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## A CRITICAL ANALYSIS OF THE ONLINE COURT

DORON MENASHE\*

### ABSTRACT

It is no secret that many judicial systems across the globe are stumbling beneath a heavy burden of thousands of suits filed every year in court. The need to optimize the judicial system of England and Wales led Lord Justice Briggs to write a comprehensive report about the subject, in which he suggests the establishment of a model, the first of its kind in the United Kingdom, which he terms the "Online Court." In *Civil Courts Structure Review: Final Report*, he sets out the details of this Online Court, which I will analyze in this article.

The article contains two main parts. In the first part, the model is analyzed and broken down by its three stages. The advantages inherent to the Online Court are presented, including: saving time and money, making the court accessible to the disadvantaged, and reducing the caseload of each courtroom. Although there are many advantages, the Online Court has some serious drawbacks, including enabling frivolous lawsuits and the threat of identity theft by either party or even by a third party.

In the second part, I will attack the crux of the matter, tackling the attendant issues raised by moving legal proceedings to a virtual environment. These aspects relate to the absence of legal representation envisioned by the model, as well as the concern of false testimony.

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\* Associate Professor and Head of the LLM Program for Adjudication and Criminal Procedure, Faculty of Law, University of Haifa, Israel. I am greatly indebted to Guy Sender, Inbal Av, Lotem Zagagy, and Eyal Groner for their excellent contribution.

In the final analysis the pros of this model far outweigh the cons. Indeed, the model is a desirable template which should first be employed as a pilot program, dealing with civil proceedings which may be easily resolved and claims involving relatively small amounts of money. Further down the road, this model may be applied to additional proceedings involving cases which are more expensive or more complex.

Ultimately, the online legal system proposed constitutes the first step toward accommodating the court system to the innovative reality of the Internet Age, in a manner which is both systematic and controlled. The aim is to streamline existing legal proceedings and to make all legal services accessible, with the overarching ideal of "justice for all" as the guiding principle.

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## 1. INTRODUCTION

With the advent of the Internet, there have been numerous technological innovations and developments penetrating every domain of society, simultaneously offering vast improvements in communication and information, while presenting challenges with protecting privacy and sensitive information.<sup>1</sup> At the same time, the pace of change in life is quite rapid - access to information and the need for efficiency have motivated many institutions, in the private and the public sector to transfer at least some of their activities and services to websites they manage.<sup>2</sup>

These activities have contributed both to social and economic connections, primarily saving time and money; existing backlogs have been reduced, processes have been streamlined, and wait times have been minimized.<sup>3</sup> To encourage the public to use these online services, sometimes there is a discount for those who pay through the website. Moreover, there is often a quick-service counter set up at the offices of these institutions for those who order or pay online, as will be discussed below.

Using a website is accessible, convenient, and user-friendly. With the push of a button and from the convenience of one's home, it is now possible to pay most bills, including electric, water, and property taxes. One can even buy airplane tickets online at a discount. The Internet provides many and sundry services. The inherent advantage in moving certain activities online has not escaped the attention of the courts. It is no secret that justice systems in many countries are overburdened by a backlog of thousands of suits filed annually.<sup>4</sup>

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<sup>1</sup> See also Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] To Privacy*, 80 ANTI-TRUST L. J. 121 (2015) (discussing privacy in the context of consumer protections and competition).

<sup>2</sup> For more information on the contribution of the transition to digital government systems, see Executive Office of the President, *Digital Government: Building a 21<sup>st</sup> Century Platform to Better Serve the American People*, <https://obamawhitehouse.archives.gov/sites/default/files/omb/egov/digital-government/digital-government.html> [<https://perma.cc/KAV9-8JLM>] (describing the Digital Government Strategy initiative by Former President Barack Obama).

<sup>3</sup> *Id.*

<sup>4</sup> Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, Judiciary of England and Wales (2016), 48-49, <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> [<https://perma.cc/6AS7-XM4M>] (providing Lord Justice Briggs's final re-

The quantity of suits is daunting, especially considering that the number of judges is limited, and each courtroom bends under the weight of so many cases. This may be seen, *inter alia*, by the absurd length of time a case takes to wend its way through the court, from the moment it is filed until it is finally resolved.<sup>5</sup> Potential reforms in Israel and around the world to reduce this burden, will be considered below.

This article will analyze the civil courts structure report<sup>6</sup> written by Lord Justice Briggs, which presents a model for a courtroom on the Internet, the first of its kind in England, known as the Online Court. This article will answer the following question: is the online court a worthy model? Beginning in England and Wales, the system subjects cases of less than twenty-five thousand pounds to an expedited process, transferring them from conventional courtrooms to the Internet. The model is predicated on three essential stages.<sup>7</sup>

The first stage requires the claimant to fill out forms online. The judge adds relevant scanned documents. Subsequently, the file moves on to the respondent, who also fills out forms and scans documents. At this stage, each party has the opportunity to express anything they find relevant and germane to the suit. Moreover, once the documents have been filed, there is an opportunity for the parties to communicate and seek arbitration.

At the second stage, a clerk receives the documents and inspects them to ensure all forms have been properly filled out and all necessary documents have been submitted. Each party can amend and complete missing details and documents. Similar to the current procedure, the court can offer arbitration.

The third and final stage, is the judge's decision. The judge

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port of the civil courts); *see also* Lady Justice Arden, *The Judicial System of England and Wales: A Visitor's Guide*, Judicial Office International Team (2016), <https://www.judiciary.gov.uk/wp-content/uploads/2016/05/international-visitors-guide-12.pdf> [<https://perma.cc/S2XM-NK6S>] (providing Lady Justice Arden's report on the courts, tribunals, and justice systems in England and Wales).

<sup>5</sup> For details about the quantity of cases handled by English courts according to legal discipline, *see* Arden, *supra* note 4 at 17; Concerning the ills of the English court system, *see* Owen Bowcott, *Online court proposed to resolve claims of up to £25,000; Civil justice council calls for Internet-based dispute resolutions system similar to eBay's to be available within two years*, THE GUARDIAN (Feb. 16, 2015), <https://www.theguardian.com/law/2015/feb/16/online-court-proposed-to-resolve-claims-of-up-to-25000> [<https://perma.cc/8NWH-USSG>].

<sup>6</sup> *See* Briggs, *supra* note 4.

<sup>7</sup> *Id.*

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may hear testimony and ask for additional information or clarifications from either party by way of an online hearing, a conference call, or submitting documents. Only as a measure of last resort, if the case proves to be complex or an appeal filed, there is a face-to-face trial.

In discussing the pros and cons of the model, other questions will emerge regarding establishing a courthouse on the Internet. The core issues of an online proceeding are: should the online court be a new court or part of the conventional court system? Should the online court have an independent legal framework? Moreover, which cases may be resolved in the framework of this court? Should the online court be a mandatory or voluntary proceeding? How does the framework deal with people who have difficulties with computers? What are the forms of payment? What are the grounds for appeal? How can the online court be secured?

This article has two main parts. In the first part, I will examine the three stages of the online court model and will try to respond to some of the complex above-mentioned questions. In the framework of the debate, I will look at the advantages inherent in the online court, including: saving time and money, access to the courts for the disadvantaged, an easier division of labor for judges dealing with online court cases, expanding the scope of issues which the court may handle, etc.

Nevertheless, aside from the above-mentioned advantages, the online court does have some serious, but not inconsiderable drawbacks, to which attention must be paid and for which solutions must be found. For example, I will discuss the fact that the online court opens the door for frivolous lawsuits; the danger of identity theft by one of the parties or by a third party; the need to train judges to use this technology; crafting a legislative framework which accommodates the model of the online court; the lack of the intimidation factor usually experienced by witnesses when they give sworn testimony in court; the concern that without face-to-face communication, the judge will not be able to evaluate the witness's appearance, testimony and indicators of reliability; the concern of securing the litigants' information; and dealing with leaks.

In addition, I will discuss how to relocate the case to a regular courthouse and the methods of appeal. As the reader shall see, most of these disadvantages may be easily dealt with.

In the second part, I will deal with the meat of the matter, concerning additional aspects which arise in our view from holding a trial in a virtual environment. These aspects are linked to the issue

of the lack of legal representation and the concern of error. In addition, I will delve into the debate concerning the problematic nature of testimony in a virtual environment; the concern about false testimony grows with the absence of the pomp and circumstance associated with testifying in court. I will suggest tools to deal with this problem, proposing a normative model which will give judges wide discretion to give any order or remedy, or alternatively to rule on costs in exceptional circumstances. After taking into account the pros and cons of the online court model, in the final analysis the former outweighs the latter.

## 2. DISSECTING THE THREE-STAGE MODEL OF THE ONLINE COURT

This is not the first of its kind; the legal literature shows that other models of online courts have been employed. In the United States, the state of Michigan set up a model for an online court to deal with business and commercial suits of more than twenty-five thousand dollars. This virtual courtroom was built as a pilot program by the College of William & Mary Law School,<sup>8</sup> the National Center for State Courts and its Court Technology Laboratory.<sup>9</sup> In addition, there are American courts in which hearings are held us-

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<sup>8</sup> *Id.* To expand on the idea of a courthouse on the Internet, see generally Lucille M. Ponte, *The Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse*, 4 N. C. J. L. & TECH. 51 (2002).

<sup>9</sup> Established in 1993, the Courtroom 21 project is a collaborative effort between the College of William & Mary Law School and the National Center for State Courts (NCSC) and the NCSC's Court Technology Laboratory. Courtroom 21 at the McGlothlin Courtroom is considered to be one of the most technologically advanced courtrooms in the world. Courtroom 21 provides training programs on courtroom technology and seeks to act as a resource for those studying and considering the use and impact of technology on court processes; see CENTER FOR LEGAL & COURT TECHNOLOGY, <http://www.legaltechcenter.net> (providing information on the Courtroom 21 project). See also Frederic I. Lederer, *Courtroom Practice in the 21st Century*, TRIAL 1 (July 1999), <http://www.ncsc.dni.us/NCSC/TIS/TIS99/CtromtecTrial2.html> and Frederic I. Lederer, *The Courtroom as a Stop on the Information Super Highway*, 71 THE AUSTL J. L. REFORM 4, (1997), <http://www.courtroom21.net/About.Us/Articles/AUSTLREF.HTML> (describing the implications of technological advancements in the courtroom). The project considers itself to be the model for the proposed Michigan Cyber Court. Press Release, *Immersive Virtual Reality to Be Used in Groundbreaking Experimental Trial* (n.d.), <http://www.courtroom21.net/Currentevents/Currentevents.htm> (last visited June 27, 2002) (on file with the North Carolina Journal of Law & Technology).

ing conference calls.<sup>10</sup> Similarly, there are courts operating now in an advanced-technology environment and with digital aids, such as the Florida court system.<sup>11</sup>

Another example of extending the activities of the court beyond the courthouse walls via the Internet has been partially implemented in Israel using the "Net Hamishpat" system of the judiciary,<sup>12</sup> which computerized clerkship in the court system. The president of the then Supreme Court Beinisch pointed to the contribution of Net Hamishpat in her ruling on *The Association for Civil Rights in Israel v. Minister of Justice*<sup>13</sup> noting that the website increased immeasurably the access of the Israeli public to the courts and their rulings.<sup>14</sup>

On the one hand, this initiative of computerizing the courts contributed to the greater public and to those who deal professionally with the legal system by increasing efficiency and availability, cutting wait times, and simplifying the process. On the other hand, its implementation brought to the surface a number of deficiencies, some technical and some inherent, which may inform the English online court model of some of the difficulties which it may face.<sup>15</sup>

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<sup>10</sup> See Susan Nauss Exon, *The Internet Meets Obi-Wan Kenobi in the Court of Next Resort*, 8 B.U. J. Sci. & Tech. L. 1, 5-6 (2002) (discussing the impact of the Internet on the judicial decision-making process).

<sup>11</sup> See Lin Walker, *Courtroom 23, Orange County Florida*, CT. TECH. BULL. (1999), <http://www.ncsc.dni.us/NCSC/TIS/TIS99/CTB/1999/PIPCTrm23.htm> [<https://perma.cc/3ZWX-9CVF>] (discussing Courtroom 23, a technologically-advanced courtroom); see also *Courtroom 23+*, *Courtroom 23*, [http://www.ninja9.org/courtadmin/mis/courtroom\\_23.htm](http://www.ninja9.org/courtadmin/mis/courtroom_23.htm) [<https://perma.cc/VRR4-L9WU>] (providing information on Courtroom 23, a technologically-advanced courtroom).

<sup>12</sup> Israel Courts Official Website, *Net Hamishpat* (2003) [Hebrew], <https://www.court.gov.il/NGCS.Web.Site/HomePage.aspx1> [<https://perma.cc/DV83-2AM5>].

<sup>13</sup> Arbel, Dan, *Computerization of the Courts in the 2000s* (1999) [Hebrew] <http://elyon1.court.gov.il/heb/rashut/alon/arbel.doc> [<https://perma.cc/DV83-2AM5>]. The system is based on the "electronic lawsuit" concept, also known as the paperless courthouse. The system, inter alia, allows one to file suit electronically, with a lawyer uploading the suit form his office without handing in files and claims to the court clerk. In addition, documents and affidavits may be scanned in, petitions and appeals filed, court dates set, decisions received, files consulted and many other services.

<sup>14</sup> HCJ 5917/97, *The Association for Civil Rights in Israel v. the State of Israel*, NEVO (Aug. 10, 2007), [https://www.nevo.co.il/psika\\_html/elyon/97059170-n25.htm](https://www.nevo.co.il/psika_html/elyon/97059170-n25.htm) [<https://perma.cc/EL9S-9S7C>].

<sup>15</sup> For the obstacles encountered at the launch of the *Net Hamishpat* system, see Annual State Comptroller's Report #60B, *Actions & Criticism: Processes and Ac-*

It is not inconceivable that a system which for decades employed adversarial, frontal debate, when transferred to a parallel web interface, may give rise to several difficulties. There is a broad consensus that the model is desirable and must from its inception be based on easily-resolved civil proceedings and relatively small amounts of money. In this setting, I deal with the question of opt-in versus opt-out services. The former applies the model to all proceedings, afterwards mapping what appears to not fit in the system. The latter proposes first using this system for minor proceedings and afterwards adding more and more complex proceedings. I support the former model, although he argues that the first cases to be tried this way should not be small claims, but rather civil suits of up to twenty-five thousand pounds, to be settled in an expedited process based on the innovative method of litigants conducting the trial online without legal representation.

The pilot program should be applied to small claims specifically. Currently, in small-claims cases, the parties are not represented by lawyers, and the rules of evidence usually observed in court are not enforced. Only after the online court has been fully implemented for small claims, with all the attendant deficiencies and amendments, can this model be applied to more complex and expensive cases.<sup>16</sup>

The next part will focus on the problems inherent in a lack of representation. A close analysis of the English court system reveals an unfortunate situation of excessive pressure on the courts, with exorbitant court costs and a shocking backlog.<sup>17</sup> The price of justice is far too high, beginning with the fees for legal representation and spreading to other areas, so the legal system serves the interests of the well-off, while the disadvantaged cannot enjoy the legal services the courts are supposed to provide, which often prevents them from ever filing suit.<sup>18</sup> Transferring the courtroom to the virtual realm allows the service to become better and more efficient, saving time and money and promoting justice for all. True, it demands a costly investment at the outset, but the ongoing costs for the court system will be significantly less compared to current

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*tivities to Computerize the Courts* (2010), [http://www.mevaker.gov.il/he/Reports/Report\\_292/fa399d37-04ae-462b-bf33-7e29aae86e2a/part238-mishpatim.docx](http://www.mevaker.gov.il/he/Reports/Report_292/fa399d37-04ae-462b-bf33-7e29aae86e2a/part238-mishpatim.docx) [<https://perma.cc/X3T3-3XSF>].

<sup>16</sup> Ponte, *supra* note 8 at 61.

<sup>17</sup> Briggs, *supra* note 4 at 48-49.

<sup>18</sup> See *id.* at 51-52 (discussing the price of litigation and also work-hour losses caused by spending time waiting in a court).

costs, without the online option. Savings will be realized in terms of construction, organization, administration of the courts (maintenance, security, visitors' services, office and clerk costs), and a drastic reduction in office work and paperwork.

Another advantage will be to make it easier to file a claim, without excessive effort or peril and without unnecessary costs of precious time or resources. Thus, for example, forms may be filled in online and documents may be scanned and uploaded, circumventing the current onerous process of handing in every relevant piece of paper by hand.<sup>19</sup> In addition, through using the interface, the parties may formulate their claims in a far better manner. Similarly, if the litigants so wish, they may reach a stage at which the decision will be made by a qualified judge.

On the other hand, in order to prevent frivolous claims, a method of filtering must be employed, so that parties filing such claim will be found liable for costs.<sup>20</sup> An additional advantage is that judges will have more free time to deal with cases in the conventional court, while the division of labor for judges in the online court system can be split into shifts spread out over the duration of the day.<sup>21</sup> The quantity of the judges working in the online court will depend on the quantity of claims filed via the website. For this purpose, it is essential that the judges go through technological training for working online.<sup>22</sup>

In addition, it is necessary to pass appropriate legislation that will accommodate online court, responding to the challenges posed by the work of adjudicating online,<sup>23</sup> including the lack of frontal, adversarial proceedings allowing the parties to use their represent-

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<sup>19</sup> See, e.g., Ponte, *supra* note 8, at 80 (discussing streamlining the cyber court process to leverage the benefits of current online technologies); Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High-Technology Courtrooms*, 50 S. C. L. REV. 799, 803-807 (1999) (explaining how modern technologies are the foundation of online court systems); Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 L. & CONTEMP. PROB. 253, 266, 272-273 (2001) (discussing issues arising from electronic discovery).

<sup>20</sup> But see Theodore Eisenberg et al., *When Courts Determine Fees in a System with a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 UCLA L. REV. 1452 (2013) (noting that prevailing parties are not always awarded costs).

<sup>21</sup> See Ponte, *supra* note 8, at 59 (discussing judges appointing procedure in a Michigan Cyber Court).

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., Hanoch Dagan, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* 31-32 (1997).

atives to expose the core issues at the heart of the conflict before the court. Instead, the verdict is based on documentation presented by the parties, and if necessary, hearings to take place on the internet.

The online court will be able to take advantage to technological aids, such as telephone and internet conference calls, carried out on computer screens.<sup>24</sup> In a case where the proceedings take place without attorneys, filing in online court will be unattractive for parties such as business executives, since they will have to fill in all the information themselves, an activity which they are used to delegating. Regarding forms, it will naturally be impossible to verify the identity of the person filling in the document, and nothing prevents the litigants from using legal staff to assist in the process.<sup>25</sup> If this is the case, there is no doubt that the advantages of holding hearings online will be particularly attractive to those companies dealing with lawsuits on a daily basis. Whether a lawyer participates or not has little bearing on the need for the litigant to be present at a hearing, the way these are held in physical courtrooms today. When the testimony is offered in a virtual environment and by way of an office computer screen, this will allow businessmen and executives to continue their daily routine with maximum efficiency and without having to personally appear with their representatives in court, possibly wasting valuable work-hours in courtroom argumentation.<sup>26</sup>

Granted, one of the problems of holding a trial in a virtual environment, is where the litigant testifies; the litigant could be in an environment they find most comfortable, home or office. This situation lacks the awe which usually attends to appearances in the courtroom, with the ceremony and physical presence of a judge.<sup>27</sup> In an online case, the parties testifying may feel free—perhaps ex-

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<sup>24</sup> See Fredric I. Lederer, *Courtroom Technology: For Trial Lawyers, the Future Is Now*, 19 CRIMINAL JUSTICE MAGAZINE 14 (2004) (discussing technology related issues and ways of resolving them).

<sup>25</sup> Cf. Bowcott, *supra* note 5 (“About 80% of the UK population are estimated to be internet users . . . and only 3% of the adult population have no one who can help them go online.”). The new Internet model proposes that the court administration will provide help to those facing difficulty in filling out the forms and providing documents, see Azeez, *infra* note 43 (“There is also a help desk at the County Court Bulk Centre.”).

<sup>26</sup> Cf. Gordon Bermant & Winton D. Woods, *Real Questions about the Virtual Courthouse*, 78 JUDICATURE 64, 67 (1994).

<sup>27</sup> Cf. Marilyn Krawitz & Justine Howard, *Should Australian Courts Give More Witnesses the Right to Skype?*, 25 JOURNAL OF JUDICIAL ADMINISTRATION 44 (2015).

cessively so — to testify falsely.<sup>28</sup>

However, without being dismissive of this challenge, today a considerable portion of the testimonies presented in civil proceedings are gathered by deposition. A witness seeking to deceive may easily do so through a deposition. If a situation arises where the testimony's reliability is unclear, or if the case is appealed on this ground, the classic court would take over.<sup>29</sup>

It seems, then, that if the choice is between audio and video communications, the latter is certainly preferable.<sup>30</sup> That is due to the reasons mentioned above, in addition to the difficulty faced by a judge attempting to evaluate a witness's testimony, appearance and signals of reliability.<sup>31</sup> Furthermore, as long as video cross-examination is possible, most of the advantages of confrontation are maintained. Therefore, it is not certain that the difference between video and in-court testimony is so vast as to justify sacrificing the efficiency inherent to the online court. After all, the epistemic interpretation of body language, even based on face-to-face observation, is far from being precise. Complex concerns and questions are raised by the online court model, but the serious advantages in efficiency might outweigh any disadvantages. In Part 3 of this article, I will discuss additional issues related to testimony in a virtual environment and methods for dealing with them.

Those who support the rule of administrative justice would agree that procedural efficiency is a value worth advancing, even more than others, such as the pursuit of truth and justice. Their opponents would counter that a just trial is difficult to produce in a virtual environment, and the nature of the proceeding strays from the classic adversarial system,<sup>32</sup> being more similar to the French

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<sup>28</sup> See, e.g., Russell Kostelak, *Videoconference Technology and the Confrontation Clause*, at 5, Cornell Law School J.D. Research Papers, Paper 33, CORNELL LAW LIBRARY (Apr. 24, 2014), [https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1049&context=1ps\\_papers](https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1049&context=1ps_papers) [<https://perma.cc/92QG-54XA>].

<sup>29</sup> Cf. Richard Susskind, *Online disputes: Is It Time To End The 'Day In Court'?*, THE TIMES (LONDON), February 26, 2015 ("If complex claims were to come before online facilitators or judges, we would expect them to assign these to the traditional court system. Online dispute resolution is not suitable for all cases.").

<sup>30</sup> See Lederer, *supra* note 24.

<sup>31</sup> See Kostelak, *supra* note 28, at 4 (discussing reliability of modern technology in online courts); Krawitz & Howard, *supra* note 27, at 8 (discussing use of skype for witness testimonies).

<sup>32</sup> The adversarial justice system relies on two parties, represented by counsel, presenting their strongest arguments to the court, which arguably makes the

model, where the judge is also the investigator.

The quality of justice is not adversely impacted in the transition to an online setting, as contemporary real-life courtrooms do not have the capacity to deal with their caseloads within reasonable timeframes. The fact that some litigants may expect the legal system to address their claims for years on end demonstrates that whatever justice is offered in the current system, it is left wanting. Today, most legal disputes never reach a verdict by a judge or jury; rather, the parties most often reach a settlement. Thus, the second stage I propose does not drastically change the status quo.

Using the online mechanism, many conflicts may be resolved in a more efficient and speedy manner, some being resolved without the involvement of a judge (the second stage in the proceeding). Ultimately, promoting efficiency might also promote justice, by making courts easier to utilize and more accessible, while preventing delay in the legal process.

Today, it is also appropriate to integrate the process of alternative dispute resolution<sup>33</sup> into the online model, so it will be carried out in the virtual courthouse. Appropriate cases may be routed towards this kind of process, which often produces an efficient and inexpensive result, while maintaining the consent and participation of both parties.<sup>34</sup> This may be termed ODR (“Online dispute resolution”).<sup>35</sup>

An essential element of the proposed model is the identification of the parties.<sup>36</sup> This is a challenging problem, because, in a forum where any person may file a claim, it is important to prevent

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investigation of the truth an easier task for the court. See, e.g., Robert Gilbert Johnston & Sara Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 J. MARSHALL L. REV. 147 (2002); Gerald Walpin, *America's Adversarial and Jury Systems: More Likely to Do Justice*, 26 HARV. J. L. & PUB. POL'Y 175 (2003).

<sup>33</sup> For an introduction to alternative dispute resolution in the U.K. court system, see Arden, *supra* note 4, at 18.

<sup>34</sup> See, e.g., Michael R. Hogan, *Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation*, 27 WILLAMETTE L. REV. 429 (1991); Jeffrey A. Parness, *Improving Judicial Settlement Conferences*, 39 U. C. DAVIS L. REV. 1891 (2006).

<sup>35</sup> ETHAN KATSH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES* 17-24 (Oxford University Press 2017).

<sup>36</sup> Cf. Md Nadeem Ahmed, *A Model for Protecting Online Banking Using Transaction Monitoring*, INTERNATIONAL JOURNAL OF COMPUTER NETWORKS AND COMMUNICATIONS SECURITY (Mar. 2015), [http://www.ijcnscs.org/published/volume3/issue3/p3\\_3-3.pdf](http://www.ijcnscs.org/published/volume3/issue3/p3_3-3.pdf) [https://perma.cc/6ZZM-SPG8] (discussing identification of transacting parties in online banking).

one party from impersonating the other, or a third party from doing so.<sup>37</sup> To illustrate this, assume A files suit against B. A then impersonates B and submits a false answer. The process will yield a finding of liability for B, without B ever knowing about the trial. Conversely, what happens when a person loses a lawsuit they never filed?

Today, parties typically identify themselves before their respective lawyers prior to filing court papers. Israeli lawyers verify their identity using a smart card, which is required for them to initiate a proceeding and manage it through the *Net Hamishpat* website.<sup>38</sup> Before the filing of a pleading, motion or other court paper is finalized, the lawyer must use both the smart card and a password to electronically sign the uploaded document; the system can display the name of the lawyer responsible for uploading each document.<sup>39</sup> In addition, hearings are still held in court before a judge, so it is more difficult to steal another's identity. This concern increases when more activity is conducted online, without human supervision.

A suggested solution for dealing with the challenge of identification is appointing a designated official, stationed in a courthouse, post office or bank, before whom parties will identify themselves with identification cards or other official government documentation. The official will record the data after confirming its veracity and then give the party an access code to file court papers online.

Presenting materials for verifying one's identity, when personal, sensitive or confidential activities are concerned, is a well-accepted method. It is similar to the method employed by the *Net Hamishpat* system, as described above. In both the traditional and online models, primary identification through documentation before a human agent is required. A similar process is used when a bank provides one of its account-holders with credentials to access

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<sup>37</sup> For more on identity theft and methods for dealing with it, see Debra Lindberg et al., *Prevention of Identity Theft: A Review of the Literature*, Criminology and Criminal Justice Senior Capstone Project, PORTLAND STATE UNIVERSITY (2011), [https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1008&context=cj\\_capstone](https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1008&context=cj_capstone) [<https://perma.cc/3SRY-73BH>] (discussing crimes caused by identity theft in the Internet); Ali Hedayati, *An Analysis Of Identity Theft: Motives, Related Frauds, Techniques And Prevention*, 4 J. LAW CONFLICT RESOLUT.1 (2012), [http://www.academicjournals.org/article/article1379859409\\_Hedayati.pdf](http://www.academicjournals.org/article/article1379859409_Hedayati.pdf) [<https://perma.cc/B6KP-RZR9>].

<sup>38</sup> Arbel, *supra* note 13, at 16.

<sup>39</sup> *Id.*

online services. The initial identification is processed by a teller or clerk. Afterwards, the account holder may access the account on their own.

There are many models for online banking security. The simplest way utilizes the IP address of the account-holder. This address is specific to a computer and thus may easily be recognized by the bank's systems. However, today there are programs which can spoof an IP address, essentially "lying" to the bank's systems; for this reason, it is recommended to give a one-time password to the account-holder via the mobile phone or email address on record. This solution significantly reduces the ability to impersonate others online. There are additional models, more complex and abstruse, including passwords integrated with biometric tools.<sup>40</sup>

Naturally, identity theft is not utterly eliminated by recurring a human agent at the point of first contact; identity thieves continue to evolve and to develop new methods as technology advances. Nevertheless, we must bear in mind that most of the public has no interest in stealing each other's identities; identification measures are designed to filter out the simplest cases of impersonation. When no such safeguards exist, even the most obvious cases slip through.

Another important viewpoint is public confidence in the system. To what extent would people want to obligate themselves to amounts of twenty-five thousand pounds through an unsecured website? To what extent would people want to submit documents which have personal or private information – contracts, bank accounts and other evidence – whether as plaintiffs or defendants, without knowing that the other party had to submit some form of identification to a human being in order to access the website in the first place? Identification of both parties before a human agent, in addition to the secured website, provides the feeling of security and trustworthiness for the site in the eyes of the public.<sup>41</sup>

Another element to consider, which is missing from the model and relates to securing information on the Internet which contains the personal information of many people, is the concern of whether people will be prepared to upload personal files and transfer sums in the thousands of pounds in online court.<sup>42</sup>

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<sup>40</sup> *Id.* See also Donald R. Moscato and Shoshana Altschuller, "International Perceptions of Online Banking Security Concerns," *Communications of the IIMA*: Vol. 12: Iss. 3, Article 4 (2014).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

The problem of data leaks is analyzed at length concerning the biometric database maintained by the government; the likelihood of someone breaking into the database and making criminal use of the information is a pressing concern.<sup>43</sup> To summarize, the two elements of identifying the parties and establishing a secure site are intertwined. Without this minimal level of trustworthiness, the public will not utilize the site at all.

Once the suit has been filed, the bank or the post office legally issues the claim to the defendant, based on the legal regulations and the username which the defendant uses to file their own affidavit of defense, with the possibility of using e-mail or SMS to notify the defendant. However, this is somewhat problematic, as the defendant may deny receiving such a message.<sup>44</sup>

The best platform for the online court to adopt would be one similar to that of eBay. As eBay already deals with thousands of orders, complaints and interactions between buyers and sellers on a secure site which protects customers' information, there is no need to build a new site from scratch.<sup>45</sup>

Moreover, the established framework must include specific information about every single case that the online court may deal with. The website must be flexible and updatable, as laws change from time to time. It is also essential that the directions not be composed in legalese, but rather in clear, simple vernacular; there should be multilingual options.

In addition, there must be help screens to guide users and explain the basics to them, including legal principles. The parties may use these explanations to understand what topics should be focused on, so that they do not bring suits which have no chance of succeeding. The development of ODR will be elaborated below.

With that in mind, should the online court be a mandatory or voluntary institution? Initially, this should be a voluntary institution. The plaintiff may present the suit in a real-life courtroom or a virtual courtroom<sup>46</sup> to protect public confidence and the implementation of the site using the incentivized model I mentioned above. At this point, the debate about the attractiveness of opening the

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<sup>43</sup> Madhavi Gudavalli, D. Srinivasa Kumar and S. Viswanadha Raju, 8 INTERNATIONAL JOURNAL OF SECURITY AND ITS APPLICATIONS 103, 112 (2014).

<sup>44</sup> Walé Azeez, "Online: e-commerce: Stake a claim in cyber court: Go online to recover debts. It's easier than doing it in person," *The Guardian*, 28 February 2002 (henceforth: Azeez).

<sup>45</sup> Susskind, *supra* note 29.

<sup>46</sup> Ponte, *supra* note 8, at 61.

process on the Internet is lacking.

Today in England, a small claim can be filed online without a fee.<sup>47</sup> A comparable incentivized model exists in the Michigan Cyber Court: filing the suit in the online court means a reduced fee compared to doing so in real court. This is similar to the incentivized model which airlines have; ordering online allows customers to save money without an agent's fee. It is important to use an incentivizing model to motivate plaintiffs to use the new online interface.<sup>48</sup>

Moreover, another consideration lacking at the moment is the question of a respondent who has no interest in participating in an online trial and wants to move the proceeding to a frontal process in a traditional court. Such transferring of the case to a regular courtroom under specific criteria, should be allowed. However, the party which wants to transfer the proceeding to a real court to receive a judge's verdict must bear the cost of an additional fee to the court.<sup>49</sup>

One criterion for relocating the proceeding should be that the respondent is a private individual. This is a principle in small-claims courts in Israel – only an individual may initiate such a proceeding. It appears that the Israeli legislature has considered the need to protect private individuals from the broad gap between them and those entities which have “deep pockets.” Similarly, it is best to say here that only a private individual can petition to have the proceeding moved to a frontal venue. It may be inevitable, if powerful entities have the right to petition the court to transfer proceedings from the virtual world to the real one, they will do so automatically, to dissuade the less privileged from filing suit and then losing time, work, and money to be physically present in court, which will make the whole enterprise untenable for the latter.<sup>50</sup>

Moreover, it is recommended that appeals of the online court's ruling be limited to appeal by permission.<sup>51</sup> This is in order to

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<sup>47</sup> See a table comparing the rates paid on the website to those in the courthouse at: <https://www.gov.uk/make-court-claim-for-money/court-fees>.

<sup>48</sup> Ponte, *supra* note 8, at 76, 89-90.

<sup>49</sup> For another expansion of the issue of determining court costs, see Eisenberg, *supra* note 22.

<sup>50</sup> See para. 60A, Courts Law (Consolidated), 5744-1984, S.H. 198 (henceforth: Courts Law).

<sup>51</sup> Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22:1, 21.11 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW, Vol (2011).

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avoid a situation in which a case is retried in a regular court as long as the appeal is by right. A corporation may automatically appeal to the district court. The aim should be for cases adjudicated in the online court to be settled there.<sup>52</sup>

Up until this point, the online court model raises questions in a number of areas, some of them procedural, some of them technical and technological: identification of the parties, securing their online information, ensuring privacy with all of its complexities. Now I will deal with some important points to ponder concerning the online process: representation on the Internet and the risk of error, holding a trial in a virtual environment and the expressive-ceremonial aspects of justice, video testimony, dissuading witnesses from false testimony, balance and sanctions.

### 3. HOLDING A TRIAL IN A VIRTUAL ENVIRONMENT: A CRITICAL VIEW

When reviewing the civil courts structure report<sup>53</sup> written by Lord Justice Briggs, which presents a model for online court, there is a particular focus on litigants without representation. The number of people advertising counsel for litigants without representation seems to be increasing. On the one hand, there is a need to streamline organizations to assist parties who do not have legal representation, so they may access practical information and support throughout the litigation process. Similarly, for those litigants who choose to use the Internet, there needs to be legal advice either free of charge or at a reasonable price. On the other hand, organizational duplication must be avoided concerning anyone who will have the authority to offer technical and legal assistance.<sup>54</sup>

Lord Briggs's interim report of the civil courts structure notes organizational difficulties in assisting litigants without representation and the courts' inability to help them. The report does not ignore the attempts made previously to assist litigants; on the contrary, it praises those efforts. As an example, some of the assistance

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<sup>52</sup> Para. 64 of the Courts Law determines that a verdict in small-claims court may be appealed to the district court if the district court judge gives permission. A different judge must then preside over the trial in district court.

<sup>53</sup> See Briggs, *supra* note 4.

<sup>54</sup> LORD JUSTICE BRIGGS, JUDICIARY OF ENGLAND AND WALES, CIVIL COURTS STRUCTURE REVIEW INTERIM REPORT, 3.38-3.45. (December 2015).

includes legal explanations, help filling out forms, clarifying legal terminology, etc. These elements are added in the final report as an assortment of recommendations to offer legal aid in the stages before the proceedings, advancing the legal education of the public. There is quite a ways to go before this model of assistance will be complete.<sup>55</sup> The final report of Lord Justice Briggs proposes that the online court operate without legal representation.<sup>56</sup>

Litigation without representation is not a wise course, aside from exceptional cases, such as small claims or litigants with a legal background. Rabeea Assy deals with the arguments against the right to self-representation in his sweeping work, *Injustice in Person: The Right to Self-Representation*.<sup>57</sup> Moreover, there is another argument against self-representation beyond what Assy raises, which is the risk of error.<sup>58</sup> Every civil trial has a risk of error, such as the danger of a wrongful verdict; however, the odds of an incorrect verdict increase when litigants are not represented. I share Assy's view that self-representation is inherently inferior to litigation with representation. Litigating on behalf of one's self creates a greater risk of error than representation by another.

One argument is that people choose self-representation out of an overly confident estimation of their own abilities or, alternatively, because they feel they have no choice due to financial duress.

Indeed, in the English system, the right to self-representation is almost unqualified; data shows that most litigants who choose self-representation do so because they feel they have no choice.<sup>59</sup> For example, a 2014 survey of those who chose self-representation in

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<sup>55</sup> *Id.*, at 5.52-5.47.

<sup>56</sup> LORD JUSTICE BRIGGS, JUDICIARY OF ENGLAND AND WALES, CHANCERY MODERNISATION REVIEW FINAL REPORT, 6.22-6.39. (December 2013).

<sup>57</sup> Although self-representation is regarded as sacrosanct in common law jurisdictions, most civil law systems take a diametrically opposite view and impose obligations of legal representation as a condition for conducting civil litigation, except in low-value claims courts or specific tribunals. In his book, Rabeea Assy emphasizes the theoretical value of self-representation, and he challenges the conventional perception that ties self-representation to a fundamental right. All in all, Assy develops a new justification for mandatory legal representation, based on several aspects. *See generally* RABEEA ASSY, *INJUSTICE IN PERSON: THE RIGHT TO SELF-REPRESENTATION* (2015).

<sup>58</sup> *See generally* Doron Menashe & Eyal Gruner, *Litigants in Person and the Risk of Error: A New Perspective on Rabeea Assy's Injustice in Person: The Right to Self-Representation* 35 *Civ. Just. Q.* 237 (2016).

<sup>59</sup> *See* George Applebey, *Justice without Lawyers? Litigants in Person in the English Civil Courts*, 18 *HOLDSWORTH L. REV.* 109, 109-12 (1997) (describing the "explosion of litigants in person" in English civil courts).

England found that most did so because they felt they had no choice: They neither had sufficient funds to hire representation nor were entitled to free legal aid.<sup>60</sup> Although half of those who chose self-representation received legal advice at some point, almost all of them encountered difficulties with the legal proceedings.

In addition, it appears that most of those who chose self-representation were defendants, not plaintiffs. Most were male, young, welfare recipients, and had a lower level of education than those who had legal representation.

We may divide the motivations for self-representation into three categories: cost, choice, and difficulties in receiving legal aid. In this study and other previous studies, 75% to 80% of the litigants chose self-representation because of one of the above-mentioned reasons, and only 20% to 25% did so by choice. Furthermore, it was found that most of those who chose self-representation due to cost or difficulty in receiving legal aid would have received assistance from an attorney, if they had the choice. In addition, they believed that if they had such a resource, they would have had better results.<sup>61</sup>

In 2012, England instituted a reform of legal aid. This reduced entitlements to receive free legal aid to save on costs and to encourage conflict resolution outside the courthouse. Since it has been put into effect, the number of cases in which the party chose self-representation has increased.<sup>62</sup>

In the past, many of those who chose self-representation did so of their own volition. However, most of them did so because of an inability to hire lawyers and ineligibility to receive legal aid after the reform. It is reasonable to assume that a person who chooses self-representation out of free will be more capable of doing so than one forced into such a situation.<sup>63</sup>

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<sup>60</sup> See generally *Self-representation rises after legal aid cuts*, Inst. Emp't Rts. (Jan. 22, 2015), <http://www.ier.org.uk/news/self-representation-rises-after-legal-aid-cuts> [<https://perma.cc/8AEE-MDMC>].

<sup>61</sup> See MINISTRY OF JUSTICE, LITIGANTS IN PERSON IN PRIVATE FAMILY LAW CASES, 2014, at 11-21 (UK) (describing characteristics of litigants in person, reasons for self-representation, and the features of partial representation).

<sup>62</sup> See *Id.* An analysis of all family court cases in England, from January 2014 to March 2014, showed that in 80% of cases, at least one of the sides was not represented by an attorney.

<sup>63</sup> Mainly after the reform, it was discovered that a large segment of the litigants not represented were people who had difficulty presenting their case in the best way, whether due to a lack of education, a lack of self-confidence, learning difficulties or any other obstacle which might prevent one from having a success-

It can be concluded that in the context of legal proceedings over a long period, there tend to be far more wrongful verdicts in cases of self-representation than litigation by representation.<sup>64</sup> Granted, the damage is less harmful in civil cases than it would be in criminal cases, but self-representation still poses a significant threat to a correct verdict.

Some of the risks of error in civil proceedings can significantly damage the litigants' welfare. For example, family court exists in the civil realm: a decision in the matter of child custody, declaring a minor a dependent, removing a minor from the custody of their parents to the custody of the state, an adoption order for a minor, or a restraining order keeping an individual out of their residence due to a concern of violence and the like.

Generally speaking, the losing party in a civil suit naturally has negative feelings: disappointment, frustration, and bitterness—not to speak of the financial hit. This is true whether the loser is a plaintiff whose suit has been rejected, a defendant against whom a suit has been accepted, or even a plaintiff who has been awarded less than what they think they deserve. When the verdict is mistaken, these unpleasant emotions are unjustified. Had the verdict been correct, there would have been no ill will.

To illustrate this, consider a dispute in commercial law. There is a normative aim to be achieved through law enforcement, protecting private property, distributive justice, restorative justice, and economic efficiency. A wrongful verdict impinges on the right to

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ful encounter with the legal process. See HOUSE OF COMMONS LIBRARY, LITIGANTS IN PERSON: THE RISE OF THE SELF-REPRESENTED LITIGANT IN CIVIL AND FAMILY CASES, 2016, HC 07113, at 5-7 (Eng. & Wales) (describing the relationship between self-represented litigants and The Legal Aid, Sentencing and Punishment of Offenders Act 2012).

<sup>64</sup> For empirical facts, indicating that, in civil law, litigants without representation receive inferior results compared to those who do have representation, see ASSY, *supra* note 57, at 12 (“Because LIPs lack adequate understanding of procedural and substantive law, a passive arbiter is not presented with the clash of evidence and argument that is necessary to establish a correct outcome.”). As for criminal cases, analysis of the first 130 cases of exoneration due to the activities of the Innocence Project using DNA testing showed that 32% of the wrongful convictions were due to inadequate counsel. See BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 242 (2003) (“Studies by the Innocent Project found that 32 percent of the wrongfully convicted had subpar or outright incompetent legal help.”). However, those data refer to inadequate or incompetent counsel, not a lack thereof. Nevertheless, we may assume that similar or more severe failures would exist in a case of lack of representation, so that a lack of representation would create the risk of wrongful conviction at least as much as inadequate representation, if not more so.

private property, seizing possessions that rightfully belong to one party and handing them to the other without any legal justification. This undermines the owner's right to property.<sup>65</sup> Conversely, a rightful verdict makes certain that the rightful owner retains their money or property.

Moreover, a wrongful verdict may also undermine distributive justice as the normative aim is to allocate resources in a fair way.<sup>66</sup> Beyond this, restorative justice is also harmed.<sup>67</sup> If the verdict is correct, the situation will be restored to its correct state, with a tort or contract violation rectified, but a wrongful verdict prevents this from happening. Additionally, when the legal norm is to advance economic efficiency, a wrongful verdict creates an inefficient situation.<sup>68</sup>

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<sup>65</sup> For the concept of private property as a tool to protect freedom, see JOHN RAWLS, *POLITICAL LIBERALISM* 298 (1993) (discussing how "the right to hold and to have the exclusive use of personal property" is "among the basic liberties of the person").

<sup>66</sup> For the distributive view in private law in general, see HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* 31-32 (1997) (discussing how the law of unjust enrichment has "an important distributive component"); DUNCAN KENNEDY, *SEXY DRESSING ETC.* 83 (1993) (discussing the relationship between the law and the skewed distribution of wealth, income, power, and access to knowledge "along class and race lines"). As for distributive justice in contract law, this value contradicts the principle of freedom of contracts, because the contract is determined by the consent of each side, not justice. However, there is theoretical writing on contract law according to which a fitting aim of contract law is establishing social justice between the parties. See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980). As for distributive justice in tort suits, there are issues of risk distribution and the "deep pockets" consideration. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 527 (1961) (detailing the "deep pocket consideration"); OLIVER WENDELL HOLMES, *THE COMMON LAW* 77 (1881) ("The state might conceivably make itself a mutual insurance company against accidents, and distribute the burdens of its citizens' mishaps among all its members.").

<sup>67</sup> As for restorative justice in tort suits, Richard Epstein takes the principle of restorative justice as a result of causing damage not necessarily through negligence. See generally Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973). Ernest Weinrib and Richard Posner base restorative justice on causing damage through negligence. See generally Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 L. & PHIL. 37 (1983); Richard A. Posner, *The Concept of Corrective Justice in Recent Theory of Tort Law*, 10 J. LEG. STUD. 187 (1981). George Fletcher bases restorative justice on the damage caused by creating a risk which is not mutual. See generally George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Jules Coleman claims that restorative justice must nullify gains and wrongful damages. See JULES L. COLEMAN, *MARKET MORAL AND LAW* 184 (1988) (introducing a response to *The Concept of Corrective Justice in Recent Theory of Tort Law*).

<sup>68</sup> For considerations of effectiveness in contract law, see ROBERT E. SCOTT &

After considering the ramifications of a lack of legal representation, I will analyze how risks of error may be expressed in civil law and claim agreements. One possible claim is that, because in civil law the dispute is private, it is each party's prerogative to use self-representation, so that any risk of error is accepted. Unlike criminal law, there must be consent in civil law because it is dispositive. No one is obligated to file a civil claim even if they have good cause to do so; creditors may forgive and waive debts and plaintiffs may withdraw their claims or may reach a settlement. Even after winning the case, the plaintiff may still return the money to the defendant, and if the defendant wins, they must still pay the plaintiff.

Because both parties have the freedom to conduct transactions of money and property without being bound by considerations of justice or efficiency, based on the principle of freedom to contract, does this negate the argument of risks of error? Does a litigant who chooses not to be represented accept all of the risks inherent in this decision?

In my view, though civil law is dispositive, and freedom to contract is a fundamental principle of it, this does not obviate the risk of error. The reason for this is that there is no justification to view choosing self-representation as a surrender of rights as the victim of a wrongful verdict. Choosing self-representation does not mean welcoming the damages and losses of judicial error; ra-

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DOUGLAS L. LESLIE, *CONTRACT LAW AND THEORY* 8 (1988) (explaining the functions of contract law); Alan Schwartz, *The Default Rule paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 392, 399, 402-403, 416 (1993) (explaining the default rule paradigm, as well as the paradigm's normative constraints and limits). As for effectiveness in tort suits, according to Calabresi's definition, the aim of tort suits is to limit the damages of accidents and the costs of preventing them. Therefore, the preferred legal regime to accomplish this is giving the responsibility to the one best equipped to consider this (*i.e.*, the one who can consider optimally if and how to exact cost which can prevent damage and to act on the basis of this consideration). *See generally* GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); Guido Calabresi & Jon T. Hirschoff, *Towards a Test for Strict Liability in Torts* 81 YALE L.J. 1055 (1972). For the preferred legal regime being negligence, *see generally* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). For economic negligence as the basis for the tort of negligence as presented in the ruling of the American judge Learned Hand, *see generally* *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). As for the right of private property as a tool to reach economic effectiveness, *see generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 88 (1988) (introducing the economic theory of property); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 31 (1992) (introducing the relationship between economic analysis and property).

ther, the litigant seeks to enforce their rights and to win the case. The litigant has no interest in being damaged by a court's wrongful verdict. Nevertheless, in practice and despite the litigant's intentions, the risks are vastly increased. A litigant cannot be aware of the deficiencies of self-representation and so cannot accept them. Had the litigant desired to forgive, to waive, to compromise, or to pay the other party, they would not have entered an adversarial proceeding. The fact that they have done so indicates that they have no intent to concede the case to the benefit of the opposing party.

This causes the following question: Does a litigant who chooses self-representation, who incorrectly evaluates the quality of self-representation as opposed to litigation with representation, not commit a mistake which the court should in fact ignore? Not every party who signs a contract mistakenly may withdraw from it. If the mistake is of a sort that the party assumes of his own free will, it is insufficient to frustrate the contract.<sup>69</sup>

A distinction must be made between determining a sweeping *a priori* rule that contracts will be considered null and void due to defects in the consent of a party and a situation in which no such rule exists but requires an examination of one's consent in each case. This distinction is necessary because if vitiated consent is analyzed on a case-by-case basis, the other party relies on this consent, and this factor must be taken into consideration. On the other hand, when legislation determines *ab initio* that a certain type of contract is null and void due to vitiated consent, there is no one who relies on such consent, because it is known *a priori* that such a contract is worthless.

The argument that one should disregard the consent to self-representation belongs to the former category of cases, in which there is a sweeping rule that such consent will be null and void. The reason for this is the inherent flaw in such a desire; on the one hand, people want the best form of litigation, but, on the other hand, they mistakenly believe that self-representation is superior to litigation with representation. This is a pervasive flaw in consent, and, to avoid it, any consent to conduct such litigation should be *a priori* negated, which results in no injury through the assumption

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<sup>69</sup> In an English case, the Court of Appeal found that the party had taken upon himself the risk of a common mistake, and therefore the contract was not frustrated. See generally *Amalgamated Investment and Property Co. Ltd. v. John Walker & Sons Ltd.* [1977] 1 WLR 164 (CA) (appeal taken from Eng.).

of the other party.

We cannot say that the opposing parties accept the risk of inferior litigation, because they would never undertake such a risk if they knew the inferior character of self-representation. The only reason they assume the risk is because they believe self-representation is superior to representation by another party. The assumption that they are interested in maximizing the quality of legislation is inconsistent with the feasibility of undertaking the risk that self-representation will be more successful.

An instructive analogy is consenting to accept results of a polygraph test. If the assumption is that the two parties believe sincerely that they are factually correct and want to convince others that this is accurate, then their interest lies in a test that maximizes the epistemic state. If what maximizes the epistemic state is judicial reasoning rather than a polygraph, then choosing a polygraph involves vitiated consent. The parties do not (or one of them at least does not) know the truth of the matter, that by choosing to accept a polygraph test, they hurt their ability to persuade using their genuine claims. This situation justifies rejecting an agreement by both parties to accept the polygraph, due to vitiated consent, but because this is an *a priori* invalidation, it does not injure either party through reliance on the opposing party on this agreement.<sup>70</sup>

This argument does not impinge upon the general principle that the two parties have the right to stipulate as to what evidence they will present and forge compromise agreements; compromise agreements and evidentiary agreements are also subject to defects in consent. There is no inherent vitiated consent in these agreements, except in cases where the parties are unaware that they are acting in opposition to their own interests.

There is a link between the rejection of the consent argument and the rejection of the paternalism argument. The objection to paternalism assumes that a person may indeed want a bad result, and paternalistic interference withholds from him the unfavorable outcome he seeks. However, if someone desires an activity that causes a bad result but does not want the bad result, such as if they believe that the outcome will not be unfavorable, in this case there is a good reason to prevent the undesirable outcome which they do not want. This is not the imposition of a foreign will upon another;

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<sup>70</sup> The Supreme Court of Israel ruled thus concerning consent to polygraph testing in civil suits. See generally CA 61/84 Biasi et al. v. Levi 42(1) PD 446 (1988) (Isr.).

one can bring the realization of the other's true desire by this intervention.<sup>71</sup>

Mill presents such an argument to justify intervention in another's activity. If a person is about to cross a bridge that is structurally unsound and there is no time to warn him, one is justified in grabbing them and pulling them back. Mill holds that this is not an impairment of their liberty. Compelling such a litigant to accept representation is not an offense to their autonomy, just as stopping the wayfarer from setting foot on the bridge is not an offense to their freedom.<sup>72</sup> The autonomy argument based on freedom of conscience does not apply in civil law, because the claimant who is not interested in a civil trial will not file a lawsuit, while the respondent who refuses to participate in a trial will be compelled to accept a verdict based on his lack of defense.

To summarize, as Rabeea Assy correctly concludes, the verdict in a civil case can be very hard for the party being injured by it. The risk of error is quite high, not unlike that in criminal cases. Some consequences of this include the following: incarceration due to contempt of court, involuntary commitment to a mental-health institution, deportation, revocation of citizenship, and loss of parental or custodial rights. Financially, a hefty debt can be just as, if not more, significant to a litigant than a criminal fine. Therefore, the issue of representation must be considered in the final model, in light of the arguments and claims presented above.<sup>73</sup>

Expanding on an issue raised in the first part of this article, concerning the difficulty of realizing the expressive-ceremonial aspect of justice in a virtual environment. Any Internet courthouse inherently makes confrontation between the parties more difficult, first and foremost in the cross-examination of witnesses.<sup>74</sup> Indeed, the interim report of Lord Briggs takes note of this problem, which makes the proceeding more inquisitorial rather than adversarial, as mentioned above in part one:

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<sup>71</sup> Assy makes a similar claim about the issue of the distinction between means-related paternalism and ends-related paternalism, as paternalism of the former type is more justifiable than the latter. See ASSY, *supra* note 57, at 156-57 ("Paternalism which concerns only means is more justifiable . . . than paternalism concerned with ends . . .").

<sup>72</sup> See JOHN STUART MILL, ON LIBERTY 158 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (discussing the functions of police and the extent to which the government can intervene in crime prevention).

<sup>73</sup> See ASSY, *supra* note 57, at 57-58 (describing the relationship between mental competence and self-representation).

<sup>74</sup> See CIVIL COURTS STRUCTURE REVIEW INTERIM REPORT, *supra* note 54, at ch. 6.

Finally, the [online court] will mark a radical departure from the traditional courts (outside the small claims track) by being less adversarial, more investigative, and by making the judge his or her own lawyer. By that I mean that judges will receive no assistance in the law from the parties, and may well need more training, more frequently, in the law relevant to the caseload of the OC that they receive at present. I acknowledge that, even now, the DJs who decide cases on the small claims track already have to be their own lawyers, but the ambition of the OC will extend to a substantially wider caseload.<sup>75</sup>

Indeed, the reports raise the possibility of using videoconfer-  
ence for interrogation. The interim report notes:<sup>76</sup>

Nor is the phrase 'online court,' and the acronym ODR, meant to suggest that the whole of the procedure for the resolution of disputes submitted to that court will inevitably take place online, rather than, for example, on the telephone, by video conference, or in a traditional face-to-face encounter with a judge in a hearing room. That may have been a reasonable impression to be derived from the ODR Report, but the Justice Report contemplated that determination by a judge online would only be one of a range of options, the others including at least telephone and frontal hearings.<sup>77</sup>

The main idea is that in a frontal encounter in the courtroom, cross-examination endows the legal proceeding with an expressive advantage which cannot be attained in a videoconference interrogation. For this reason, having the proceeding take place in a courthouse, with all the ceremonial characteristics of a trial, may be significant.

This is related to a broader theory on the expressive function of justice.<sup>78</sup> This is a general theory of justice, applying to both proce-

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<sup>75</sup> *Id.*, para. 6.15.

<sup>76</sup> *See id.* paras. 4.25, 4.26, 5.129 (discussing the Reform Programme and its limitations).

<sup>77</sup> *Id.*, para. 6.4; *see also* CHANCERY MODERNISATION REVIEW FINAL REPORT, *supra* note 56, para. 6.80.

<sup>78</sup> *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A*

dural and other aspects. The expressive approach brings out values and feelings by institutionalizing them. For example, Stephen argues that criminal justice is simply the institutionalization of vengeance, much as marriage is the institutionalization of lust.<sup>79</sup> From another perspective, the expressive function of justice inherently endorses certain types of behavior and rejects others.<sup>80</sup>

According to this theory, justice functions by transmitting normative and value-based messages through ceremonies, symbols, declarations, and ambiances. The ceremonial function of justice is one among its many aims. It is expressive, in that it transmits a normative, value-based message; it may also be required in order to generate an atmosphere where litigants act in an appropriate and desirable manner. The courts act as guardians of certain fundamental concepts—the ethos and tradition of society as a whole and the legal system in particular. The ongoing commitment to this ethos is expressed through repetition and reinforcement of symbolic and ceremonial practices. Thus, the legal system attempts to influence the consciousness of the public, by conveying certain messages and through a symbolic atmosphere which acts upon the litigants, even if they encounter the legal system only once in their lifetime.<sup>81</sup> The expressive-ceremonial function also impacts judges, whose daily routine occurs in this arena. As they are personally invested in the system, it makes them committed to the messages it transmits.

Another advantage of legal proceedings is the intrinsic expression of the value of due process. This may be examined using some of Tribe's arguments against "trial by mathematics" in the

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*General Restatement*, 148 U. PA. L. REV. 1503, 1531-1564 (2000) (discussing expressivism in the context of individual conduct and additionally relating the theory to the expressive character of the law).

<sup>79</sup> See JAMES FITZJAMES STEPHEN, *A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 99 (1863) (describing the development of English criminal law and the current state of the law). For a general argument about the expressive function as institutionalized emotions and the institutionalized expression of emotions, see generally Alan Strudler, *The Power of Expressive Theories of Law*, 60 MD. L. REV. 492 (2001).

<sup>80</sup> See Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 342-43 (2000) (discussing the components and implications of the attitudinal theory).

<sup>81</sup> See Nakhshon Shokhat, *The Moral and Legal Duty to Protect the Innocent from False Conviction: A Critical and Analytical Study Regarding the Derivative Normative and Procedural Obligations of the Legal System* 207-208 (2015) (unpublished Ph.D. thesis, University of Haifa Faculty of Law) (on file with the author).

criminal law of evidence. Tribe argues that an announcement of an *a priori* probability of guilt impinges on the expressive value of the presumption of innocence; even if there is an *a priori* probability of guilt, it must not be stated, because the declaration itself transmits a message, which detracts from the commitment to the presumption of innocence.<sup>82</sup>

Tribe further argues that determining a few innocent people, which society is willing to sacrifice, by wrongful conviction, through quantifying what constitutes proof beyond a reasonable doubt, undermines the message carried by the principle of due process to the innocent.<sup>83</sup>

In light of these considerations, video testimony cannot perfectly replace testimony in court. First, video testimony negates the expressive advantages of the judicial process. A person testifying at home does so in a safe, familiar environment, and over the physical conditions of which he exerts control. However, when one testifies in court, those conditions are dictated by the ceremonial setting. A courthouse is not home. Rather than comfort and convenience, the court is designed to express governmental power. The symbolic structure of the courtroom is meant to represent certain feelings and values. For example, people rise when the judge enters the courtroom; the judge sits above all others present, with the national and state flags conveying his authority. The witnesses are meant to be intimidated: They testify in uncomfortable and imposing conditions, under oath or affirmation, with deputies and bailiffs present, and without food or drink. The court often induces a feeling of awe in the witness. This deters witnesses who might be tempted to testify falsely.

Additionally, there is an epistemic difference between video and in-court testimony, as the latter offers greater opportunity for the court to evaluate both the witness and the testimony. Griffin writes:

In *United States v. Yates*, for example, the Eleventh Circuit found live, two-way video conferencing with overseas witnesses insufficient to satisfy the Confrontation Clause because it lacked the “intangible elements of the ordeal of tes-

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<sup>82</sup> Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1371 (1971) (discussing the impact of measuring and acknowledging a factual presumption of guilt on jurors in criminal cases).

<sup>83</sup> See *Id.* at 1372-1375 (detailing the implications of uncertainty in the context of criminal procedure).

tifying.” Physical presence can serve important expressive functions, but as discussed here, the essential purposes of confrontation are analytic ones, and the substantive interaction between prior statements and current testimony produces information that speaks more directly to those concerns.<sup>84</sup>

As Kostelak adds:

[V]ideoconferencing may distort nonverbal cues, such as facial expressions, gazes, postures, and gestures. For example, laggy streams may obscure facial reactions. Even in a live stream that is working perfectly, a headshot may overemphasize facial expression while leaving gestures partially obscured or out of the shot entirely.<sup>85</sup>

Indeed, “[c]ross-examination is the greatest legal engine ever invented for the discovery of truth.”<sup>86</sup> If cross-examination on videoconferencing is epistemically deficient, an important tool for uncovering the truth is missing. An inability to cross-examine properly increases the risk of error.

Just because there are some deficiencies in online court proceedings, the whole endeavor is not invalid. A balance must be struck between these disadvantages and the upsides of online court. As long as video cross-examination is possible, most of the advantages of confrontation are maintained. Consequently, the gap between video testimony and in-court testimony is not necessarily so vast as to justify sacrificing the loss of efficiency provided by the online court. In any case, even the epistemic interpretation of body language based on frontal observation is far from precise.

To deal with these concerns, sanctions may be imposed for costs<sup>87</sup> if a witness testifies falsely. Additionally, false testimony is

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<sup>84</sup> Lisa Kern Griffin, *The Content of Confrontation*, 7 DUKE J. CONST. L. & PUB. POL’Y 51, 65 (2011) (internal citations omitted).

<sup>85</sup> Kostelak, *supra* note 28, at 4 (internal citation omitted).

<sup>86</sup> 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (1974).

<sup>87</sup> Regarding trial costs, two central models are prevalent: the British and the American model. The former is more common globally. Under the American model, each party bears its own costs. Under the British model, the losing party is often required to pay the other's costs. In Israel, the British model applies. However, the court has wide discretion to determine who would bear the costs, based on the circumstances of each case. For further analysis, see generally Eisenberg, *supra* note 20.

a criminal offense incurring fine or imprisonment.<sup>88</sup> However, a punitive sanction may be imposed for perjury only if the offender has been found guilty at trial. This sanction seems to be weak, for the following reasons:

Invoking criminal law is complicated, since it raises issues of proof. The model proposed here is based on the online court addressing simple cases. Complications tend to drag cases back to the regular courthouse. Issues of perjury and evidence are an additional complication. A civil court may determine that a witness is unreliable even without a detailed written opinion. This will likely cause difficulty when it comes to indicting the witness.

The very act of putting a witness on trial is a kind of punishment. Therefore, it is inaccurate to assume that the witness will be vindicated if found not guilty.

An additional danger involved in criminal law is over-deterrence. Not only perjurers will hesitate; honest and innocent witnesses, too, will either avoid testifying or testify with an overabundance of caution. Witnesses can be thoroughly cross-examined, which tends to create the impression, sometimes mistakenly, that they are untrustworthy. Introducing a criminal dimension might chill testimonies to an unacceptable degree.

Civil and criminal law might clash, in appearance or in fact, due to different evidentiary standards. This might seriously undermine the finality of the court's decision and the public's acceptance thereof.

These considerations lead to one conclusion: Criminal law is a blunt instrument, unsuited to the concept of online justice. While it should be noted that in the United Kingdom, legislation and literature have not provided a complete civil alternative to punitive sanctions for a perjurious witness,<sup>89</sup> criminal law should be used to

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<sup>88</sup> See, e.g., Criminal Justice Act 1967, c. 80, § 89(2) (Eng. & Wales) ("The Perjury Act 1911 shall have effect as if this section were contained in that Act."). Criminal common law similarly forbids false testimony.

<sup>89</sup> See The Civil Procedure (Amendment) Rules 2013, pts. 44-47 (Eng. & Wales) (providing rules that relate to cost). Part 44.1 defines "costs" as follows: "[C]osts' includes fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under rule 46.5 and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track." The burden of payment may only be placed on the losing party; yet, the parties may reach an agreement regarding costs. The costs which may be claimed are those of attorneys, barristers or counselors, witnesses and experts. In addition, the court has the authority to rule on ancillary expenses, as well as the authority not to do so, if this is justified by the circumstances. See *id.* pt. 44.2 ("Where the court orders a party to pay costs subject to de-

deal with perjury only in the most severe cases.

Dealing with issues of perjury in the online court context should be divided into several areas. Regarding forms and documentation, the litigants should be warned that any falsification of evidence is a criminal offense, carrying a penalty as set by the law. The legislature must give the court discretion to issue any appropriate order, including the imposition of costs against a litigant who falsely testifies. If the perjurer is a party, the party will naturally lose the case and often be forced to pay costs. It is also appropriate to impose punitive costs in sufficiently serious cases. Additionally, case law should be made available online, so that litigants will be able to plan their own moves, while also serving a function of deterrence.

From this short analysis, it appears that the nature of testimony in a virtual environment should be addressed in legislation. Evidence law must also be adjusted to the virtual environment, grappling with such issues as false testimony, the evaluation of witnesses, issues of reliability, and so on.

This part discussed problems of judicial process in a virtual environment; the lack of frontal confrontation and the lack of deterrence regarding false testimony, when both testimony and cross-examination take place using a videoconference. Current law is not fitted for online adjudication. Thus, I propose a model of wide judicial discretion, including the imposition of costs, is proposed to

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tailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.”). In small claims cases, costs are limited to trial costs alone. See *Make a court claim for money*, GOV.UK, <https://www.gov.uk/make-court-claim-for-money/court-fee> [<https://perma.cc/VW2P-EDFA>] (providing the table for court costs based on the amount of the claim in small-claims court in England). In addition to this legislation, the Contempt of Court Act (1981) must be considered. See Contempt of Court Act 1981, c. 49 (U.K.) (discussing the strict liability rule and other aspects of law and procedure). By law, contempt of court can be declared if one ignores a court order or refuses to show up for a court date. Another means for ruling on costs is based on the inherent authority of the court. The inherent authority of English courts may be employed to achieve various ends. There are four categories of conduct which might lead to a stay of a civil proceeding, based on the inherent authority of the court: proceedings designed to deceive the court, proceedings which were not submitted in a sincere manner but used in an inappropriate way or for an improper purpose, procedures unfounded or not serving any useful purpose, and duplicate procedures aimed at harassing the court and causing mischief. The remedy provided is stay of proceedings, rather than costs. For a comprehensive discussion of this issue, see I.H. Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEGAL PROBS. 23, 27-28 (1970) (describing the concept of inherent jurisdiction).

advance justice.

#### 4. CONCLUSION

The future holds many changes. The online court raises complex concerns and questions; yet, it appears that, in the bottom line, advantages outweigh the disadvantages. A system built upon the concept of adversarial, frontal cross-examination, when transferred to an online arena, will encounter problems. Therefore, a desirable model must initially be based on simple, low-cost procedures. This model should be adopted as an experimental program. Only after it is fully implemented and the deficiencies are addressed, the model should be applied to more complex and expensive proceedings. Trailblazing of a new legal model should be done carefully, accommodating the existing legal system in a controlled and systematic environment, with the aim of increasing the accessibility of justice.

In my view, when a process moves online, its nature changes on the most fundamental level. It is neither feasible nor necessary for the online court to use the familiar tools of real-life court; instead, new tools must be developed to account for technological development. The lessons to be learned throughout this process might be able to improve the legal system in its entirety and to effectively minimize future conflicts.