



# Justice and Nonverbal Communication in a Post-pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges

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## Abstract

On 11 March 2020, the World Health Organization officially declared COVID-19 a pandemic. The new physical distancing rules have had many consequences, some of which are felt throughout the justice system. Courts across the world limited their operations. Nonetheless, given that justice delayed is justice denied, many jurisdictions have turned to technologies for urgent matters. This paper offers an evidence-based comment and caution for lawyers and judges who could be inclined, for concerns such as cost and time saving, to permanently step aside from in-person trials. Using nonverbal communication research, in conjunction with American and Canadian legal principles, we argue that such a decision could harm the integrity of the justice system.

**Keywords** Trials · Witnesses · Nonverbal communication · Facial expressions · Hand gestures · COVID-19

## Introduction

On 11 March 2020, the World Health Organization officially declared COVID-19 a pandemic. The resulting new physical distancing rules have had many consequences, some of which are felt throughout the justice system, a pillar of democracy for societies based on the rule of law. Courts across the world limited their operations. Nonetheless, given that justice delayed is justice denied, many jurisdictions have turned to technologies for urgent matters. The use of phone and computer applications such as Skype or Zoom to conduct trials instead of the usual in-person format raises concerns similar to those identified by legal scholars with regards to trials by videoconference, such as dehumanizing defendants (Eagly 2015; Salyzyn 2012). Importantly, the use of such applications also raises a number

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of commonly ignored issues related to the role of nonverbal communication during in-person exchanges. Because legal scholars and practitioners are rarely trained in research-based principles of nonverbal communication (with some even attending pseudoscientific lie detection seminars, Denault et al. 2020), there can be serious threats to the proper course of court proceedings. This paper offers an evidence-based comment and caution for lawyers and judges who could be inclined, for concerns such as cost and time saving, to permanently step aside from in-person trials.

First, we address the faulty historical premise that the role of nonverbal communication during trials is simply to determine who is lying and who is telling the truth. Second, we explain why a fair trial and a meaningful application of the presumption of innocence require, among other things, that lawyers and triers of facts be able to adequately see *patterns* of witnesses' nonverbal communication, not just their facial expressions. Finally, we call upon lawyers and judges to closely work with nonverbal communication scholars and, in turn, nonverbal communication scholars concerned about the actual state of democracy to address more directly the dynamics of courts and courtrooms.

## The History and Criticism of Demeanor Evidence

The use of nonverbal communication during trials goes back hundreds, if not thousands of years, whether it was to identify individuals who wanted to poison others by observing, among other things, the color of their face (Troville 1939; Wise 1845), or to ascertain the guilt or innocence of suspects through “Judgments of God” by examining scars resulting from physical procedures (Ford 2006; Kleinmuntz and Szucko 1984). To this day, in American and Canadian justice systems, for example, triers of facts (i.e., judges in bench trials or jurors in jury trials) are legally authorized to consider witness demeanor. According to the United States Supreme Court, triers of facts may judge a witness “by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief” (*Mattox v. United States* 1895, p. 242–243; see also *Coy v. Iowa* 1988). Likewise, the Supreme Court of Canada asserted that triers of facts have “the great advantage of watching the demeanor of all who testify” (*P. (D.) v. S. (C.)*, 1993, p. 192). More recently, the Supreme Court of Canada argued that facial expressions were important to conduct effective cross-examinations by lawyers and witness credibility assessments by triers of facts:

Non-verbal communication can provide the cross-examiner with valuable insights that may uncover uncertainty or deception, and assist in getting at the truth. Covering a witness's face may also impede credibility assessment by the trier of fact, be it judge or jury. (*R. v. N. S.* 2012, p. 743–744)

In keeping with the views of the United States and Canada's highest courts, triers of facts regularly turn to witness demeanor for credibility assessment. This approach, however, has been severely criticized (e.g., Blumenthal 1993; Minzner 2008; Timony 2000; Wellborn 1990). For example, meta-analyses have shown that nonverbal cues to detect lies are largely faint and unreliable and that lie detection accuracy using common visual nonverbal cues rarely exceeds chance (Bond and DePaulo 2006, 2008; DePaulo et al. 2003; Leach et al. 2016; Snook et al. 2017; Vrij and Turgeon 2018). Furthermore, judges in bench trials and jurors in jury trials hold erroneous beliefs about the validity of nonverbal cues to detect lies (e.g., Denault and Dunbar 2019; Heath 2009; Strömwall and Granhag 2003). For example, the popular belief that liars act nervously is not supported by empirical evidence

(The Global Deception Research Team 2006; Vrij 2008). These criticisms might seem consistent with limiting in-person trials and replacing them with phone and computer applications on a regular basis. We contend, however, that such a position would be misguided.

## Flawed Arguments Against the Importance of Witness Demeanor

There should be no doubt about the importance, if not the necessity, of recognizing the dangers of systemic biases and stereotypes in courtrooms. Rape myths, for example, distort the outcome of trials and allow perpetrators to escape justice (Dinos et al. 2015; Leverick 2020). The same holds for erroneous beliefs about the validity of nonverbal cues to detect lies. Indeed, as Denault and Dunbar (2019) point out, expectations about how honest and dishonest witnesses are supposed to behave influence witness credibility assessments. And according to the Supreme Court of Canada, “credibility is an issue that pervades most trials, and at its broadest may amount to a decision on guilt or innocence” (R. v. Handy 2002, p. 951).

Arguing against in-person trials, however, because common visual nonverbal cues to detect lies are largely faint and unreliable fails to recognize that many vocal and verbal cues to deception are also largely faint and unreliable (DePaulo et al. 2003). In addition, novel lie detection techniques using verbal cues, and promoted as alternatives to nonverbal cues (Snook et al. 2017; Vrij and Fisher 2016; Vrij and Granhag 2012; Vrij and Turgeon 2018), were developed for investigative interviews, not for real-life court proceedings (Denault and Jube 2018; Denault et al. 2019a). As Denault and Dunbar (2019) argue, those techniques ignore characteristics of adversarial justice systems, including the more passive roles of judges and jurors. In addition, the nature of questions asked by lawyers during real-life examinations and cross-examinations are often different from those in experimental settings. The same holds for the answers of witnesses in courtrooms. As Scheppele (1989) points out,

Stories may diverge, then, not because one is true and another false, but rather because they are both self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense of events. (p. 2082)

Furthermore, arguing against in-person trials because of erroneous beliefs about the validity of nonverbal cues to detect lies overlooks the fact that triers of facts also hold erroneous beliefs about the validity of vocal and verbal cues to deception, and that “lawyers performing cross-examination can draw witnesses into these cues to make them appear nervous and untruthful” (Denault et al. 2019a, p. 5; see also Denault and Dunbar 2017, 2019; Denault et al. 2019b; Strömwall and Granhag 2003). For better or worse, common sense is an integral part of judicial reasoning (Burns 2016; Cochran 2013; Friedland 1989). Judges in bench trials and jurors in jury trials use it for more than evaluating demeanor and are authorized to do so in making their decisions. As the Supreme Court of Canada notes, “credibility must always be the product of the judge or jury’s view of the diverse ingredients it has perceived at trial, combined with experience, logic and an intuitive sense of the matter” (R. v. Marquard 1993, p. 248). In other words, the belief that ignoring faces and bodies will result in more rational judicial reasoning, without further adverse consequences, is not supported by empirical

evidence. In fact, the importance of nonverbal communication during trials involves much more than simply characterizing witnesses as liars or truth-tellers.

## The Role of Nonverbal Communication During Trials

Although crime drama television series, such as *Lie To Me*, have brought the topic of deception detection to the forefront in recent years (Serota 2014), nonverbal communication has been subject to thousands of peer-reviewed publications since the 1960s. Scholars across several academic disciplines have shown that, during in-person exchanges, our face and body serve a variety of functions beyond lie detection (Patterson 1983, 2011). As Hall et al. (2019) emphasize,

The breadth of topics that relate to NVC [nonverbal communication] is quite wide, in accordance with its many functions, which include displaying affect (such as anxiety or happiness), revealing attitudes (such as interest, prejudice, or intimacy), regulating interaction (such as taking turns or directing attention), managing impressions (such as by presenting oneself as competent or brave), revealing physical and mental conditions (such as pain or mental disorders), and exerting interpersonal control (as in displaying dominance). (p. 273)

Nonverbal communication refers to the sending and/or receiving of information through a variety of environmental cues, appearance features, and nonverbal cues and behaviors such as facial expressions, gaze patterns, postures, and body movements (Hall and Knapp 2013; Manusov and Patterson 2006; Matsumoto et al. 2016; Patterson 2011). Thus, the design and arrangement of courts and courtrooms, as well as the appearance features and the nonverbal cues and behaviors of judges, jurors, court clerks, security guards, defendants, witnesses, and lawyers, all affect the course of court proceedings. Their facial expressions, gaze patterns, postures, and body movements convey interpersonal and social information, such as their appraisals, concerns, and dispositions about a situation. In addition, these nonverbal cues and behaviors signal their behavioral intentions, and create impressions among those present in courtrooms and in public observing them, without a single word being uttered (Hall et al. 2019; see also Blanck et al. 1990; Remland 1994; Searcy et al. 2004).

In the case of bench and jury trials, the opportunities to observe nonverbal behaviors include the following: (1) when judges talk to witnesses and lawyers; (2) when witnesses testify; (3) when lawyers examine and cross-examine witnesses; (4) when lawyers make their opening and closing arguments; and (5) when lawyers and clients talk. Moreover, “third-party” expressive reactions by judges, jurors, defendants, witnesses, and lawyers to other interaction participants precipitate evaluations about the course of events. In other words, nonverbal communication, which includes much more than just the speaker’s face, provides participants feedback to coordinate and manage in-person exchanges on a moment-by-moment basis in the service of participants’ goals (Harrigan 1985, 2005; Patterson 2019; Rossano 2012). As Patterson (1995) describes,

... interactants simultaneously act with, and form impressions of, their partners. Thus, individuals are encoding information, feelings, intentions, scripts, or other reactions into behavioral expression while, at the same time, decoding the behavior of the partner and experiencing feedback from their own behavior. (p. 6)

Very few nonverbal cues and behaviors have definite signification. As reiterated by Hall et al. (2019), “contextual factors involving encoders’ intentions, their other verbal and nonverbal behaviors, other people (who they are and their behavior), and the setting will all affect meaning” (p. 272). In addition, how people understand and adapt to facial expressions, gaze patterns, postures, and body movements often happen outside of awareness (Patterson 2019), including through nonconscious mimicry (also known as the “chameleon effect”), that is, the automatic tendency to imitate the behavior of others (Chartrand and Bargh 1999; Hess and Fischer 2014). Nonconscious mimicry also has many other prosocial consequences between interaction participants, including the increase in accuracy of emotion perception, in displays of helpful behaviors, and in feelings of liking, empathy, and trust (Chartrand and Lakin 2013).

Although facial expressions, gaze patterns, postures, and body movements have garnered much attention (Plusquellec and Denault 2018), “a large body of research shows that hand gestures produced during speech are, along with the words, part of an integrated speech production system” (Hall et al. 2019, p. 272). For example, in a variety of contexts, the speaker’s hand gestures can reduce demand on working memory and facilitate speech production (e.g., Cook and Fenn 2017; Cook et al. 2012; Krauss et al. 2000; Ping and Goldin-Meadow 2010), provide information on their own, and improve the listener’s understanding of the speaker’s verbal information (e.g., when the speaker’s verbal information is equivocal) (Goldin-Meadow and Alibali 2013). In addition, listeners producing hand gestures themselves can enhance their understanding of the speaker’s speech (Dargue et al. 2019; Hostetter 2011).

Finally, although the use of phone and computer applications such as Skype or Zoom limit the breadth of view and the ability of lawyers and triers of facts to choose their focus, it could be argued that the behavioral information is simply different. For example, contrary to in-person trials where judges in bench trials and jurors in jury trials may be many feet away, facial characteristics of witnesses could be viewed better on phone and computer screens. This could introduce, however, other concerns about the course of court proceedings. When the focus is primarily on the face, for example, the potential impact of facial characteristics increases. This is not to be taken lightly. Facial characteristics can adversely influence the evaluation of evidence and the sentence of defendants, even when they are subject to the death penalty (Porter and ten Brinke 2009; Porter et al. 2010; Wilson and Rule 2015, 2016).

Our brief overview describes the pervasive and complex role of nonverbal communication during in-person exchanges, including those in courtrooms. Because one of the main functions of judges in bench trials and jurors in jury trials is to understand witnesses, and to ascertain the sometimes complex facts to which the law will apply (Bell 2013; Denault et al. 2019a; Denault and Jupe 2018; Paciocco 2010), the critical role of nonverbal communication in courtrooms should be weighed before limiting in-person trials and replacing them with phone and computer applications on a regular basis. The Supreme Court of Canada emphasized that “credibility is an issue that pervades most trials, and at its broadest may amount to a decision on guilt or innocence” (R. v. Handy 2002, p. 951) and that “effective cross-examination is integral to the conduct of a fair trial and a meaningful application of the presumption of innocence” (R. v. N. S. 2012, p. 743; see also *Mattox v. United States* 1895). Permanently moving away from in-person trials could interfere with the conduct of effective cross-examinations by lawyers and witness credibility assessments by triers of facts, and ultimately, harm the integrity of the justice system.

## The Use of Phone and Computer Applications: A Call for Caution

This paper offers an evidence-based comment and caution for lawyers and judges who could be inclined, for concerns such as cost and time saving, to permanently step aside from in-person trials. First, we addressed the faulty historical premise that the role of nonverbal communication during trials is simply to determine who is lying and who is telling the truth. Second, we explained why a fair trial and a meaningful application of the presumption of innocence require, among other things, that lawyers and triers of facts be able to adequately see the *patterns* of witnesses' nonverbal communication, not just their facial expressions. As we have noted, nonverbal cues can also be misleading and result in systematic biases and stereotypes.

There should be no doubt that during the COVID-19 pandemic, technology allows triers of facts to listen to witnesses, albeit imperfectly, and to resolve urgent disputes (e.g., Abruzzese 2020; Boisvert 2020; Burns 2020; Gerstein 2020; Ibrahim 2020; Mathieu 2020; McLachlin 2020; Reynolds 2020; Schmitz 2020). And it is evident that in some delicate situations, technology (e.g., CCTV) can facilitate the testimony of vulnerable individuals, such as rape victims and child witnesses (e.g., Bennett 2003; Hamilton et al. 2017; Kenniston 2015). These accommodations are also recognized by the US Supreme Court and the Supreme Court of Canada (Maryland v. Craig 1990; R. v. J. Z. S. 2010).

Nevertheless, before extolling the merits of phone and computer applications, the multiple functions of nonverbal communication should be carefully considered, as should other concerns raised by experts. Legal scholars have written about various adverse consequences of trials by videoconference (e.g., Cimino et al. 2014; Diamond et al. 2010; Donoghue 2017; Federman 2006; Marr 2013; Poulin 2004; Walsh and Walsh 2008). These consequences not only include dehumanizing defendants (Eagly 2015; Salyzyn 2012), but also compromising their right to effective counsel assistance (Johnson and Wiggins 2006), and hindering the image and the role of judges, the symbolic function of courthouses, and the law's legitimacy and authority (Rowden 2015; Rowden and Wallace 2018; Salyzyn 2012). Concerns raised by practitioners should also not be overlooked. For example, in the absence of in-person trials, it is difficult, if not impossible, to know if someone not visible on the screen is coaching witnesses, or if witnesses are consulting unauthorized documents to assist in their examination and cross-examination (Bermann 2020). In addition, inadequate access to computers and high-speed internet could lead to severe equity problems (Offit 2020).

In light of all of these issues, lawyers and judges can closely work with nonverbal communication scholars in the pursuit of improving the administration of justice in a post-pandemic world. The steadily growing body of research-based principles of nonverbal communication can assist in establishing evidence-based practices for in-person trials. And nonverbal communication scholars concerned about the actual state of democracy might address more directly the dynamics of courts and courtrooms, as well as conducting further collaborative research on these matters. In spite of the challenges of researching justice systems, such efforts provide an opportunity for nonverbal communication scholars to contribute to the betterment of society.

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