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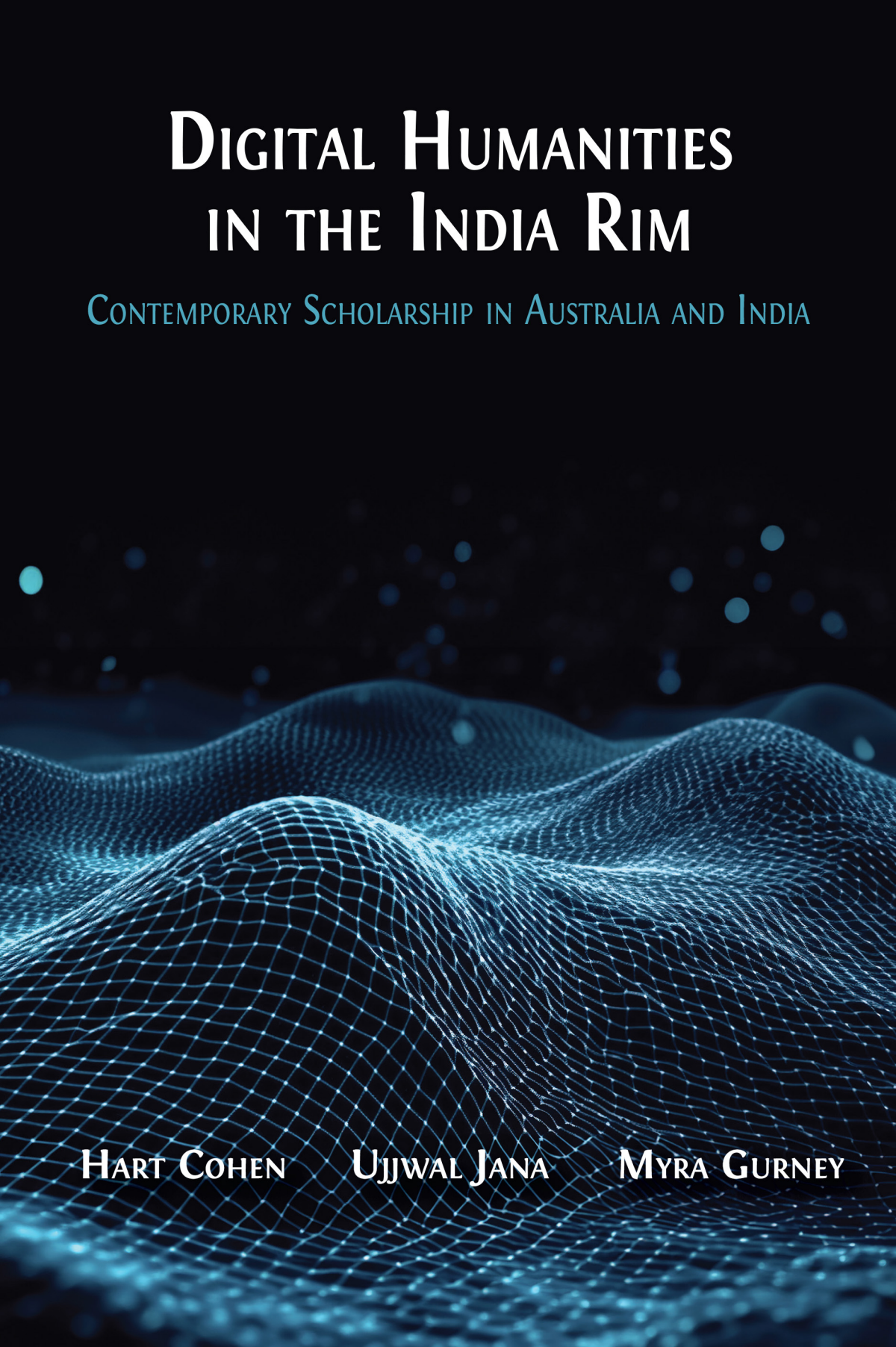

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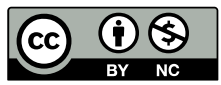

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4. Digital justice: Interactions and rituals in the virtual courtroom

David Tait and Meredith Rossner

Abstract

Courts have increasingly made use of video technologies to allow witnesses and defendants to take part in hearings. This use increased dramatically as a result of COVID-19. Not only did individuals appear on screens in physical courtrooms, but courts themselves sometimes went virtual. We examine what happens to interactions and rituals when the physical courtroom disappears. We compare the standard form of video conference based on isolating participants into boxes in a gallery, with an alternative approach, the metaverse court, which brings participants together into a shared space.

Keywords

Metaverse; avatars; video conference; digital justice.

Introduction

As a research paradigm, Digital Humanities has opened up the archive, most notably in literature, linguistics, archaeology, art history and history. Law is not far behind, with platforms to access Old Bailey cases from 1674 to 1913 (Digital Humanities Institute, 2023), or track offences such as blasphemy and Sabbath-breaking before the Court of Assistants

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of the Massachusetts Bay Colony from 1630 to 1692 (Massachusetts Court of Assistants, 2001). One significant Australian Digital Humanities database in the legal field lists convicts transported to the penal colony of Van Dieman's Land, including visual marks on their bodies produced by smallpox, tattoos or punishment beatings (Digital Panopticon, n.d.). Using digitised databases like this allows us to tell stories about the past that track patterns across long periods or multiple sites.

The digital revolution is not confined to unleashing floods of information. It has also transformed almost every type of communication, from texting to streaming of images. In this chapter, we focus on legal communication in one particular setting: justice hearings, and explore the possibilities starting to be opened up by immersive virtual hearings.

We are all so accustomed to video conferencing that, if we think of it all, we think of it as part of the fabric of everyday life. But as Garfinkel (1967) suggested, we can better understand a phenomenon if we stand back from it and treat something familiar or obvious as strange.

So, what are the aspects of video conferencing we might classify as strange?

- It brings people together into a shared conversation while isolating them in boxes in a gallery.
- It avoids the need for participants to meet in person, while bringing their faces uncomfortably close.
- Participants can see themselves looking back at them.
- All participants can see each other but nobody makes eye contact.

These paradoxes are not a necessary consequence of holding a meeting with dispersed participants. They result from the particular way video conferencing is organised—its origins were in a video call between two people to which additional participants could be added.

There is an alternative technology capable of being used for such communication, although rarely so employed: the computer game. Re-imagining a meeting as a game rather than a hi-tech phone call assumes the participants are together in a single shared space. A justice participant in this hearing game can see the entire courtroom from a first-person viewpoint as judge, litigant or witness. Others are seen in

their assigned position, at the distance they would be in a regular court. When a lawyer questions a witness, the two interlocutors can turn to face each other (or they could turn away or look down), and when lawyers address the Bench, they can pivot to face the judge. Of course, a computer game used as a platform for a justice hearing can also be seen as strange:

- Users do not see images of the other participants; they see avatars representing them.
- If the avatars and the environment seem almost identical to real-world images (but not quite the same), this can produce what is referred to as an 'uncanny valley' effect.[1]

This chapter explores some of the rituals and interactions that are made possible by the two different technologies, the assemblages of actors, objects and actions that are brought together in the production of a justice hearing. It uses as the comparison case the physical courtroom and in-person hearing. These vary enormously, of course, between lengthy war crimes trials before an international tribunal and police courts that sentence motorists for speeding offences, so the descriptions are necessarily somewhat stylised.

At this stage of technological development, some of the prognosis about how the technology will work is somewhat speculative, although we do have some prior research, including randomised controlled trials, that offer some clues. No doubt some of our hypotheses will turn out not to be supported, but at least they might help to set the research agenda for the next phase of this research.

The issues to be covered are:

1. Producing subjects.
2. Producing deference and authority.
3. Moving rituals.

1 This term refers to digital images that are close approximations of the person being represented, which reportedly produce a dip in empathy compared to a less realistic image.

Methods

This chapter is written as a reflective essay rather than a research report. As such, it draws on several studies carried out by the authors as well as a range of work by others. An important inspiration is the analysis of interaction rituals by Erving Goffman. The authors have undertaken numerous studies using this framework — of restorative justice, juvenile court and Indigenous court hearings, as well as federal and criminal courts. An underlying feature of this approach is the assumption that the identity of subjects is not just 'there' in the person themselves; rather it is negotiated, formed and developed in relation to others. The key unit of analysis is thus the encounter or the interaction between people in particular settings.

In outlining possible differences between a courtroom encounter using currently available video conferencing platforms and what we term the 'metaverse court', we are basing our reflections on a platform developed by the Fraunhofer Institute in Graz, Austria, and tested out by us in 2022 in the Harvard Visualization Research Lab in Cambridge, MA and the Cyberjustice Lab at the University of Montreal. This metaverse court prototype has several features that provide advances over other current avatar-based or immersive video conferencing approaches developed by Meta, Zoom or Microsoft—the avatars are highly realistic, the virtual environment is detailed and plausible as a courtroom, (apparent) eye contact is achieved with multiple participants, and, most importantly, all this is created without the need for intrusive 3D goggles. The downside is that bringing multiple participants together into this metaverse court requires powerful game computers with expensive graphics cards, good internet access, and the use of a cloud server. As a research platform, it allows researchers to test the strengths and weaknesses of the metaverse approach compared to alternatives. Many of the major IT companies are investing heavily in this area, which could transform some of our speculations into testable propositions.

Reference is made in this chapter to an earlier version of this platform (also developed by Fraunhofer), using multiple screens and multiple cameras. This platform was used in a randomised controlled trial in a comparison with a face-to-face condition. To achieve a hearing between four sites required 12 cameras, 12 screens and six simultaneous video

calls, something that would be hard to sustain for real trials. Despite the extensive technical infrastructure required, the platform did not achieve what the metaverse court could—embedding participants in a shared environment.

Producing subjects

One of the key arguments Goffman (2017) makes in his dramaturgical analysis of human interaction is that subjects (including the 'self') are produced as part of the process of interacting with others within a particular social setting. People learn how to behave in response to the constraints and possibilities offered by the environment. People entering a monastery learn how to become monks, while those entering a psychiatric institution learn how to become patients. As individuals embark on their 'moral careers', they learn how to act, move and interact with others and take on the role expected of them (Goffman, 1959).

What sorts of subjects do justice processes produce? In one of our previous studies, a comparison of two different children's court procedures, it was suggested that whereas a restorative justice procedure that focused on getting the young person to 'acknowledge' their shortcomings and 'agree to' some remedial actions proposed by adults might tend to produce an 'obedient child' as the ideal subject, whereas interrogation before a French '*juge des enfants*' which required agile thinking and the ability to formulate arguments might produce an 'argumentative citizen' as its ideal subject (Tait, 2018). The infamous Stanford Prison Experiment reportedly turned psychology graduate students either into sadistic guards or docile prisoners within a few days (Zimbardo et al., 1971). In both cases, the setting helps to shape the type of subject produced.

So, what sort of subjects do these two technologies—video conferencing and gaming—create? We know from two randomised controlled trials we have carried out that if a defendant is placed in a dock or box in a physical courtroom, they are almost twice as likely to be found guilty, compared to sitting alongside counsel, other things being equal (Rossner, 2017). The furniture in some way seems to shape the way the jury perceives the accused—perhaps the balustrade around the box informs the jury that the person needs to be constrained, or maybe the

isolation from others suggests they are different (perhaps dangerous). Or perhaps sitting alone encourages disinhibited behaviour (though not in our experiment—the actor performed identically whether in a dock or beside the lawyer). There could also be different messages received by different jurors.

Whatever the mechanism, the effect is that jurors are more likely to consider someone they see in a dock as guilty. Appearing on a screen, on the other hand, whether alone or alongside counsel, according to our study at least, makes no difference to perceived guilt (Tait & Tay, 2017). This has two implications for the production of the subject in a virtual environment.

First, appearing on a screen can potentially have something of a levelling effect. For a video conference, everyone is in a box, and the boxes are usually of equal size. The impression given in a physical courtroom by elevating the judge and placing the accused in isolation is thus removed.

In a metaverse courtroom, the levelling effect could be even greater. The accused appears as an avatar, but if the avatars are drawn from a limited pool of standard images, any advantages or disadvantages potentially associated with body shape, beauty or age can be removed. Not all prejudice disappears: a name can provide cues about ethnic background, and if a person speaks, their accent can betray their origins.

There is a second implication of the apparent lack of impact of screen appearances for the metaverse courtroom—evidence could become relatively more important. In a video conference, viewers can guess (however incorrectly) whether a person is guilty, dangerous, or honest by how they look, although pixilation and voice distortion could be used to conceal the identities of protected witnesses (McKay, 2018). The image of an avatar on the other hand provides few, if any, cues about the person behind the avatar, and even a Metahuman avatar is unlikely to communicate all the subtle gestures (like shaking knees or sweating brow) that the image of the person on a video conference could provide. If the accused does not testify—and normally they do not—then the jury would have to rely on evidence, they hear without getting any assistance from glances to look inside the soul of the accused.

In the video conferencing environment, the boxes might hint at a form of equality, but judges still control the hearing. Indeed, in some

ways, they may have even more control. In some in-person hearings, it can take some time for order to be restored when a person becomes verbally aggressive. If the person is on the screen they can be quickly muted, and the feed cut.

Participants in a video conference often have some control over their background, whether physical or virtual. A good lawyer will ensure that the background behind their client is consistent with the presumption of innocence. The availability of virtual backgrounds in all major video conferencing platforms means that even if defendants are in custody they can be seen in front of a bookshelf, a gurgling stream or a family room. The person can be positioned at a dignified distance from the camera—not too close to appear intimate and not too distant to appear remote. On the screen, the accused might be placed in the box alongside their lawyer, or in a central position, or even at the top. Meanwhile, a victim whose sporting career was terminated by an accident might have sporting trophies subtly positioned in the background to remind viewers of the impact the accident had on their life. A metaverse court however removes the opportunity for users to customise their environment—as with a physical courtroom, the courtroom design is given.

There are potential risks associated with seeing others only on screens. Empathy might be harder to develop (Bandes & Feigenson, 2021), and witnesses might be less likely to lie if they are confronted with the person whose life could be impacted by their testimony—alternatively they are less likely to be intimidated if they are separated from the accused by a screen, whether a physical barrier in a courtroom or a video monitor[2]—while judges might find it easier to pass harsh sentences if they do not see a real person in front of them. Indeed, on one occasion during the pandemic, a Singapore judge sentenced someone to death by Zoom (McLennan, 2021). Lawyers could feel that their theatrical talents are not put to such good use if the audience does not see them in person, although it could equally well be argued that most people's understanding of the law comes from a screen anyway (Guéry, 2015).

A critical part of the production of subjectivity is the way particular 'lines' are received by others and negotiated in the process of interaction

2 This is the one of the bases for the confrontation clause in the US Constitution.

(Goffman, 1955). In a video link, a witness or defendant will usually only see the person asking questions and miss out seeing the responses of other court participants. This could also be true in a video conference in which the image of the complainant is hidden from the defendant, or audience members are shown as black boxes (or, in a video streaming session, not shown at all). In the metaverse court, only the key participants will likely be shown, and of those who are, their appearance as avatars is likely to reduce the number of emotions that are expressed. So, it is likely that, with a reduced number of cues compared to a face-to-face hearing, a witness or defendant may be unable to adjust their performance in a way they would normally. The subjects that might be produced could therefore be less nuanced or flatter.[3] On the other hand, they might be less anxious, less intimidated, and therefore less likely to be traumatised by the experience.

As well as producing subjects, rituals such as justice processes may also produce or reproduce forms of organisation, such as hierarchy, authority or deference. It is to these that we now turn.

Producing authority and deference

Courts are inherently hierarchical places. The spaces of courtrooms are segregated and organised by status. Judges, juries, lawyers, defendants, witnesses and the audience—everyone has their place, which they will soon discover if they sit in a place designated for someone else. Judges typically preside over the hearing from a Bench, which is elevated either by a small step as in most Scandinavian and Dutch courts, or, at the extreme, six steps as in the Irish court system. In many common law courts, lawyers establish their centrality to the process by sitting at a bar table which dominates the well of the court. In older French courts, prosecutors sit on a throne dressed in ermine in the front left corner of the room, a position once occupied by the king in the Paris 'parlement' (Garapon, 2001). When they stand to speak, they have the highest position in the room.

When the judge (and sometimes jury) enter a courtroom, the

3 This argument is somewhat speculative, but it does find some research support that compares live and video testimony, with child witnesses seen more positively and as more convincing if seen in the live setting. See Landström et al., (2007).

audience is expected to stand to show their acknowledgement of the authority invested in the judge. When participants or audience members leave the courtroom, in some jurisdictions at least, they are expected to face the Bench and bow. They are not, however, bowing to the judge as a person, but, at least in England and Wales where the tradition is perhaps most entrenched, they are bowing to the coat of arms behind the Bench, representing royal justice (England and Wales, n.d.).

The pattern of deference is further established by the style of language used in addressing legal professionals. Judges are referred to in some jurisdictions with the respectful honorific 'Your Honour'. In some English courts (including the High Court and the Court of Appeal) the judge may be referred to as 'Your Lordship' or 'My Lord'. Interestingly in Irish courts, where such titles were officially abolished in 1922, one can still hear senior judges being referred to as 'Your Lordship'. Lawyers in common law courts call their opponent 'My Friend' or if the opponent has taken silk (become a Senior Counsel or King's Counsel) they are referred to as 'My Learned Friend'.

Clothing may also serve to establish the place of different court participants in the hierarchy. Judges often wear robes, and in countries based on English tradition, wigs as well. Judges in Italy tend to wear a red sash with a white stripe as well. Lawyers often wear black robes, and, in England, King's Counsel have gowns made of silk and with a gold braid sewn onto the left shoulder. At the other end of the spectrum, a person in custody may in some US states (and elsewhere) be shackled in five places and chained to the floor. According to the 2005 Deck vs Missouri decision, such constraints were not to be visible to the jury, a position that a conservative Supreme Court has begun to roll back (US Supreme Court, 2022).

How can such markers of status be shown in a hearing where the participants appear on a screen? Using honorifics and wearing robes are relatively easy practices to bring across into the digital environment, but there are challenges with other rituals. A witness who stands up in a remote witness room to acknowledge the judge in a video conference may end up providing a view of their stomach to the other participants. Bowing has similar problems to standing, but a slight lowering of the head (or in some cultures, holding hands in a prayer position) could serve as an appropriate gesture of deference. However, new forms of ritual will

likely emerge. There is no reason, for example, why participants need to sit for video hearings (also no reason why they should be prevented from doing so). One federal judge observed in Sydney presided over court from a standing desk in his chambers, while one of the lawyers in the case stood at a lectern.

A raised judicial Bench can be represented in a video conferencing screen by fixing the judge at the top centre of the gallery, something tax courts in the UK have done. There is an issue, however, with criminal defendants who appear by video link into a courtroom for a trial in which they say nothing (as they are entitled to do). Their face usually appears, larger than life, on a raised screen as a sort of exhibit. If the person scratches their nose or scowls, everyone can see. If one tried to design a degradation ritual to cause maximum invasion of a person's privacy, it would hard to improve on an approach that fixes a camera on a person's face for hours on end and projects the enlarged image high on the wall in a room full of strangers.[4] This is not inevitable—in many Dutch courts, the life-sized image of the remote participant is at the same level as the in-court participants and it is in front of the judge, not off to the side.

A metaverse court has more flexibility and can place the participants in their normal courtroom positions, including giving the judge an elevated Bench if desired, as well as locating them at appropriate distances from other participants to the right level of formality. Defendants can be placed alongside counsel, behind them or anywhere else that is considered appropriate to communicate the message that they are innocent until proven guilty. The courtroom layout can be adjusted for different parts of the process—just as in Indigenous courts where judges routinely move between a Bench and sitting around the Bar table.

It seems likely that judges may have to establish their authority in a different way than they would in a physical courtroom. In one of our studies, in which research participants took part in a hearing as 'witnesses' or 'litigants' in relation to a neighbourhood tree dispute and were randomly assigned to either a face-to-face or virtual multi-screen condition, those who saw the judicial officer in person regarded him as

4 The term was developed by Harold Garfinkel, with particular reference to court hearings. See: Garfinkel (1956).

more authoritative (Tait & Tay, 2019). One way of interpreting this is that there could well be an authority deficit in a virtual condition that needs to be addressed. This might mean additional preparation is required for lay participants, as well as reminders of the seriousness of the process and guidance as to the expected demeanour of participants. However, what is considered 'authority' might not translate into acceptance of the fairness of the process or the decision. It could rather be an indication of perceived social distance and lack of affinity ('the judge is not one of us'), which might produce a feeling of intimidation or anxiety. The social levelling produced by technology might produce more genuine engagement, rather than disruptive defendants feared by courts. More likely it will have different effects on different people, so a range of strategies is likely to be required.

Moving rituals

Courtrooms are places of constant movement. When judges enter or leave the court, others stand. Streams of witnesses enter and leave the witness box, lawyers moving around to talk to each other, court officials scurry around, escorting witnesses, passing on documents or checking on recent court entrants, while audience members come and go.

Superficially it appears that in any sort of video-enabled hearing, the participants remain static—as faces in boxes (in a video conference) or avatars in position (in a metaverse court). In fact, these courts have their own forms of movement. When a person drops out of a video conference, including the judge, they typically appear in the gallery somewhere else, often in the bottom right corner. The active participants (e.g., lawyer and witness) might be 'spotlit' so they occupy two large boxes in the centre of the screen, while other court participants are relegated to the margins as thumbnails. The 'spotlighting' movement around the screen might be managed by the judge or a court official, or individual may 'pin' others in a similar way, for their own view only. Or a 'speaker' view (rather than 'gallery' view,) might be chosen so whoever is making the most noise at the time occupies the central position on the screen. This can mean that a person who coughs, laughs or shuffles paper becomes the central figure on the screen for a moment. This form of movement is therefore generally to and from the margins of the screen. If a defendant

does not testify, they therefore remain at the margins, as a thumbnail, for the whole process, which is at least less intrusive than being placed on a large in-court screen for a hearing by video link.

Participants in a video conference who do not have a speaking role, such as judge's associates, court clerks, technology officers, journalists and members of the public are typically consigned to black boxes—frames with a name but no face. Alternatively, a streaming version of the software may be used, giving such groups viewing and hearing access, but not speaking rights or a box in the gallery.

Because participants in a video conference are framed in boxes it might be assumed that they remain somehow frozen in place and the viewer notices only those who are speaking at the time. However, the eye tends to detect movement ('visual attention capture'), so anyone who moves significantly is likely to draw attention. For example, during an observation in the Australian Federal Court during the COVID-19 pandemic (observed from the judge's chambers), two barristers were on the screen arguing their points in turn. When one barrister was making his argument to the judge, the other lawyer was preparing what he was about to say, so had switched his microphone to mute and was chatting to his solicitor, writing notes, and looking at documents. He was facing sideways to the camera. In a regular courtroom, this would have been entirely normal and unlikely to attract any attention. In the Zoom court, it was hard (for the observer anyway) to focus on what the speaker was saying because of the extensive movement in the box alongside. It did not seem to distract the judge, who could have changed the spotlighting arrangement if he wished, but it did illustrate the way small movements can be magnified in this technological environment compared to in a physical courtroom.

For a video conference hearing, it is possible to create 'pathways to court' that provide a trajectory through the process. Zoom and Teams provide waiting rooms and breakout rooms that can be used to manage entrances and provide opportunities for consultations, negotiations or sidebars (discussions between judges and lawyers). The Pexip software used in Irish courts takes this one step further with greater customisation of these side rooms for different categories of participants. The moving rituals therefore, within video conference hearings, are not within the gallery (apart from transitions from thumbnails to spotlit places), but between rooms at different stages of the process.

For the metaverse courtroom, participants could in principle move around the virtual space—lawyers, for example, could walk over to a position in front of the witness box to examine the witness or approach the Bench to confer with the judge, while witnesses could enter the courtroom and walk into the witness box. In the prototype version, participants remain in their correct position for the duration of the process. Movements are restricted to standing up or sitting down and moving the head and upper body (including of course the hands). These are tracked by the user's webcam.

The metaverse courtroom might appear as a less chaotic place than a real courtroom. Not only is less movement shown around the courtroom but support staff who work to help the judge, barrister or witnesses might not be visible at all—the fewer avatars that are shown, the less pressure on bandwidth. However, the concept of having multiple rooms, developed for video conference hearings, could be used. In addition to waiting and breakout rooms, a metaverse court could provide an evidence room—a 3D space that court participants, including of course jurors, can be invited to 'walk through'. For this purpose, court participants might use 3D headsets.

There is another form of movement that participants in a virtual hearing make. It is the transition between the local and remote environments. This is clearly the case when participants enter a virtual environment from the comfort of their home (or the discomfort of the prison video room). During the hearing itself, however, participants may seek relief from their screen by looking out of a window or staring at a wall. Lawyers meanwhile are likely to move their attention constantly between the virtual hearing space and their local desk space, giving them access to case files, legislation, and other documents being used in the process. This double presence—being present in both local and virtual spaces—means that moving rituals are an inherent part of online justice hearings. It provides material for backstage talk as participants discuss their local environments, particularly technical challenges such as internet reliability, forgetting to mute or unmute sound, and needing to log in again.

Reflections

One of the possible impacts of both forms of virtual court that are examined here is a possible levelling effect, a narrowing of status differences. This seems to be the case if participants are all allocated equal-sized boxes in a Zoom gallery, but it could also apply to avatars drawn from a standard stock. The assemblage in this case would include constraints such as the Zoom boxes or the limited avatar wardrobe. But the assemblage would also include the rules about who gets to place participants in waiting rooms or breakout rooms, who decides whether to spotlight or use galleries at all, who allocates speaking turns or asks questions, and ultimately who gets to make decisions. So perhaps the appearance of increased egalitarianism is to some extent an illusion.

But it is an illusion that may have some benefits. An analogy with a physical courtroom might be that rather than the judge sitting far above the assembled multitude—six steps up as in Irish courts—they sit at about the same level, as in Danish, Swedish or Dutch courts. And rather than seeing the accused in a glass cage as in a French or English courtroom, they see them free and unconstrained, again as they would in a Danish, Swedish or Dutch court. In other words, the practices that are found in the jurisdictions that design their physical courtrooms according to human rights principles are closer to the practices made possible by the virtual court technologies being developed or used. The implication of this observation for future use of virtual courts is that jurisdictions that are the most conservative or restrictive in the design of their physical courts have the most to gain from virtual technologies.

Eliminating the human face as a source of information –which an avatar courtroom could do—sounds rather troubling, perhaps almost dehumanising. It could be justified perhaps for judges, who should arguably be seen to be neutral umpires who should try to leave their personal concerns at the door of the court, or for lawyers who have a responsibility as agents of the court. Standardised avatars for professionals might be considered just one step further than donning robes and sometimes wigs. But witnesses on the stand—is it not important to be able to detect a guilty conscience by the way the person fidgets, hesitates or avoids eye contact, in short, by their demeanour? And can't you generally tell if a person is guilty by whether they seem shifty, look

uncomfortable when others talk about them or feign boredom when the nature of their alleged crime is outlined? The answer to these questions is 'No'; these cues are generally unreliable (Vrije et al., 2019). Relying just on oral evidence has been found to obtain more accurate decisions than having images of the witness as well (McKimmie et al., 2014). In a metaverse courtroom, having standardised avatars may thus avoid providing potentially misleading visual information about the person behind the avatar. The rituals in this interactive environment, however, may tell us what sort of legal world is being reproduced and what sorts of subjects are being created.

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