video-conferencing] ... risks harming a witness's credibility."<sup>95</sup> In other words, for the time being, video-conferencing technology would seem to be an unavoidably non-neutral means of delivering witness testimony.

Acknowledging this reality gives rise to questions about our ability to assess witnesses' evidence in general. It is helpful to keep in mind that concerns relating to credibility assessments, in particular, are in large part rooted in

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91. See *e.g.* discussions regarding the effects of the use of inferior equipment in Storck & Sproull, *supra* note 72 at 199-200; Shari Seidman Diamond et al, *supra* note 65 at 898-899.

92. Eugenio Mollo, Jr, "The Expansion of Video Conferencing Technology in Immigration Proceedings and Its Impact on Venue Provisions, Interpretation Rights, and the Mexican Immigrant Community" (2006) 9:3 J Gender Race & Just 689 at 695.

93. Federman, *supra* note 61 at 436.

94. Roth, *supra* note 61 at 198.

95. Kathryn Leader, "Closed-Circuit Television Testimony: Liveness and Truth-telling" (2010) 14:1 Law Text Culture 312 at 327 [Leader, "Closed-Circuit Television Testimony"].

assumptions about the value of demeanour evidence. That is, we care about how video-conferencing technology affects our visual perceptions of witnesses because we believe that demeanour tells us something important about their testimony. The value of demeanour evidence has itself been seriously questioned, and an evolving conversation is now taking place about the wisdom of its continued use. Studies have revealed the perils of demeanour evidence, including, most starkly, that even trained professionals “did no better than chance” in detecting deception from demeanour.<sup>96</sup> Moreover, judges have taken note of this peril and cautioned against too much reliance on demeanour evidence in assessing the credibility of witnesses.<sup>97</sup> This broader questioning of the usefulness of demeanour evidence has often been overlooked or treated cursorily in considerations of the use of video-conferencing technology. As observed by Kathryn Leader, “attempts to assess what is problematic about ... [video-conferenced testimony] fail also to query what might be problematic about *live* testimony.”<sup>98</sup>

In order for further research into the effects of video-conferencing technology on credibility assessments to be optimally useful, such research should directly confront the value (or lack thereof) of demeanour evidence more generally. If this occurs, one potential result is that demeanour evidence will no longer be seen as central to assessments of witness testimony. Although such a development would diminish concerns in relation to how video-conferencing technology interacts with our ability to assess demeanour, it would also introduce significant broader consequences, including changes to well-established rules of evidence and appellate

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96. Paul Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage* (New York: WW Norton and Company, 1992) at 285. See also, Natasha Bakht, “Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms” in Grillo et al, eds, *Legal Practice and Cultural Diversity* (London: Ashgate, 2008) 115 at 118-123 (discussing the perils of relying on demeanour evidence).

97. See e.g. *Cuthbert v TD Canada Trust*, [2010] ONSC 830, OJ No 630 (QL) (per Karakatsanis J, “courts have long recognized that demeanour can be misleading and is but one factor in assessing credibility”). See also Canadian Judicial Council, *Model Jury Instructions, Preliminary Instructions* at 4.11, online: Canadian Judicial Council <<http://www.w.cjc-ccm.gc.ca/cmslib/general/jury-instructions/NCJI%20Jury%20Instruction%20Preliminary%20revised%202012-06%20E.pdf>>. These model jury instructions advise the judge to ask the jury:

What was the witness’s manner when he or she testified? Do not jump to conclusions, however, based entirely on the witness’s manner. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different intellects, abilities, values, and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or the most important factor in your decision.

98. Leader, “Closed-Circuit Television Testimony,” *supra* note 95 at 324.

standards of review where demeanour evidence plays a central role. As the Ontario Court of Appeal observed in *R v NS*:

Appellate deference is justified to a significant extent on the accepted wisdom that trial judges and juries have an advantage over appeal judges in assessing factual questions because they, unlike appeal judges, have seen and heard the witnesses. Similarly, the principled approach to the admission of hearsay evidence recognizes the value, insofar as the assessment of reliability is concerned, in the trier of fact's ability to observe the witness's demeanour as the witness made a statement which is proffered as evidence of its truth.<sup>99</sup>

Seen in this light, the use of video conferencing to receive witness testimony has potentially broad implications for the civil justice system. However, these remain hidden in the absence of a serious and detailed consideration of how video conferencing, as a mediating technology, affects how we relate to each other in adjudicatory environments.

#### IV. CHANGING SPACE, CHANGING ADJUDICATION

In Part III, the analysis focused on how the act of transmitting evidence through video-conferencing technology may affect witness testimony. In this Part, I shift my focus and explore how the act of removing witnesses from the courtroom may affect the adjudicatory process. More specifically, I consider the ways in which video conferencing, by disrupting the geography of adjudication, may threaten the solemnity associated with, and respect given to, the civil justice system. As with the risks described in Part III, I argue that the risks described in this Part require our attention as they implicate democratic values and raise fundamental questions about the future of our adjudicatory processes.

##### A. VIDEO CONFERENCING AND THE GEOGRAPHY OF THE COURTROOM

Consideration of how the receipt of video-conferenced evidence might affect the adjudicatory process generally begins and ends with a reference to “the conventional rule”<sup>100</sup> or “general principle”<sup>101</sup> that witnesses give their evidence

99. *R v NS*, [2010] ONCA 670 at para 56, OJ No 4306 (QL). See also, Henry H Perritt, Jr, “Video Depositions, Transcripts and Trials” (1994) 43:3 Emory L J 1071 at 1087-88, 1092-93 (describing how “[g]reater use of electronic formats can change the relationship between trial and appellate courts” and how the introduction of video gives rise to a need to change rules of civil procedure, rules of criminal procedure, rules of evidence and appellate rules) [footnotes omitted].

100. *Pack All*, *supra* note 7 at para 9.

101. See *Rules of Civil Procedure*, *supra* note 4.

in person in the courtroom. This convention, of course, predates the existence of video-conferencing technology and the possibility that a witness could provide oral evidence in an interactive and immediate fashion from outside the courtroom. In a number of respects, video-conferencing technology replicates features of *viva voce* in-court testimony that have been deemed important: "A witness can see and be seen ... hear and be heard immediately ... is still under oath and must still account for his or her evidence ... [and] must be in a designated place at a specific time."<sup>102</sup> Given that this is the case, why be concerned about how video conferencing affects adjudicatory practices? More specifically, "how much is the live trial to do with bodies sharing the same space at the same time?"<sup>103</sup>

One useful starting point is to acknowledge that courts have been fundamentally understood (and realized) in relation to bounded physical space for a very long time. As Judy Radul writes, "[t]he court is bound to site."<sup>104</sup> Although the courtroom may be a "relatively recent invention," bounded adjudicative space is not. Courts have a long history of being held in single, designated spaces imbued with special meaning.<sup>105</sup> The use of video-conferencing technology breaks with this history. It is not simply that the physical environment of adjudication is changing, for example, from under a tree to a brick courthouse. Video-conferencing technology opens up the possibility of multiple, simultaneous, and interactive sites of adjudication. This is something entirely new, bringing with it a new set of challenges.

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102. Leader, *supra* note 95 at 318.

103. *Ibid.*

104. Judy Radul, "What Was Behind Me Faces Me - Performance, Staging and Technology in the Court of Law," online: <<http://www.eurozine.com/articles/2007-05-02-radul-en.html>>.

105. Richard Mohr, "In Between Power and Procedure: Where the Court Meets the Public Sphere" (1999) 1 J of Soc Change & Crit Inquiry, online: <<http://pandora.nla.gov.au/nph-arch/2000/Z2000-Jan-24/http://www.uow.edu.au/arts/joscci/mohr.html>>. As Mohr notes:

Dating back to Ancient Greece, courts have been held in special places. Homer described the 'polished stones in a sacred circle' which defined the place where the elders decided disputes. In the twentieth century, it is still possible to consider courts as a sacred circle, though different signs now distinguish them from the profane world outside. Robert Jacob has described the evolution of the modern European court, from the place of justice signified by a tree and an enclosure of hazel branches, to the timber panelling characteristic of more recent courtrooms.

Legal doctrine itself demands the court be fixed in place, from the Magna Carta's dictum that 'Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place,' to the modern requirement that courts sit at a 'proclaimed place'.

...

Major tensions arise, in courthouse architecture and in law, between the place of the court and the other places of which the court must take account: the sites of crimes or injuries, places where witnesses are, and places accessible to the public.

These challenges can be understood in a number of different ways. One approach is to consider the legal geography at play and the relationship of bounded adjudicative space to the adjudicatory process. In her work examining video-conferencing technology in the English context, Linda Mulcahy has thoughtfully explored how the physical environment in which testimony is given “plays a critical role in reinforcing the importance of the trial and the role of state-sanctioned adjudication.”<sup>106</sup> One manifestation of this role, as Mulcahy notes, can be seen in “journeys to the trial.”<sup>107</sup> That is, for courtroom participants the very act of travelling to the courthouse to participate in proceedings can be transformative due to the physical surroundings experienced during this journey. Visual cues created by, for example, the distance that a court is set back from a busy street or the design of the entrance to the courthouse can be used to “reinforce the fact that going to court is not an ordinary or everyday occurrence.”<sup>108</sup> Indeed, as Mulcahy observes, official design guides for courts have taken note of this reality. In these guides, general exhortations such as the proposition that “courthouses must be planned and designed to frame, facilitate, and mediate the encounter between the citizen and the justice system”<sup>109</sup> can be found, as can more specific guidance like the assertion that “the main entrance and entrance hall require a civic presence to reflect the status of law in society and engender respect for decisions made in the courts.”<sup>110</sup> If witnesses no longer attend court but rather provide their

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106. Linda Mulcahy, “The Unbearable Lightness of Being? Shifts Towards the Virtual Trial” (2008) 35:4 J L & Soc’y 464 at 478–479 [Mulcahy, “Unbearable Lightness”]. See also, Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (New York: Routledge, 1997) [Mulcahy, *Legal Architecture*]. See also, Linda Mulcahy, “Architects of Justice: The Politics of Courtroom Design” (2007) 16:3 Soc & L Stud 383.

107. Mulcahy, “Unbearable Lightness,” *supra* note 106 at 477–79.

108. *Ibid* at 477–78.

109. Judicial Conference of the United States, U.S. Courts Design Guide (2007) at 3–1 [*US Courts Design Guide*]. This phrase appears within a longer description of design goals that reads in part:

The architecture of federal courthouses must promote respect for the tradition and purpose of the American judicial process. To this end, a courthouse facility must express solemnity, integrity, rigor, and fairness. The facility must also provide a civic presence and contribute to the architecture of the local community.

Courthouses must be planned and designed to frame, facilitate, and mediate the encounter between the citizen and the justice system. All architectural elements must be proportional and arranged hierarchically to signify orderliness. The materials employed must be consistently applied, be natural and regional in origin, be durable, and invoke a sense of permanence. Colors should be subdued to complement the natural materials used in the design.

110. Mulcahy, “Unbearable Lightness,” *supra* note 106 at 478. Mulcahy notes the advice given to architects in UK, Ministry of Justice, *Court Standards and Design Guide* (London: Her

testimony remotely using video-conferencing technology, such visual cues will be unseen and unheeded. The traditional relationship between court participants and the geography and architecture of the court is disrupted. In this manner, video-conferencing technology may be understood as potentially influencing the cultural meaning associated with adjudicatory processes.

## B. CONSIDERING SOLEMNITY

The idea that physical presence and the physical environment of the court room are important is often connected to the concept of solemnity. A number of authors have framed their concerns with video-conferencing technology in terms of how “virtual trials threaten the solemnity of the courtroom.”<sup>111</sup> Speaking from a judicial perspective, former US District Court Judge Nancy Gertner has written about the impact of video-conferenced testimony on the “gravitas” of the courtroom and queried, “In the final analysis, should trials have the look and feel of the television evening news?”<sup>112</sup> Canadian courts have, to some extent, acknowledged the potential for video-conferencing technology to disrupt the solemnity associated with conventional trial practices. In *R v Allen*,<sup>113</sup> Justice Duncan recognized the objection that the “entire truth seeking process suffers by permitting the witness to ‘mail it in’—to give evidence at a distance without his being brought into the presence of those he is accusing and the solemn and majestic atmosphere of the courthouse.”<sup>114</sup> In discussing the principles to be applied when considering whether a witness should be permitted to provide evidence in a criminal case through a video link, Justice Gorman recently noted that “the Court must, in considering

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Majesty’s Courts Service, 2010), an 830 page document providing detailed guidance on the physical appearance and layout of Crown, county and magistrates’ courts in the UK:

The main entrance and entrance hall require a civic presence to reflect the status of Law in society and engender respect for decisions made in the courts. This can be achieved by being the focus of the townscape, through symmetry and formality in the architecture, through a generous use of space and height internally and by the use of steps to the entrance ... there should also be a generous external gathering space outside the entrance. The main entrance should symbolically be the image of the court, and the place outside which the Press photograph those seeking publicity after a case.

111. See *e.g.* Sossin & Yetnikoff, *supra* note 56 at 262; Nancy Gertner “Videoconferencing: Learning Through Screens” (2004) 12:3 Wm & Mary Bill Rts J 769 at 773.

112. *Ibid* at 784. Justice Gertner further observes:

We are used to looking at screens, in our bedrooms and living rooms, our offices, the train station, in restaurants. The court, however, is different as seen with ‘the formality that attaches to the ceremony, the robed judge, the witness’ oath, the public’s scrutiny, the creation of an appellate record formed in a moment experienced simultaneously by all the parties.’

113. 2007 ONCJ 209, OJ No 1780 (QL).

114. *Ibid* at para 28.

the location from which the evidence will be presented, consider whether the witness will face the same level of solemnity offered by a courtroom.”<sup>115</sup>

Underlying the above comments is recognition of the deep role that physical instantiations of ritual have historically played in relation to adjudicatory processes. Although sites of adjudication have not always involved what we now take as the paradigmatic adjudication location—bricks and mortar single-use courthouses—“[w]here a chosen site for adjudication has no extraordinary characteristics which mark it out as legal space it is often ritual rather than location which render the proceedings significant.”<sup>116</sup> Just as video-conferencing technology alters the interaction that court participants have with the physical geography of the courthouse, it also changes the nature of the court ritual—a ritual that has traditionally relied on the presence of witnesses to imbue the court with meaning and authority.

### C. IMPLICATIONS OF THE VIRTUAL COURTHOUSE

As was the case with the risks to credibility assessments and emotional connectivity identified in Part III, possible ways to manage risks to the solemnity of court processes associated with taking witnesses out of the courtroom can be identified. One seemingly straightforward measure would be to take steps to infuse the remote location where the video-conferencing testimony is being given with some of the gravitas that can typically be seen in physical courtrooms. A precedent can be found in a video conferencing Practice Direction adopted by England in its civil procedure rules. Among other things, the Practice Direction provides that “[w]hen used for the taking of evidence, the objective should be to make the [video-conferencing] session as close as possible to the usual practice in a trial court where evidence is taken in open court.”<sup>117</sup> To this end, the Practice Direction specifies, among other things, that “if the local site is not a courtroom, but a conference room or a studio, the judge will need to determine who is to sit where,” and that the “arranging party should make arrangements, if practicable, for the royal court of arms to be placed above the judge’s seat.”<sup>118</sup> Further, in cases involving public trial proceedings, the arranging party must also ensure that the local site (if a studio or conference room rather than a courtroom) “provides sufficient accommodation

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115. *R v Osmond*, [2010] NJ No 54 at para 19 (QL), CanLII 6535 (Prov Ct).

116. Mulcahy, “*Legal Architecture*,” *supra* note 106 at 27.

117. *The Civil Procedure Rules 1998*, SI 1998/3132 (L 17) at PD 32, Annex 3, para 3 [*The Civil Procedure Rules*].

118. *Ibid* at paras 12, 14.

to enable a reasonable number of members of the public to attend.”<sup>119</sup> Regarding the actual conduct of the hearing, the Practice Direction dictates that the judge “will determine who is to control the cameras” and “decide whether court dress is appropriate when using [video conferencing facilities].”<sup>120</sup> Another example can be found in the Practice Direction published by the District Court of Western Australia regarding evidence taken via video link. Although the Australian Practice Direction speaks in more general terms than the English Practice Direction, it does specify that the party who intends to call a witness through video-conferencing technology must “use reasonable endeavours to ensure that ... [the witness is] dressed appropriately for court, as if the witness was giving evidence in person in the court room; [and that] the arrangements made with the venue from which the video link or audio link is to be broadcast maintain the dignity and solemnity of the court, consistent with the venue being treated as part of the court for this purpose.”<sup>121</sup> Even with these types of measures, however, it is readily apparent that video-conferenced testimony takes place in a significantly different environment than in-court testimony. Practice directions and protocols may mitigate some of the differences but they cannot replicate all of the subtle effects of the geography of the courthouse. Whether this is a good or a bad thing is not entirely straightforward.

On the one hand, there is good reason why we would want to engender respect in adjudicatory processes. As the Supreme Court of Canada has repeatedly emphasized, public confidence in the justice system underwrites both the effective administration of justice and the rule of law.<sup>122</sup> From a more theoretical standpoint, if public adjudication reflects and promotes democratic values, as is contended in Resnik and Curtis’ account of adjudication as a democratic practice,<sup>123</sup> the increasing use of video-conferencing technology can be seen as a loss for democracy if it diminishes public adjudication by disrupting the solemnity and gravitas of the trial. Indeed, Mulcahy sees this particular risk in relation to video-conferencing technology, writing:

More significant in the present context is the importance of physical presence itself. It could be argued that the expectation that a person makes his or her accusation in the presence of the accused in a setting designed for public functions speaks to

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119. *The Civil Procedure Rules*, *supra* note 117 at para 13.

120. *Ibid* at paras 13, 19.

121. Chief Judge, District Court of Western Australia, *Practice Direction GEN 1 of 2011 – Video Link Evidence* at 5.1(d), online: District Court of Western Australia <[http://www.districtcourt.wa.gov.au/\\_files/Practice%20Direction%20GEN%20of%202011%20Use%20of%20Video%20Link%20Facilities.pdf](http://www.districtcourt.wa.gov.au/_files/Practice%20Direction%20GEN%20of%202011%20Use%20of%20Video%20Link%20Facilities.pdf)>.

122. *Application Under s 83.28 of the Criminal Code*, *Re*, 2004 SCC 42, 2 SCR 248.

123. See generally, Resnik & Curtis, *supra* note 81.



a society that has an active public sphere and a sense of the collective. By way of contrast, when evidence is transmitted from the home, workplace or hotel room it suggest that the performance of civil duty in public has become an inconvenience.<sup>124</sup>

In other words, if we understand the “public processes of courts to contribute to the functioning of democracies and give meaning to democratic aspirations”<sup>125</sup> as well as to underwrite the legitimacy of the legal system,<sup>126</sup> we should be concerned about trials potentially losing vitality and weight if and when court participants no longer physically attend in court.

On the other hand, there are also a number of reasons why we might find the disruption of traditional trial practices and conventional conceptions of the trial to be a positive development. Design is far from benign when it comes to adjudicatory spaces.<sup>127</sup> As Henri Lefebvre observed, “[s]pace is not a scientific object removed from ideology or politics; it has always been political or strategic.”<sup>128</sup> In the case of legal proceedings, notwithstanding the fact that courthouses and courtrooms are often designed to “express solemnity, integrity, rigor, and fairness,”<sup>129</sup> the architecture of these spaces also often operates to reinforce unequal power relations and marginalize vulnerable individuals and groups. Mulcahy provides a crucial reminder on this issue in her work:

[T]he way space has been used in the courthouse has been fundamental to the exercise of power by the privileged, ensuring a certain allocation of people in space and a coding of their reciprocal relations. Studies of the architecture of courts have, for instance, drawn attention to the ways in which the laity have been marginalized in courtroom design and segregated from professionals for fear of ‘contamination’. Others have drawn attention to the difficulties witnesses have in appearing confident while describing intimate experiences to other across a large intimidating courtroom ... Seen in this way, the space in a courtroom becomes a particular articulation of social, cultural, and legal relations in which some actors are privileged and others disempowered.<sup>130</sup>

124. Mulcahy, “Unbearable Lightness,” *supra* note 106 at 484.

125. Resnik & Curtis, *supra* note 81 at 301.

126. Markovits, *supra* note 88 at 184-93.

127. See e.g. the discussion in Mulcahy “Unbearable Lightness,” *supra* note 106.

128. Henri Lefebvre “Reflections on the Politics of Space,” translated by Michael J Enders (1976) 8:2 *Antipode* 30 at 31. The work of Michel Foucault has, of course, also been tremendously influential on the topic of the ideology of space. See e.g. Michel Foucault, *Discipline and Punish: the Birth of the Prison*, translated by Alan Sheridan (New York: Pantheon Books, 1977).

129. *US Courts Design Guide*, *supra* note 109 at 3-1.

130. Mulcahy, “Unbearable Lightness,” *supra* note 106 at 480-81. On the issue of segregation, David Tait has further observed, “[i]t can be argued that recent courthouses, with up to six separate circulation systems, are some of the most segregated buildings in the modern world. Judges, court staff, prisoners, protected witnesses, the public—and jurors—may have their

Situated in these critiques, video conferencing cannot simply be seen as a way in which witness testimony can be more easily and cheaply presented in court. Rather, in removing witnesses from the courtroom, this technology has the potential to disrupt the power relations that would otherwise be embedded in an adjudicatory process where witnesses physically come to court.

For Aboriginal communities, in particular, the impact of altering the geography of adjudication is complex. Speaking to the Australian context, Anne Wallace queries:

For Aboriginal people who may be more likely to feel intimidated or marginalized in the physical courtroom, will the “virtual court” experience add or detract from those feelings? Will the additional layer of “technology-mediated communication” only add to the linguistic and cultural differences that can impede their effective participation in the courtroom?

On the other hand, is it possible that for those Aboriginal witnesses, the distancing effect, and perhaps a less formal approach, may assist their effective participation?<sup>131</sup>

Wallace further reports that discussions with Australian Aboriginal persons as part of case studies into the use of video-conferencing technology revealed “a clear preference for people to be able to remain within their community to deal with legal matters, wherever possible” and that “[t]his is a product not just of the difficulties and cost associated with arranging travel from remote locations, but of the desire of Aboriginal people to remain on their own country.”<sup>132</sup> If Canadian Aboriginal communities share these preferences, this provides a compelling reason to use video-conferencing technology in relation to these communities. Exactly *how* these technologies might be best used in these communities, however, would still remain an important question to be determined. As Wallace points out, issues such as the location of facilities (*e.g.*, will remote witness rooms be located in police stations or community centres?) and levels of on-site support are crucial, but are at risk of being given little thought.<sup>133</sup>

Outside the context of these particular communities, the risk that video-conferencing technology will disrupt the geography of adjudication leaves lingering, but fundamental questions regarding what type of civil justice system we wish to have and what values it will prioritize. As Winner observes:

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own distinct network of entrances, staircases, elevators, bathrooms and waiting areas.” See David Tait, “Democratic Spaces in a Citadel of Authority” (2009) 98:5 *Architecture Australia* 45 at 45.

131. Wallace, *supra* note 89 at 16.

132. *Ibid.* at 21.

133. *Ibid.*

As we “make things work,” [the important question about technology becomes] what kind of *world* are we making? This suggests that we pay attention not only to the making of physical instruments and processes, although that certainly remains important, but also to the production of psychological, social, and political conditions as part of any significant technical change.<sup>134</sup>

By taking witnesses outside the courtroom, video-conferencing technology disrupts the geography of adjudication and threatens the solemnity associated with, and respect given to, the civil justice system as it is conventionally understood today. It also, however, carries with it a liberating potential to shape new court process that are more responsive to and inclusive of the public. We need to confront the potential transformative power of video-conferencing technology, with respect to both the justice system and to society more broadly, rather than simply continuing to treat it as a neutral tool at our disposal.

## V. THE CASE FOR CAUTION REVISITED

Parts III and IV, above, explore potential consequences generated by, first, the use of video conferencing as a mediating technology and, second, changes to the geography of adjudication brought on by video conferencing. They establish that, notwithstanding the advanced technology available today, significant risks remain in relation to using this technology, including problems with credibility assessments, with the emotional connections (or lack thereof) fostered between courtroom participants, and with the solemnity of our adjudicatory processes. Moreover, when considered through these perspectives, possible broader political and social implications as well as the transformative potential of this technology are brought to the forefront.

The upshot, in my view, is two-fold. First, our conversations regarding the use of video-conferencing technology need to be broadened and deepened beyond the now-dominant focus on cost and efficiency to include discussions of the considerations identified above. Until this happens, we ought to resist barrelling ahead with more widespread use of video-conferencing technology in civil justice systems. Second, once we more fully confront the possible impacts of video-conferencing technology, we must consider how we want to further incorporate it into our civil justice systems, if at all. At the heart of this decision, it would seem to me, are choices about our attitude towards risk, as well as fundamental questions about our justice system and how it ought to adapt to meet our needs and reflect our values.

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134. Winner, “Technologies as Forms of Life,” *supra* note 43 at 112.

To be sure, the questions raised are not easy and do not permit straightforward answers. Further complicating the picture is the reality that the environment in which these issues and values are to be considered is in the midst of significant change. There is currently an aggressive move away from the full public trial (complete with *viva voce* in person evidence) as the paradigmatic means of resolving civil disputes, towards more tailored, flexible, and private means of resolving disputes.<sup>135</sup> The shifting ground of the civil justice system also needs to be integrated into our evaluation of this technology.

Moreover, many of the terms used above—such as dignity, democracy, and access to justice—are contestable and, indeed, contested. A discussion about what these terms mean and how they are to be realized in our justice system needs to be brought to the forefront of the conversation about video-conferencing technology and the use of other courtroom technologies. Finally, given what is at stake, this conversation needs to extend beyond the judiciary and policy makers and to be situated within broader public discussion regarding the state of the civil justice system. In the words of Andrew Feenberg, “The design of technology is ... an ontological decision fraught with political consequences. The exclusion of the vast majority from participation in this decision is profoundly undemocratic.”<sup>136</sup> In short, a deeper and broader conversation is required.

## VI. CONCLUSION

*Technology presents itself as a one-way street; we are likely to dismiss discontents about its direction because we read them as growing out of nostalgia or a Luddite impulse or as simply in vain. But when we ask what we “miss,” we may discover what we care about, what we believe to be worth protecting. We prepare ourselves not necessarily to reject technology but to shape it in ways that honor what we hold dear.*<sup>137</sup>

- Sherry Turkle

The aim of this article is to reframe the conversation about the use of video conferencing in civil trials in Ontario. As the analysis illuminates, there is good reason to adopt the cautious approach to this issue that is evident in the current judicial consideration of video-conferenced evidence. The adoption of video conferencing raises both empirical and normative questions that require careful

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135. See Julie MacFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008); See also Herbert M Kritzer, “Disappearing Trials? A Comparative Perspective” (2004) 1:3 J Empirical L Stud 735.

136. Feenberg, *supra* note 39 at 3.

137. Turkle, *supra* note 2 at 19.

attention. I offer no final verdict on the use of this technology in our civil justice system. Rather, I take the position that the failure to meaningfully engage with its risks means that we are in danger of what Langdon Winner has termed “technological somnambulism.”<sup>138</sup> In taking witnesses outside the courtroom we do much more than simply allow witnesses to avoid the cost and inconvenience of having to travel to attend court. We need to wake up and engage with the potential unintended and diffuse consequences of introducing this technology into our courts. The operative issue, in my view, is not whether the new tools available to us are good or bad but rather how we should use them, if at all, in light of our values. Although the path forward remains to be determined, it seems clear that we can no longer afford to be sleepwalking through these important decisions.

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138. Winner, “Technology as Forms of Life,” *supra* note 43 at 104.