

**REPLACING THE CD WITH A CASSETTE TAPE AND OTHER  
FOUNDATIONAL CONSIDERATIONS BROUGHT UPON BY  
REMOTE JUSTICE**

Renee Danser\*

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\* Renee Danser is an attorney, access to justice advocate, and researcher working with the Access to Justice Lab at Harvard Law School. She can be reached at [rdanser@law.harvard.edu](mailto:rdanser@law.harvard.edu).

## I. INTRODUCTION

[1] I once knew a couple who bought a brand new car but asked to remove the CD player and replace it with a cassette tape player. The couple thought the CD was just a fad. Putting aside that the CD is now obsolete (and the cassette tape before it), and some adult readers will not know what CDs were in the first place, those of us that do will chuckle at this choice. During the peak of the pandemic, justice moved completely online. As society contemplates a return to normal, the justice system considers whether to sustain those remote processes or return to pre-pandemic operations in full. Will remote justice be the removed CD player, replaced with the business-as-usual courthouse?

[2] Courts across the country spent the whole of the pandemic planning and iterating remote operations to accommodate access to justice needs.<sup>1</sup> At the outset, courts treated pandemic closures like other emergency court closures.<sup>2</sup> In times of inclement weather, for example, courts temporarily close and reconstitute at a later date and time.<sup>3</sup> Continuity of operations planning is a standard annual effort in most courts throughout the United States.<sup>4</sup> However, a pandemic that rages on

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<sup>1</sup> See generally *Coronavirus and the Courts*, NCSC, <https://www.ncsc.org/newsroom/public-health-emergency> [<https://perma.cc/249K-F2A8>] (cataloging efforts by the NCSC and state courts around the country throughout the pandemic to respond to justice needs during the pandemic).

<sup>2</sup> See generally *Coronavirus and the Courts, 2020 Emergency Order Archive*, NCSC, <https://nationalcenterforstatecourts.app.box.com/s/bqbl3fjlpw5bt87j6nnbocxlq9fgpzf> [<https://perma.cc/J5SY-TJP3>] (compiling emergency orders from State Supreme Courts throughout the pandemic).

<sup>3</sup> Nathan Hall et al., *Courts Continuity of Operations (COOP) Planning Guide and Template*, NCSC 40 (2021), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0021/60393/NCSC-COOP-Planning-Guide-and-Template\\_2021.pdf](https://www.ncsc.org/__data/assets/pdf_file/0021/60393/NCSC-COOP-Planning-Guide-and-Template_2021.pdf) [<https://perma.cc/7G8X-5VCH>] (noting a general consideration for activation of a COOP as “changes in threat or weather advisories).

<sup>4</sup> See generally *Updating a Continuity of Operations Plan*, NCSC, (July 7, 2021), <https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing->

more than a year calls for far different efforts. Reconstituting, at least in person, is not an option. Doing nothing was also not an option. Access to justice is a fundamental right of all citizens, and in some instances access to that right also requires access to swift justice.

[3] To respond to this need, courts have considered and implemented a myriad of options. One of those options was looking to remote justice solutions. While remote justice had been considered and implemented to some extent pre-pandemic, the implementation efforts proceeded with greater earnest as 2020 moved into 2021. This effort feels temporary in large part. There is skepticism regarding whether the justice system can and should sustain remote operations in a post-pandemic world. This paper will advocate against that skepticism.

[4] Using the example of remote jury trials in the criminal justice context and online dispute resolution (“ODR”) in the civil justice context, this paper will look at relevant concerns and chart a path forward. Part I will address ODR as a potentially viable option. While ODR began being implemented before the start of the pandemic, the promise that it once showed has proven short lived. This section will also consider whether courts should continue to implement ODR in a post-pandemic world. Part II will address remote jury trials in criminal justice, putting forth the oft-expressed concerns of the effective ability to judge credibility and a potential to dehumanize defendants. In this Section, the well-built body of social science literature that addresses these concerns will be discussed. Part II will conclude with a review of the constitutionality of remote criminal trials. Part III will offer closing concerns and issues to consider as we move forward with the future of justice and conclude by sounding a call to action to rethink the delivery of justice from the lens of the users.

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pg/tool-helps-courts-assess-the-current-state-of-their-continuity-program [https://perma.cc/YW3X-3FR4] (“Following FEMA recommendations, courts should complete an assessment of their continuity program on a regular basis [e.g., annually].”).

## II. PART I ODR

[5] Courts were working on ways for litigants to engage remotely before COVID-19. It may be that the public just took notice of these efforts to engage litigants remotely out of necessity because of COVID-19. It may also be that before COVID-19, court conversations on remote engagement were insular, not allowing the public to take notice of the efforts. Regardless, the conversations existed, and now society is discussing these options as well. One of the most celebrated implementations of remote engagement is ODR, a technique widely used in the private sector,<sup>5</sup> particularly among online retailers. Courts around the country have either implemented ODR technology, are in the process of implementing it, or are considering whether to implement it.

[6] Even more complicated is defining what it means to be a “working” ODR. There is a real lack of rigorous evidence to know if ODR is working or if it is not working, and perhaps as a product of the excitement about remote engagement, this author has observed no appetite for developing a body of evidence. Fads come and go. Will ODR crash and burn from over-enthusiasm, possibly from fear of evaluation that is misplaced, or from displacement from the next fad that comes along? Or perhaps ODR doesn’t work now, but might it work if it underwent refinement and adjustment? If so, why is the justice system so afraid to learn something isn’t immediately perfect, but, rather, may need some iteration to be useful?

[7] This author thinks ODR should be implemented, but that this implementation should be accompanied by rigorous evaluation. ODR isn’t free, either to start up or to maintain, and when resources are

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<sup>5</sup> See generally Ayelet Sela, *The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions*, 21 LEWIS & CLARK L. REV. 635 (2017) (discussing how a variety of ODR technologies are being used in the private and public justice system); Ethan Katsh & Leah Wing, *Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future*, 38 U. TOL. L. REV. 19, 20–21 (2006) (discussing interest in growing the field of ODR and reviewing technological changes affecting ODR’s growth and use).

stretched thin, courts should know what works as they decide whether to invest in or maintain ODR systems.

[8] Stepping back, ODR is the use of technology to automate some or all of the steps in a resolution process.<sup>6</sup> ODR can reduce communication costs for parties who have access to high-speed Internet, and therefore could be useful during any phase of adjudication. The Hague Institute for Innovation of Law (“Hiil”) suggests that ODR may be particularly useful for at least three phases of resolving a legal problem: diagnosis, conciliation, and decision.<sup>7</sup> In the United States, however, courts thus far have shown less interest in engaging with the diagnosis phase overall, much less through ODR.<sup>8</sup> There is a general reluctance among courts to engage with disputes or parties pre-filing. So that leaves conciliation (settlement) and/or decision as areas of focus. For conciliation, parties can engage in settlement negotiations as they please, but ODR can offer a low-cost method of communication; presumably, that’s why the private sector relies on it so heavily. And for some high-volume, low-level, and factually simple disputes, such as traffic cases,<sup>9</sup> possibilities seem promising on the decision side as well.

[9] Importantly, ODR can be flexible. Specifically, the asynchronous nature of ODR allows the possibility of litigants and the court to meet at different times, which improves access to justice by removing the barriers that come with mandatory physical presence at a court facility. These barriers range from the usual, to those that we face as a society now, including transportation and childcare challenges, missing work for an

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<sup>6</sup> See Joint Technology Committee, *ODR for Courts 2* (2017).

<sup>7</sup> See Hiil, *ODR and the Courts: The Promise of 100% Access to Justice?*, NCSC 3 (2016), <https://www.hiil.org/wp-content/uploads/2018/09/Online-Dispute-Resolution-Trend-Report.pdf> [<https://perma.cc/2D5A-4E7K>].

<sup>8</sup> See Amanda R. Witwer et al., *Online Dispute Resolution: Perspectives to Support Successful Implementation and Outcomes in Court Proceedings* 3–5 (2021) (summarizing ODR programs in use in the United States).

<sup>9</sup> See *id.*

unpredictable amount of time, and public health concerns. In addition, proponents of ODR also suggest that remote interactions with the justice system and opposing parties are less stressful than in-person interactions.<sup>10</sup> The theory goes on to suggest increased resolution of cases by those who otherwise would be unlikely to proceed when met with stressful or anxiety-laced case events.<sup>11</sup> When parties are able to distance themselves from overwhelming and immediate emotions in their cases, they may be able to exercise caution more effectively in composing language,<sup>12</sup> something that could potentially facilitate a settlement result.

[10] However, as is true of most innovations, there is no consensus that ODR works, nor that asynchronicity is positive. Critics of ODR have argued that the asynchronous model results in response delays, prolonged waiting periods, and sabotaged conversation, all which can understandably heighten emotion.<sup>13</sup> Further, while some suggest power imbalances among parties may be neutralized by ODR,<sup>14</sup> others fear that ODR would only exacerbate these disparities.<sup>15</sup>

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<sup>10</sup> See *id.* at 6.

<sup>11</sup> See *id.*

<sup>12</sup> See Zoe I. Barsness & Anita D. Bhappu, *At the Crossroads of Culture and Technology: Social Influence and Information-Sharing Processes During Negotiation*, in THE HANDBOOK OF NEGOTIATION AND CULTURE, 350, 354–57 (2004) (discussing that parties' ability to thoughtfully respond rather than reacting immediately limits conflict escalation in the context of e-negotiation); Dafna Lavi, *No More Click? Click in Here: E-Mediation in Divorce Disputes – The Reality and the Desirable*, 16 CARDOZO J. CONFLICT RESOL. 479, 498 (2015).

<sup>13</sup> See Lavi, *supra* note 12, at 502.

<sup>14</sup> See Abraham Kuhl, Comment, *Family Law in the Twenty-First Century: Comment: Family Law Online: The Impact of the Internet*, 21 J. AM. ACAD. MATRIMONIAL L. 225, 242 (2008).

<sup>15</sup> See, e.g., Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. (2009) (emphasizing that dispute system design choices should consider contextual and intuitional variables and particularly power imbalances in the process).

[11] Courts must often balance fairness and efficiency. ODR is seen as a way to create efficiency, especially around high-volume dockets, with little reimagining of the process.<sup>16</sup> But is it wise to replicate the in-person process in an online setting, or is the fact that most ODR systems as deployed in courts do little reimagining of the existing process a concern? Moreover, if courts envision ODR as a default or mandatory process for certain types of cases to increase efficiency, what will they do to accommodate the 21 million people in the U.S. who lack any serious internet access, or the 44% of households with incomes below \$30,000 that do not have broadband internet?<sup>17</sup> Addressing these challenges would require innovative solutions such as public access terminals or computers in public spaces and community centers.<sup>18</sup> It remains unclear whether such substantial costs would be outweighed by the speculative benefits of moving online.<sup>19</sup> Once again, rigorous evaluation seems in order.

[12] Thus far, evaluation shows little, simply because there hasn't been enough of it, and what exists is questionable. There are a handful of empirical studies that investigated user experiences in ODR processes,

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<sup>16</sup> See Orna Rabinovich-Einy & Ethan Katsh, *A New Relationship Between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution*, 32 OHIO STATE J. ON DISP. RESOL. 695, 720 (2017).

<sup>17</sup> See Joyce Winslow, *America's Digital Divide*, PEW CHARITABLE TRS., (July 26, 2019), <https://www.pewtrusts.org/en/trust/archive/summer-2019/americas-digital-divide> [<https://perma.cc/VSD6-SU7M>].

<sup>18</sup> If courts do choose to do this, the author would enjoy seeing courts explore public spaces beyond libraries like grocery stores, post offices, and community recreation centers.

<sup>19</sup> See Amy Schmitz, *Expanding Access to Remedies Through E-Court Initiatives*, 67 BUFF. L. REV. 89, 160 (2019).

with particular focus on gender,<sup>20</sup> hierarchical dynamics,<sup>21</sup> availability of information,<sup>22</sup> and small claims dispute resolution in construction cases.<sup>23</sup> Many of these research efforts, however, concern platforms operating outside of the United States.<sup>24</sup> The body of research we have in the U.S. relies mostly on self-reported pre-ODR and post-ODR comparisons, with data mostly compiled by courts and private platforms and unconfirmed by independent research.

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<sup>20</sup> See Martin A. Gramatikov & Laura Klaming, *Getting Divorced Online: Procedural Outcome Justice in Online Divorce Mediation*, 14 J.L. & FAM. STUD. 97 (2012) (finding high levels of satisfaction with online divorce procedures and quality of outcomes of both male and female divorcees in the Netherlands, although the former focused more on monetary and time costs while the latter focused on negative emotions).

<sup>21</sup> See Katalien Bollen & Martin Euwema, *E-Supported Mediation: What Do We Learn from the Field?*, Paper Presented at the National Mediation Conference: Emerging Dynamics in Mediation – New Thinking, New Practices, New Relationships (Sept. 10-13, 2012) (finding that a hybrid process combining online intake with face-to-face mediation had an equalizing effect in hierarchical labor settings on parties' fairness and satisfaction perceptions).

<sup>22</sup> See Laura Klaming et al., *I Want the Opposite of What You Want: Reducing Fixed-pie Perceptions in Online Negotiations*, 2009 J. DISP. RES. 139 (finding that providing negotiators with incentives independent from the resources that have to be divided, as well as providing them with information about the opponent's preferences, led to more agreements in online negotiations).

<sup>23</sup> See Udechukwu Ojiako et al., *An Examination of the 'Rule of Law' and 'Justice' Implications in Online Dispute Resolution in Construction Projects*, 36 INT'L J. PROJECT MGMT. 301, 311 (2018) (finding that the ODR process does not affect parties' satisfaction with the "rule of law" or "justice" in small claims ODR in construction projects, while suggesting further research on the cultural contexts around these concepts).

<sup>24</sup> See Witwer et al., *supra* note 8, at 6 ("Research on court-based ODR in the United States remains nascent.").

[13] The pre- versus post- comparison is a weak research design,<sup>25</sup> meaning these studies tell us little at best. Some might think that if we didn't have ODR before, and if now we do, it makes sense that whatever differences we see must be a result of ODR. However, because the world is ever-changing and not all variables causing change can be controlled, it is difficult to measure whether differences between pre- and post- ODR worlds are caused by ODR. Some courts, for example, likely adopted ODR in early 2020; should one attribute to ODR the huge drop in case processing volume that many courts experienced around this time? That's exactly what a pre- versus post- comparison study would do.

[14] More generally, if we implement ODR this year and see an increase in settlements from last year before we implemented ODR, it could be a direct result of the ODR platform. It could also be explained in a variety of other ways, such as less high-stakes cases being filed, a general increase in filings, more amicable parties, better lawyering, better self-help materials unveiled during that same year, turnover in mediators, and any number of other things. These sorts of studies rarely produce credible results.

[15] As the third COVID-19 wave is upon us, and in-person justice becomes less and less the norm, courts should perhaps rush to add remote engagement opportunities. Public safety demands nothing less. But they should also evaluate these systems rigorously. And courts should not be afraid of failure. We should embrace a culture of celebrating failures because those failures allow us to recognize success. Right now, we can't say if ODR is doing what we hope it will. There's reason for optimism and there's reason for doubt.

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<sup>25</sup> See generally Kevin Arceneaux et al., *Comparing Experimental and Matching Methods in a Large-Scale Field Experiment on Voter Mobilization*, 14 POL. ANALYSIS 1, 37–62 (2006) (discussing the differing results at which researchers can arrive depending on the methodology used and specifically noting the mixed results of studies evaluating the performance of matching estimators which use a non-randomized comparison group to compare to a non-randomized treatment group).

[16] As noted, ODR was underway pre-pandemic, and while it is an example of a remote process that perhaps should garner more skepticism, it doesn't seem to be waning but rather the conversation and enthusiasm around its potential promise seems to just subside. Courts continue to plow away at implementation, but the product is there, and it is unused, and unchanged despite the low take up, or use of the platform. Remote jury trials are a thing born out of pandemic necessity, with a disproportionate amount of seemingly preemptive skepticism in relation to the very few instances of use. The next section addresses remote jury trials.

### III. PART II REMOTE JURY TRIALS

[17] Courts are proceeding with remote hearings in some respects, however, remote jury trials in criminal matters are generally on hold, and have been since the start of the pandemic. Criminal justice stakeholders, including defenders, prosecutors, and judges, hold reservations, three of which are addressed here. Section A will address the argument that one charge of a trier of fact, including the jury, is judging credibility, which is best done in-person where demeanor queues are in plain-view. Section B. will address the argument that using video as a communication medium will dehumanize parties to a case, reducing the human connection from in-person interactions and making way for less humane decision-making. Section C. will address the argument that remote jury trials in criminal matters are unconstitutional.

#### A. Deception Detection

[18] Humans have just above a 50-50 chance of being able to detect a lie.<sup>26</sup> And it turns out this does not change with an in-person or a live virtual interaction. No evidence suggests that there is a difference between in-person and virtual interactions, and in fact, a fair amount of evidence suggests that is no difference at all. In other words, most likely, humans are bad at detecting deception regardless of the means of communication.

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<sup>26</sup> See Charles F. Bond Jr. & Bella M. DePaulo, *Accuracy of Deception Judgements*, 10 PERSONALITY & SOC. PSYCH. REV. 214, 219 (2006).

This may come as a shock. After all, most may argue they are sure when our kids or partners are lying. We presume that face-to-face confrontation makes a world of difference. But it turns out we are wrong much of the time, both about being able to tell when someone is telling the truth or not and about the usefulness of face-to-face interaction. Furthermore, the idea that we are bad at detecting lies versus the truth has been settled in science as far back as the 1920's.<sup>27</sup>

[19] These facts have profound implications for the foundations of our justice system. Our justice system is built on the core principle that the larger community, with an in-person interaction, will have a say in determining guilt or innocence, or even right and wrong. This is the trial by jury.

[20] Justice hinges on a jury's ability to sift out truthful evidence and evaluate credibility, but what if humans just aren't good at telling when someone is lying? What if determining credibility just isn't in our skill set? Evidence seems to suggest this is a problem worth considering.<sup>28</sup> As suggested above, Bond and DePaulo, in their meta-analysis of deception detection studies, places human ability to detect deception at 53.98%, or just above chance.<sup>29</sup>

[21] Why are humans so bad at deception detection? People rely on their ability to detect what they think are non-verbal cues that indicate

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<sup>27</sup> See, e.g., William M. Marston, *Studies in Testimony*, 15 J. CRIM. L. & CRIMINOLOGY 5, 22–26 (1924); Glenn E. Littlepage & Martin A. Pineault, *Verbal, Facial, and Paralinguistic Cues to the Detection of Truth and Lying*, 4 PERSONALITY & SOC. PSYCH. BULL. 461 (1978); John E. Hocking et al., *Detecting Deceptive Communication from Verbal, Visual, and Paralinguistic Cues*, 6 HUM. COMM. RES. 33, 34 (1979); Miron Zuckerman et al., *Verbal and Nonverbal Communication of Deception*, 14 ADVANCES EXPERIMENTAL SOC. PSYCH. 1, 39–40 (1981); Bella M. DePaulo & Rober L. Pfeifer, *On-the-Job Experience and Skill at Detecting Deception*, 16 J. APPLIED SOC. PSYCH. 249 (1986); Ginter Kohnken, *Training Police Officers to Detect Deceptive Eyewitness Statements: Does it Work?*, 2 SOC. BEHAV. 1 (1987).

<sup>28</sup> See sources cited *supra* note 27.

<sup>29</sup> Bond & DePaulo, *supra* note 26.

lying. For example, many believe that fidgeting, increased arm and leg movement, or decreased eye contact are indicia of lying, but this is not the case. It turns out that, while there might be some verbal cues that could be reliable for detecting lies, the vast majority of nonverbal cues (including most of those humans tend to rely on) are unreliable, and the reliable cues can be counterintuitive.<sup>30</sup> Furthermore, because humans hold inaccurate beliefs about what is and is not reliable, it is difficult for humans to disregard the unreliable cues.<sup>31</sup> Indeed, in a study that gave some participants reliable nonverbal cues to look for, with other participants not getting this information, participants with the reliable cues had no greater ability to detect lying.<sup>32</sup> So, humans aren't just bad at lie-detection, humans are also bad at being trained on lie-detection. Perhaps most surprising, all of this seems to be true regardless of one's profession. Even among those whose profession asks them to detect lies (such as police officers), respondents cite the same erroneous cues regarding deception.<sup>33</sup> The existing evidence suggests that these study participants are no better at detecting deception than the average layperson.<sup>34</sup>

[22] So, while a dishonest demeanor elevates suspicion, it has little to no relation to actual deception.<sup>35</sup> Similarly, a perceived honest demeanor

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<sup>30</sup> See Bella M. DePaulo et al., *Cues to Deception*, 129 PSYCH. BULL. 74, 95 (2003) (expressing that examples of nonverbal cues thought to indicate lying are less logical statement structure or use of passive rather than active voice).

<sup>31</sup> See Lucy Akehurst et al., *Lay Persons' and Police Officers' Beliefs Regarding Deceptive Behaviour*, 10 APPLIED COGNITIVE PSYCH. 468 (1996).

<sup>32</sup> Hannah Shaw & Minna Lyons, *Lie Detection Accuracy – the Role of Age and the Use of Emotions as a Reliable Cue*, 32 J. POLICE CRIM. PSYCH. 300, 302 (2017).

<sup>33</sup> See Akehurst et al., *supra* note 31, at 461.

<sup>34</sup> See sources cited *supra* note 27.

<sup>35</sup> See Lyn M. Van Swol et al., *Deception, Detection, Demeanor, and Truth Bias in Face-to-Face and Computer-Mediated Communication*, 42 COMMUN. RSCH. 1116, 1131 (2015).

is not reliably associated with actual honesty.<sup>36</sup> In fact, a study from 2015 shows that people attempting to evaluate deception performed better when the interaction was computer-mediated (text-based communication) than in-person communication.<sup>37</sup> At least one possible explanation is the absence of distracting and unreliable nonverbal cues.<sup>38</sup>

[23] Despite popular belief in the efficacy of judging people's honesty based on their demeanor, research on the subject appears uniform that judging deception through the use of nonverbal cues will lead us to get it wrong a lot of the time.<sup>39</sup> In fact, in a meta-analysis that covered empirical studies about cues to deception, cues that showed promise at signaling deception tended to be verbal (content of what is said) and paraverbal (how it is spoken), not visual.<sup>40</sup>

[24] Even if visual cues are eliminated from a jury's consideration, and a jury is left only to evaluate an audio feed, the problems would not be fixed. Audio-only detection accuracy does not differ significantly from audiovisual.<sup>41</sup> At this point, that shouldn't be a surprise considering the general low ceiling of deception detection accuracy - just above 50%.<sup>42</sup> Only in really high-pressure situations is it worthwhile (in a detection

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<sup>36</sup> See Timothy R. Levine et al., *Sender Demeanor: Individual Differences in Sender Believability Have a Powerful Impact on Deception Detection Judgements*, 37 HUMAN COMMUN. RSCH. 377, 400 (2011).

<sup>37</sup> Van Swol et al., *supra* note 35.

<sup>38</sup> See *id.* at 1136.

<sup>39</sup> See *id.*

<sup>40</sup> DePaulo et al., *supra* note 31, at 95 (explaining verbal cues are what is said with paraverbal cues being how something it is said).

<sup>41</sup> See Bond & DePaulo, *supra* note 26, at 225.

<sup>42</sup> See *id.* at 214.

deception sense) to remove nonverbal cues.<sup>43</sup> High-pressure situations, such as criminal confessions elicited by law enforcement, likely make exclusively audio more reliable than audio with the addition of a visual component. The problem for deception detection appears to be that, with respect to visual cues, the pressure turns up the screws both on someone who is motivated to be believed but is actually lying and on someone who is being honest but feels as though they are not believed.

[25] While here this article talks about juries, individual judges do not have any better ability to detect deception than a jury. Notwithstanding many judges' self-professed ability to detect lying, the science that humans are not good deception detectors does not have a caveat for the black robe. Remember, professionals are no better than the rest of us at deception detection; to restate, two meta-analyses from 2006 show that experts are no better at lie detection than non-experts.<sup>44</sup>

[26] What about individuals versus groups? A 2015 study did find consistently that groups performed better at detecting lies,<sup>45</sup> a result the researchers attributed to group synergy or the idea that individuals were able to benefit from others' thoughts.<sup>46</sup> In other words, open-minded group discussion was how groups outperformed individuals. Still, juries are not better than judges at deception detection. The problem is that only

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<sup>43</sup> See Saul M. Kassin et al., "I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators, 29 L. & HUM. BEHAV. 211, 227 (2005).

<sup>44</sup> Bond & DePaulo, *supra* note 26, at 229; Michael Aamodt & Heather Custer, *Who Can Best Catch a Liar?: A Meta-Analysis of Individual Differences in Detecting Deception*, 15 FORENSIC EXAM'R 6, 10 (2006) (highlighting professions thought to develop expertise in lie detection in these meta-analyses are surprisingly not judges but rather criminal investigators, police officers, and psychologists).

<sup>45</sup> Nadav Klein & Nicholas Epley, *Group Discussion Improves Lie Detection*, 112 PNAS 7460, 7464 (May 26, 2015), <https://www.pnas.org/content/112/24/7460> [<https://perma.cc/XR2L-SHE8>] (noting groups consisted of three people which is less than usually empaneled for any jury).

<sup>46</sup> *Id.* at 7463.

*certain kinds* of groups are better than individuals. In particular, groups of individuals who were familiar with one another before they were assigned a deception detection task outperformed both individuals and groups whose members had no pre-existing connection.<sup>47</sup> Groups whose members had no pre-existing connection were no better at detecting deception than individuals.<sup>48</sup> Juries are, by deliberate design, composed of a cross-section of the community, which almost always means that jurors are unfamiliar with one another before trial.<sup>49</sup>

[27] There is also an element of bias that enters into a humans' ability to recognize a lie. For example, females are labeled as liars significantly more than males even when both groups lie or tell the truth the same amount.<sup>50</sup> White respondents asked to detect lies were significantly faster to select the "liar" box to label black speakers than white speakers.<sup>51</sup>

[28] While this is troubling—the idea that a big part of our system of justice hinges on our slightly better than chance ability to determine if someone is lying—it is unaffected by COVID-19. Our inability to detect lying remains constant whether we are doing this in-person or remotely.

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<sup>47</sup> See Roger McHaney et al., *An Exploration of Deception Detection: Are Groups More Effective Than Individuals?*, 45 COMM'N RSCH. 1111, 1121 (Sept. 30, 2015).

<sup>48</sup> See *id.*

<sup>49</sup> See *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) ("The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine – that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.").

<sup>50</sup> See E. Paige Lloyd et al., *Revisiting Perceiver and Target Gender Effects in Deception Detection*, 42 J. NONVERBAL BEHAV. 427, 435 (2018).

<sup>51</sup> See E. Paige Lloyd et al., *Black and White Lies: Race-Based Biases in Deception Judgements*, 28 PSYCH. SCI. 1134, 1136 (2017).

Studies conducted in 2014<sup>52</sup> and 2015<sup>53</sup> agreed that audiovisual and audio-only mediums were not different in detection accuracy. The science suggests we should not consider the medium—in person, video, or telephonic—as having much if any relevant impact on the ability of judges or juries to tell truths from lies.<sup>54</sup>

[29] As the justice system continues to navigate the changing landscape of justice, we should not only think about new ways to access justice but also challenge the assumptions upon which our system was built.

### B. Dehumanization Effect

[30] Defense attorneys have raised concerns of dehumanization of defendants, arguing that in remote trials, triers of fact will have less compassion for defendants and are more willing to wage harsher punishments.<sup>55</sup> A review of relevant literature, however, suggests that this is not necessarily the case.

[31] While the number of studies directly investigating the possibility of online jury trials is limited, analogous studies from various other fields

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<sup>52</sup> Charlotte D. Sweeney & Stephen J. Ceci, *Deception Detection, Transmission, and Modality in Age and Sex*, 5 FRONTIERS PSYCH. 5, 10 (2014).

<sup>53</sup> Scott E. Culhane et al., *Are Two Heads Better Than One? Assessing the Influence of Collaborative Judgements and Presentation Mode on Deception Detection for Real and Mock Transgressions*, 12 J. INVESTIGATIVE PSYCH. OFFENDER PROFILING 158, 165 (2015).

<sup>54</sup> See Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1159 (1993) (summarizing the historical research and literature and comparing our ability to detect deception across mediums); Olin Guy Wellborn II., *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991).

<sup>55</sup> See Derwyn Bunton, *NAPD Statement On the Issues With the Use of Virtual Court Technology*, NAT'L ASS'N FOR PUB. DEF. (June 18, 2020), [https://www.publicdefenders.us/files/NAPD%20Virtual%20Court%20Statement%208\\_1.pdf](https://www.publicdefenders.us/files/NAPD%20Virtual%20Court%20Statement%208_1.pdf) [<https://perma.cc/57KW-NRK4>].

exist. In each of these analogous studies, a decision-maker is called upon to render a judgment or decision that affects the livelihood of the individual before them, much like a juror or judge is called upon to render a decision that affects the livelihood of a defendant.

[32] We highlight findings from a review of both legal and analogous non-legal studies here, and we place a special emphasis on study quality—that is, we prioritize randomized over non-randomized trials, field over lab/simulated experiments, and studies involving actual decision-making over studies involving precursors to decisions (e.g. ratings or impressions).<sup>56</sup> With this criteria in mind, we systematically rank the literature into three tiers, from most to least robust: first, randomized field studies (involving decisions and precursors); second, randomized lab studies (involving decisions and precursors); and third, non-randomized studies. According to research in the first tier of randomized field studies—which are the most telling for probing the possibilities of online jury trials – proceeding via videoconference likely will not adversely affect juries’ perceptions of defendants.

[33] We do take note of the findings of studies beyond this first tier, which include some from the legal field. Findings in these less credible tiers are varied and inconclusive. So, while we suggest that jurisdictions strongly consider proceeding with online jury trials and other similarly innovative ways of addressing both current crises of frozen court systems and docket challenges in the future, we recommend careful investigation and evaluation of such efforts.

### 1. Who Would be Dehumanized?

[34] At the outset, we note a problem common to all of the studies we found, in all tiers: none of the examined situations are structurally

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<sup>56</sup> See Joshua D. Angrist, *Instrumental Variables Methods in Experimental Criminological Research: What, Why and How*, 2 J. EXPERIMENTAL CRIMINOLOGY 23, 24–44 (2006) (explaining randomized studies are considered the gold standard for scientific evidence).

analogous to a jury trial. In a jury trial, a set of disinterested observers make a consequential decision regarding the actions of someone with whom they have no direct interaction and who, in fact, may choose not to speak during the proceeding. In all of the studies we were able to find, which concerned situations such as doctor-patient or employer-applicant or even judge-arrestee, the decision maker interacted directly with the subject of the interaction. It is thus questionable whether any study yet conducted provides credible insight regarding the likely effects of online as opposed to in-person jury trials.

[35] Put another way, if the jury were likely to dehumanize or discount someone, why should it be the defendant, as opposed to those with whom they “interact” with (“listen to” would be a more accurate phrase) more predictably and directly, such as witnesses and lawyers? Recalling that in the United States the prosecution bears the burden of persuasion, and thus must call witnesses that the jury must find credible in order to convict, it is not clear which way concerns of dehumanization cut. At present, then, one defensible view is that there is no evidence either way regarding dehumanization of defendants in an online criminal trial versus an in-person one.

[36] Some might respond that the gut instincts of some defense attorneys and some judges should be counted as evidence.<sup>57</sup> This paper disagrees with the arguments that the gut instincts of human beings, professionals included, are evidence in almost any setting, but we are especially suspicious in the conduct of jury trials. Such trials are the setting for some of the most stubbornly persistent and outlandish myths to which lawyers and judges cling. Among those myths is the contention that an in-person interaction improves the ability of judges and juries to distinguish truthful testimony from deceptive testimony, or accurate witness recollection from mistaken witness recollection.<sup>58</sup> As we discussed above, decades of uninterrupted, rigorous, credible, high-quality

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<sup>57</sup> See Bunton, *supra* note 55.

<sup>58</sup> See *supra* Part II.a.

studies have demolished the contention that in-person interaction improves either deception or mistake detection, as compared to the audiovisual link, or simply reading a transcript. Lawyers and judges continue to hold to the contrary on these latter points. This suggests careful interrogation of professional gut instincts on the subject of dehumanization from an online environment.

## 2. Promising Results from Randomized Field Studies

[37] Within our first-tier category of randomized field studies, the literature indicates that using videoconference in lieu of face-to-face interaction has an insignificant or even positive effect for the person about whom a judgment or decision is made.<sup>59</sup> We were unable to find any randomized field studies that conclude that video conferencing has an adverse or damaging effect on decision outcomes compared to face-to-face communication.

[38] Two randomized field studies in telemedicine, conducted in 2000<sup>60</sup> and 2006<sup>61</sup>, both conclude that using video conferencing rather than face-to-face communication has an insignificant effect on the outcomes of real telemedicine decisions and leads to equivalent<sup>62</sup> or identical results.<sup>63</sup> It is

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<sup>59</sup> By way of explanation, the difference between field studies and lab studies is whether the experiment is conducted in a live setting or a contrived setting. While lab studies are common and valuable – especially when field experiments are difficult or, even more problematically, challenge ethics or decency – the scientific community generally places greater weight on field studies.

<sup>60</sup> R. Eldford et al., *A Randomized Controlled Trial of Child Psychiatric Assessments Conducted Using Videoconferencing*, 6 J. TELEMEDICINE & TELE CARE 73, 74–75 (2000).

<sup>61</sup> Carlos De Las Cuevas et al., *Randomized Clinical Trial of Telepsychiatry Through Videoconference Versus Face-to-Face Conventional Psychiatric Treatment*, 12 TELEMEDICINE & E-HEALTH 341, 341 (2006).

<sup>62</sup> *Id.*; R. Eldford et al., *supra* note 60.

<sup>63</sup> See Angrist, *supra* note 56.

no secret that medicine-implemented telehealth well before the justice system implemented tele-justice.<sup>64</sup>

[39] Additionally, a 2001 randomized field study of employment interviews conducted either using video conference or in-person communication resulted in video conference applicants being rated higher than their in-person counterparts.<sup>65</sup> Anecdotal observations suggested that “the restriction of visual cues forced [interviewers] to concentrate more on the applicant’s words,” and that video conference “reduced the traditional power imbalance between interviewer and applicant.”<sup>66</sup>

[40] From our review of tier-one studies, we conclude that the use of video conferencing makes no difference on decision-making, and at most, the use of video conferencing could place a greater emphasis on defendants’ words and reduce power imbalances, both of which allow defendants to be perceived with greater humanity.

### 3. Varied Findings

[41] Meanwhile, randomized lab studies and non-randomized studies point to a more varied and inconclusive array of findings, giving reason to suggest that use of remote jury trials be accompanied by careful study. Randomized lab studies and non-randomized studies are not generally considered as scientifically rigorous as randomized field studies; much of the legal field literature – which might be considered more directly related to remote justice – falls within this tier of research.

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<sup>64</sup> See Risto Roine et al., *Assessing Telemedicine: A Systematic Review of the Literature*, 165 CMAJ 765, 766 (2001) (noting the earliest reviews of telemedicine occurred in 1995).

<sup>65</sup> Derek S. Chapman et al., *The Impact of Videoconference Technology, Interview Structure, and Interviewer Gender on Interviewer Evaluations in the Employment Interview: A Field Experiment*, 74 J. OCCUPATIONAL & ORGANIZATIONAL PSYCH. 279, 291 (2001).

<sup>66</sup> *Id.*

[42] On one hand, there are results analogous to the tier one studies suggesting that using videoconferencing in lieu of face-to-face interaction has an insignificant effect on the person about whom a decision is being made. When testing the potential dehumanizing effect of videoconferencing as compared to in-person interactions in a lab setting where doctors were given the choice between a painful but more effective treatment or a painless but less effective treatment, no effect of communication medium was found on dehumanizing decision-making.<sup>67</sup> If the hypothesis that videoconferencing dehumanizes patients were true, in this setting, we might expect to see doctors prescribing a more painful but more effective treatment, placing greater focus on effectiveness than an individual's suffering. No such difference emerged.

[43] On the other hand, some randomized lab experiments show an adverse effect of video conferencing as opposed to in-person interactions on human perception of an individual of interest, although these effects did not frequently extend to actual decisions. In one study, MBA students served as either mock applicants or mock interviewers who engaged via video or in person, by random assignment. Those who interviewed via video conference were ultimately less likely to be recommended for the job and were rated as less likable, though their perceived competence was not affected by communication medium.<sup>68</sup> Other lab experiments have also corroborated the notion that the video conference medium negatively affects a person's likability compared with the in-person medium.<sup>69</sup> Legal

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<sup>67</sup> See Min Kyung Lee et al., *Making Decisions from a Distance: The Impact of Technological Mediation on Riskiness and Dehumanization*, in COMPUTER SUPPORTED COOPERATIVE WORK '15: PROCEEDINGS OF THE 18TH ASSOCIATION FOR COMPUTING MACHINERY CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK & SOCIAL COMPUTING 1576 (2015).

<sup>68</sup> See Greg J. Sears et al., *A Comparative Assessment of Videoconference and Face-to-Face Employment Interviews*, 51 MGMT. DECISION 1733, 1740 (2013).

<sup>69</sup> See D. A. Baker et al., *Just Sit Back and Watch: Large Disparities Between Video and Face-to-Face Interview Observers in Applicant Ratings*, 36 INT'L J. HUMAN-COMPUTER INTERACTION 1968, 1975 (2020) (showing passive interview observers rated in-person applicants significantly higher on likability and having more agency); Chris Fullwood, *The Effect of Mediation on Impression Formation: A Comparison of Face-to-Face and*

practitioners should approach such findings with caution. Does likability factor into findings of guilt or innocence? Does likability dramatically change sentencing or conditions of release?

[44] Some non-randomized studies in the legal field have shown that videoconferencing does dehumanize defendants.<sup>70</sup> A 2008 observational study reviewed asylum removal decisions in over 500,000 cases decided in 2005 and 2006, observing that when a hearing was conducted using video conference, the likelihood doubled that an asylum seeker would be denied the request.<sup>71</sup> In a virtual court pilot program conducted in the United Kingdom, the evaluators found that the use of video conferencing resulted in high rates of guilty pleas and a higher likelihood of a custodial sentence.<sup>72</sup> Finally, a time-series analysis analyzing bail decisions in Cook County, Illinois for the eight years before and after bail hearings started being conducted exclusively using CCTV found an increase in average bond amount for certain offenses.<sup>73</sup> Again, however, these studies were not randomized, and well-understood selection effects could easily explain all of these results.

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*Video-Mediated Conditions*, 38 APPLIED ERGONOMICS 267, 270 (2007) (showing likeability and intelligence were rated higher using an in-person medium to complete a simulated mind-reading task).

<sup>70</sup> See *infra* notes 71 & 72.

<sup>71</sup> Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 259–71 (2008) (stating that the study included “all asylum cases differentiated between hearings conducted via VTC, telephone, and in-person for FY 2005 and FY 2006”).

<sup>72</sup> MATTHEW TERRY ET AL., *VIRTUAL COURT PILOT OUTCOME EVALUATION*, 24–3 (2010), <https://justiceacademy.org/iShare/Library-UK/virtual-courts-pilot-outcome-evaluation.pdf> [<https://perma.cc/YN63-R5EZ>] (noting process was not random, the pilot took place in parts of London and Kent with sixteen police stations participating, the defendants in these participating courts had to give their consent before appearing in a Virtual Court, and there was a list of suitability criteria; if a defendant met any one of these criteria, the case was deemed unsuitable).

<sup>73</sup> Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 897 (2010).

#### 4. Conclusions

[45] While the three studies last mentioned are perhaps the most relevant to the situation of a remote jury trial because they are analyzing the effects of remote legal proceedings (albeit not ones in which the trier of fact is a jury), by nature of their being non-randomized studies, we cannot simply assign causation. In other words, we cannot credibly say that the use of video conferencing contributed to a statistically significant difference in outcome results. There could be other outside factors that contributed to the results. However, and as discussed above, if people are indeed perceived more negatively through video medium compared to in face-to-face interactions, this unfavorable perception might (perhaps should) affect both witnesses and defendants.

[46] The randomized field studies, however, do point toward a promising direction for the implementation of online jury trials and sustainability of remote hearings. The fact that these studies are non-legal but analogous in topic and more scientifically robust in procedure often distracts justice system stakeholders, who might be tempted to believe that less reliable results that occur in a familiar setting deserve greater weight than more reliable results occurring in an analogous but not identical setting. However, this may be unwise.

[47] All things considered; the jury is still out on the dehumanizing effects of videoconferencing. More rigorous research, specifically in legal settings, is needed. But for now, the credible research may relieve some concerns about the dehumanizing effect of remote justice. Given the current crises around our country regarding frozen court systems, with the resultant lengthy pre-trial incarceration and virus exposure, along with emergent crises from recession-induced funding cuts, concerns of defendant dehumanization should not stand in the way of giving online jury trials a try.

### C. Constitutionality of Remote Jury Trials in Criminal Proceedings

[48] The federal right to a jury trial in criminal matters is enshrined in Article III, Section 2<sup>74</sup> and the Sixth Amendment<sup>75</sup> of the United States Constitution and flows to the states in accordance with precedent set by *Klopper v. North Carolina*<sup>76</sup> and *Parker v. Gladden*<sup>77</sup>. When understanding whether that right is violated with a remote jury trial, we primarily look to the Confrontation Clause.<sup>78</sup> Specifically, we ask whether video confrontation satisfies the confrontation right. This paper will not discuss a defendant's implications, which could well be the subject of its own scholarship. We will narrowly define our question to ask, does the jury's observation of confrontation have to be in-person to satisfy constitutionality rights? Or, rather, can observation of confrontation occur via video while still upholding the values set forth in the Sixth Amendment?

[49] The text of the Confrontation Clause does not implicate factfinders, only witnesses. However, in *Mattox v. United States*, the court implicated the factfinder when suggesting that the *Confrontation Clause* requires the defendant to have the opportunity to confront witnesses in the

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<sup>74</sup> U.S. CONST. art. III, § 2 (“[T]he trial for all crimes . . . shall be by jury; and such trial shall be held in the state where the said crimes have been committed.”).

<sup>75</sup> U.S. CONST. amend. VI (“[I]n criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed.”).

<sup>76</sup> *Klopper v. North Carolina*, 386 U.S. 213 (1967).

<sup>77</sup> *Parker v. Gladden*, 385 U.S. 363 (1966).

<sup>78</sup> U.S. CONST. amend. VI (stating that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with witnesses against him”).

presence of the jury.<sup>79</sup> A lot has changed since 1895 allowing access to courts that the *Mattox* court likely could not fathom at the time of its opinion. However, this decision is relied on in more recent cases<sup>80</sup>, requiring due consideration of its applicability. What is required to satisfy the face-to-face requirement laid out by *Mattox*?<sup>81</sup>

[50] The reasoning for in-person and face-to-face observation of a defendant's confrontation right by the jury, as stated in *Mattox*, is to allow for the jury to observe demeanor.<sup>82</sup> Assuming, *arguendo*, that is a reasonable and legitimate concern, is that concern present with the use of a remote observation of a trial by the jury? Are we capable of ensuring the ability to observe demeanor with the technology solutions? But, what about what we learned above about our ability to detect deception and how the medium does, or does not, change that ability?<sup>83</sup> It may be that we satisfy the face-to-face requirement by simulating the in-person

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<sup>79</sup> *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (indicating the purpose of the confrontation right is to give the defendant the opportunity to “compel [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief”).

<sup>80</sup> *See, e.g.*, *California v. Green*, 399 U.S. 149, 158 (1970) (stating that one purpose of confrontation is that it “permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility”); *Coy v. Iowa*, 487 U.S. 1012, 1028 (1988) (Brennan, J., dissenting) (citing *Green*, 399 U.S. at 158); *Maryland v. Craig*, 497 U.S. 836, 843 (1990); *Crawford v. Washington*, 541 U.S. 36, 36–37 (2004); *see also* *United States v. Robertson*, No. 17-CR-02949-MV-1, 2020 WL 6701874, at \*2 (D.N.M. Nov. 11, 2020) (holding that witnesses must be required to remove their face masks when worn in lieu of the face shields to allow the jury to judge their demeanor and credibility); *United States v. Crittenden*, No. 4:20-CR-7, 2020 WL 4917733, at \*5–6 (M.D. Ga. Aug. 21, 2020) (holding right to face-to-face confrontation is not absolute and “mask requirement is necessary to further an important public policy”).

<sup>81</sup> *See Mattox*, 156 U.S. at 243.

<sup>82</sup> *See id.*

<sup>83</sup> *See supra* Part § II.a.

atmosphere in a virtual or remote space. The ability to view and assess demeanor can exist. This is, as of yet, an unsettled and untested argument. Hopefully it will not remain untested for long.

#### IV. PART III CLOSING CONCERNS AND CALL TO ACTION

[51] In Part I we highlighted the alarming number of people, largely low-income folks, that do not have reliable broadband internet and asked the question whether incurring the costs of creating public access terminals in community centers or hubs warranted the continued exploration of an underdeveloped remote justice solution (ODR). However, as we think about ODR and remote jury trials in tandem and then also build out from there all the potential for remote access to courts, the cost argument diminishes, making way for justification of that expense and a forum in which courts can try and fail with ODR while succeeding with representation from all communities in a meaningful way in other justice system interactions. But let's not just try to take what we have and move it online. Let's also draw from the body of reliable evidence in other disciplines to reimagine a justice system that is representative of all, and that is useful to all. If the foundational reasoning for doing things the way we do is legitimately questioned and crumbling, should we not evaluate those foundations in addition to thinking about new ways to ensure accessible justice?

[52] This paper addressed some of the issues and concerns espoused with remote interactions in the justice system. There are other issues that deserve equal attention and deliberate thought: marginalization of users, representative sample of jurors (an issue to be addressed with in-person trials too), current disengagement of parties and a potential new crop of disengagement of users, and others. But the only way to truly know if any of these are present in the remote justice setting, or if we are addressing what we know to be present with a new tool, process, or intervention, is to try it out and evaluate the results.