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## Expanding Access to Remedies through E-Court Initiatives

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## **Expanding Access to Remedies through E-Court Initiatives**

AMY J. SCHMITZ†

### ABSTRACT

Virtual courthouses, artificial intelligence (AI) for determining cases, and algorithmic analysis for all types of legal issues have captured the interest of judges, lawyers, educators, commentators, business leaders, and policymakers. Technology has become the “fourth party” in dispute resolution through the growing field of online dispute resolution (ODR), which includes the use of a broad spectrum of technologies in negotiation, mediation, arbitration, and other dispute resolution processes. Indeed, ODR shows great promise for expanding access to remedies, or justice. In the United States and abroad, however, ODR has mainly thrived within e-commerce companies like eBay and Alibaba, while most public courts have continued to insist on traditional face-to-face procedures. Nonetheless, e-courts and public ODR pilots are developing throughout the world in particular contexts such as small claims and property tax disputes, and are demonstrating how technology can be used to further efficiency and expand access to the courts. Accordingly, this Article explores these e-court initiatives with a critical eye for ensuring fairness, due process, and transparency, as well as efficiency, in public dispute resolution.

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## INTRODUCTION

Individuals have historically resolved disputes through face-to-face (F2F) interactions, such as litigation or traditional arbitration, mediation, or negotiations. Alternative Dispute Resolution (ADR) theorists and practitioners have long assumed that empathy gained from in-person contact is necessary for resolving conflicts. Furthermore, the norm has been litigation, as individuals seek to avail their rights in courts of law. Public justice demanded that dispute resolution be exactly that, public and in full view. This has especially been true in the United States (U.S.), where one's "day in court" is sacred.

Nonetheless, times have changed, and individuals have realized that litigation is too expensive and somewhat nonsensical in many cases. Individuals used to the digital age demand real remedies in real time. Time is money. This is especially true for small dollar, property tax, parking, and other similarly less complex cases. Consumers simply are not willing to spend the time and money it takes to file a claim in court or arbitration and travel to an in-person process. For small dollar claims, it is even too costly to seek redress through F2F small claims courts or litigation alternatives such as mediation, if one must pay for the mediator's time and bear the costs of travel and time off work.<sup>1</sup>

Meanwhile, we have become increasingly comfortable with transacting online.<sup>2</sup> The Pew Research Center recently did a study of online shopping and e-commerce and found tremendous growth in the way our commercial behaviors

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1. *See generally* AMY J. SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION*, (2017) (proposing an online remedy system to expand consumers' access to remedies and to revive corporate responsibility in consumer contracting).

2. *See, e.g.*, TALKSPACE, <https://get.talkspace.com/pf-therapy> (last visited Aug. 12, 2018).

have changed.<sup>3</sup> Surveys of U.S. consumers in 2015 indicated that Americans were spending nearly \$350 billion annually online, and 79% of Americans indicated that they make purchases online.<sup>4</sup> Additionally, roughly half of Americans reported making online purchases using their cell phones, and many indicated their purchases were made on social media sites such as Facebook or Twitter.<sup>5</sup> These percentages have presumably grown since that time.

At the same time, e-commerce sites such as Amazon and eBay have gathered loyal customers by providing online means for quickly resolving purchase disputes.<sup>6</sup> This gave birth to the field of online dispute resolution, or “ODR.”<sup>7</sup> ODR includes automated decision-making, as well as online negotiation, mediation, arbitration, community courts, and variations thereof. Its efficiency, accessibility, and ease expand access to justice that moves at the pace of technology, thus allowing for innovation.<sup>8</sup> ODR also allows individuals to resolve disputes quickly and cheaply, without the costs or hassles of travel or taking time away from work.<sup>9</sup>

These ODR attributes have sparked initiatives for furthering its use throughout the world. For example, the European Union (E.U.) has promulgated the ADR Directive and ODR Regulation, which work in tandem to require Member States to implement ODR systems for consumer

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3. AARON SMITH & MONICA ANDERSON, PEW RESEARCH CTR., ONLINE SHOPPING AND E-COMMERCE 2–4 (2016) <http://www.pewinternet.org/2016/12/19/online-shopping-and-purchasing-preferences/>.

4. *Id.* at 5.

5. RICHARD SUSSKIND, TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 100–02 (2013).

6. See discussion *infra* Section I.B.

7. *Id.*

8. *Id.*

9. See Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. REV. 329, 330 (2016).

claims.<sup>10</sup> Furthermore, the United Nations Commission on International Trade Law (UNCITRAL) worked for many years in advancing guidelines on ODR for cross-border e-commerce through its Working Group III on Online Dispute Resolution. Although the Working Group never reached a consensus for such guidelines, it ended in 2016 with a strong recommendation for continuing development of ODR as imperative for efficient redress in cross-border claims. It is therefore not a surprise that the UNCITRAL Working Group IV recently expressed a desire to consider the role of ODR in its examination of cloud computing contracting and identity management.<sup>11</sup>

Nonetheless, public courts have been slow to adopt ODR or develop e-courts.<sup>12</sup> It may seem surprising that the U.S. has not moved more quickly in this direction, given that many of the leading innovators in legal technology are based in the U.S.<sup>13</sup> That is not to say that there are no innovators in U.S. courts. Instead, some courts in Michigan, Ohio, New York, and elsewhere are developing pilot projects for ODR as a pre-cursor to trial, or for e-courts to handle specific

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10. See discussion *infra* Section IV.A.

11. Comm. on Int'l Trade Law, Rep. on the Working Group IV (Electronic Commerce) on the Work of Its Fifty-Sixth Session, U.N. Doc. A/CN.9/936, at 7–8 (2018). The recent report noted: “With respect to section M, the Working Group agreed to add a subsection on online dispute resolution (ODR) in the light of the relevance and importance of ODR to resolution of disputes arising from cloud computing transactions and taking into account UNCITRAL’s work in that area.” *Id.* at 6.

12. REBECCA LOVE KOURLIS ET AL., IIALS, A COURT COMPASS FOR LITIGANTS 11 (2016), <http://iaals.du.edu/honoring-families/publications/court-compass-litigants.1%20-%20Nov.ashx>. Note that this Article uses both terms—e-courts and ODR—in discussing these various projects. However, there is a distinction between “e-courts” and “ODR.” Full discussion of the distinctions warrants another article. Suffice it to say in this limited space, however, that ODR programs generally facilitate settlement or substantive determination on the merits, while e-court projects are more limited to ending the dispute or providing a remedy or result based on limited parameters.

13. See *e.g.*, TYLER TECHNOLOGIES, <https://www.tylertech.com/> (last visited Aug. 12, 2018).

disputes.<sup>14</sup> Groups such as the American Bar Association (ABA) are also developing ODR projects that will operate as an alternative to the courts in an effort to assist parties in resolving claims with only limited judicial assistance.<sup>15</sup> At the same time, public ODR projects are taking shape in other parts of the world. Most notable have been online courts in Canada and China.

Indeed, forward thinking policymakers are learning that ODR programs improve judicial efficiency and access for litigants to “attend court” in a meaningful way.<sup>16</sup> There is no reason to confine ODR to e-commerce. Instead, individuals in our increasingly wireless world prefer to resolve disputes online. Often, lack of physical access and real-time availability of all participants impede access to justice in F2F processes.<sup>17</sup> For minor disputes, the time, money, and real or perceived risks involved with going to court are often not worth the cost or hassle.<sup>18</sup> It is simply more cost-effective and convenient for most people to use ODR for small claims, traffic, landlord-tenant, and similarly smaller or less complex disputes.

Public bodies also benefit from ODR because it is more efficient than traditional judicial proceedings. The initial start-up costs often appear daunting, but are easily eclipsed by later savings in terms of time and money. Problem diagnosis built into ODR leads to dispute prevention, while users enjoy online negotiation and mediation that lead to

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14. See generally JOINT TECH. COMM., JTC RESOURCE BULLETIN: CASE STUDIES IN ODR FOR COURTS (Nov. 29, 2017), <https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/2017-12-18%20ODR%20case%20studies%20revised.ashx> [hereinafter CASE STUDIES IN ODR].

15. *Id.* at 19.

16. See J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 1994–96 (2017).

17. *Id.* at 1995.

18. *Id.* at 1996.

consensual and quick, resolutions. This saves the courts from the administrative burden of trial and helps clear court dockets with minimal personnel costs. Online court systems also encourage fee and judgment payments by incorporating automatic notices and payments. Moreover, evidence suggests that ODR boosts citizen satisfaction.<sup>19</sup>

That leaves us asking why e-courts and public ODR are not the norm, especially for small-dollar cases. Why do we only see pilot projects in discrete locations and contexts? The answer seems to be, in part, fear of the unknown, fear of losing jobs and status, fear of start-up costs, and fear that technology will disrupt due process. This Article, therefore, aims to provide fuel for overcoming these fears to assist access to justice through expansion of e-courts and public ODR for small dollar and less complex cases. To that end, Part I will provide a brief background on the development of ODR, and reasons for moving remedy systems online. Part II will then give examples of ODR in U.S. courts, while Part III will add discussion of the international efforts toward online courts. These Parts will therefore set the stage for comparative analysis leading to Part IV, which will unpack important issues for policymakers to consider as these public ODR projects unfold. This aims to spark further debate, by discussing the essentials for building fair and efficient e-courts. Finally, Part V will conclude.

## I. MOVING CONSUMER REMEDIES ONLINE

### A. *Basic Reasons for ODR*

Consumers crave fast and easy means for obtaining remedies, especially with respect to smaller-dollar claims or smaller infractions, such as parking tickets and driving misdemeanors. ODR processes open a new avenue for individuals to obtain remedies for less time and expense. ODR goes beyond merely providing portals for consumers to

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19. *See id.* at 2050.

post complaints. It uses online processes to end disputes without need for the travel, stress, inconvenience, and other costs of traditional F2F or telephonic dispute resolution measures.<sup>20</sup> ODR systems may use facilitative or automated negotiation processes, as well as online mediation and arbitration aimed to end disputes and resolve complaints.<sup>21</sup> These systems are generally user-friendly because they allow consumers to quickly fill out standard forms and upload related documents to obtain timely resolutions. They also may use real-time and asynchronous communications for maximum convenience and efficiency.<sup>22</sup>

The American system for resolving disputes is largely legal.<sup>23</sup> As one scholar notes, “[i]f Americans do not go to law, they face relatively few alternative means of *remedy*.”<sup>24</sup> However, most consumers do not think about “law” or care to deal with litigation in seeking remedies for smaller dollar claims or less complex matters; they simply want easy access to assistance without needing to consult lawyers or physically go to court.<sup>25</sup> ODR provides this sort of remedial process.

Much of ODR’s popularity stems from its speed and low cost.<sup>26</sup> These systems are more convenient and efficient than

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20. ABA TASK FORCE ON ELEC. COMMERCE & ALT. DISPUTE RESOLUTION, WHAT IS ONLINE DISPUTE RESOLUTION? A GUIDE FOR CONSUMERS 1 (March 2002), [https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/consumerodr.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/consumerodr.authcheckdam.pdf).

21. *Id.*

22. See, e.g., *Solutions and Products*, MODRIA, <http://modria.com/how-it-works/> (last visited Aug. 12, 2018).

23. See Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 950–54 (2009).

24. *Id.* at 966 (emphasis added).

25. See Jean Braucher, *An Informal Model of Consumer Product Warranty Law*, 1985 WIS. L. REV. 1405, 1405–07.

26. See Philippe Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. ON DISP. RESOL. 301, 308–15 (2008) (noting use



F2F dispute resolution processes because they eliminate travel costs and diminish the need for legal assistance.<sup>27</sup> Furthermore, asynchronous communications and translation programs give ODR the advantage of allowing for multilingual processes and communications at times that fit parties' schedules.<sup>28</sup> Providing due process guidelines could reinforce ODR's advantages by enhancing the fairness of these processes by imposing accreditation rules for systems designers and the neutrals who may facilitate online mediations and arbitrations.<sup>29</sup>

That said, online communications do come with dangers.<sup>30</sup> Some commentators warn that the anonymity of computer-mediated communication (CMC) allows for "cyber bullying" and use of abusive or combative language parties would not feel comfortable using in person or on the phone.<sup>31</sup> CMC also may diminish empathy, which could lead to misinterpretations in online negotiations.<sup>32</sup> However,

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for consumer small claims).

27. See *id.* at 312–15; see also Public Roundtable on Dispute Resolution for Online Business-to-Consumer Contracts, 66 Fed. Reg. 7491, 7492 (Jan. 23, 2001); Public Workshop: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, 65 Fed. Reg. 7831, 7832 (Feb. 16, 2000).

28. Melissa Conley Tyler, *115 and Counting: The State of ODR 2004*, [www.mediate.com/odrresources/docs/ODR%202004.doc](http://www.mediate.com/odrresources/docs/ODR%202004.doc) (last visited Jan. 15, 2018) (noting that as early as 2004, 11% of ODR providers had multilingual capabilities).

29. See Amy J. Schmitz, *Building Bridges to Remedies for Consumers in International eConflicts*, 34 U. ARK. LITTLE ROCK L. REV. 779, 779–95 (2012); Amy J. Schmitz, *"Drive-Thru" Arbitration in the Digital Age: Empowering Consumers through Regulated ODR*, 62 BAYLOR L. REV. 178, 220–25 (2010).

30. JARON LANIER, *YOU ARE NOT A GADGET: A MANIFESTO* 60–63 (2010) (noting the anti-human approach fostered by the expansion of Internet life).

31. Jan Hoffman, *Online Bullies Pull Schools Into the Fray*, N.Y. TIMES (June 27, 2010), <https://www.nytimes.com/2010/06/28/style/28bully.html> ("It's easier to fight online, because you feel more brave and in control . . .").

32. *Id.* (discussing dehumanizing impacts of the Internet). For example, "LOL" can be interpreted as "lots of love" or "lots of laughs," which could make for awkward interactions if used in reply to news that a friend's loved one passed away.

individuals have become increasingly adept at expressing themselves through standardized textual cues and emotive characters.<sup>33</sup> CMC has become less sterile as individuals have developed means for virtually building rapport over the Internet.<sup>34</sup>

Furthermore, the relative anonymity and comfort of communicating through a computer or smartphone may ease some of the social and power pressures of F2F communications.<sup>35</sup> This is especially true for consumers who fear stereotypes or biases.<sup>36</sup> For example, a woman with a strong Hispanic accent may worry that customer service representatives will not understand her and ignore her complaints over the telephone. In addition, some individuals are less adversarial online than in-person when the asynchronous nature gives them time to digest thoughts and dissipate anger before replying.<sup>37</sup> Individuals also may be more cautious in composing e-mails due to awareness that their messages are easily retrievable.<sup>38</sup>

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33. See, e.g., Robert M. Bastress & Joseph D. Harbaugh, *Taking the Lawyer's Craft into Virtual Space: Computer-Mediated Interviewing, Counseling, and Negotiating*, 10 CLINICAL L. REV. 115, 118–26 (2003) (detailing the trends of increased use of CMC).

34. David Allen Larson & Paula Gajewski Mickelson, *Technology Mediated Dispute Resolution and the Deaf Community*, 3 HEALTH L. & POL'Y BRIEF 15, 18 (2009).

35. See Paul Stylianou, Note, *Online Dispute Resolution: The Case for a Treaty Between the United States and the European Union in Resolving Cross-Border E-Commerce Disputes*, 36 SYRACUSE J. INT'L L. & COM. 117, 125 (2008) (recognizing emotion involved with F2F communications).

36. See *id.* at 125–26 (noting benefits and drawbacks of online dispute resolution processes).

37. See David Allen Larson & Paula Gajewski Mickelson, *Technology Mediated Dispute Resolution Can Improve the Registry of Interpreters for the Deaf Ethical Practices System: The Deaf Community Is Well Prepared and Can Lead by Example*, 10 CARDOZO J. CONFLICT RESOL. 131, 149 (2008).

38. See Susan C. Herring, *Computer-Mediated Communication on the Internet*, 36 ANN. REV. INFO. SCI. & TECH. 109, 144–45 (2002); Larson & Mickelson, *supra* note 37, at 140–41 (explaining evidence that less bullying occurs through online communication than F2F).

In sum, most consumers know that the Internet can be effective for researching purchases and sharing information about products and services.<sup>39</sup> However, consumers also want to have means for resolving their claims online. They do not want to have to pick up the phone or travel to a court. Instead, consumers seek ODR, such as online mediation and negotiation, to cheaply and easily obtain redress.<sup>40</sup>

### B. *ODR Examples and Evolution*

ODR systems already exist, and their use is growing as companies, consumers, and policymakers embrace their efficiencies and other attributes. For example, the retail website eBay has been at the forefront in providing ODR free of charge for its consumers.<sup>41</sup> The eBay “Money Back Guarantee,” which applies when a buyer does not receive an item or the item is not as promised, gives the buyer the right to file an online complaint within thirty days after the latest estimated delivery date.<sup>42</sup> The seller then has three business days to respond in the “Resolution Center.”<sup>43</sup> If the seller does not respond or provide an adequate remedy, the buyer may ask eBay to assign an ODR neutral to consider the facts and make a determination.<sup>44</sup> If necessary, eBay may enforce

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39. For example, Utility Consumers’ Action Network (“UCAN”) provides an online forum for consumers to alert others regarding contract dangers and to offer suggestions for avoiding or responding to consumer issues. *See Who is UCAN?*, UTIL. CONSUMERS’ ACTION NETWORK, <http://www.ucan.org> (last visited Aug. 12, 2018).

40. Am. Bar Ass’n Task Force on Elec. Commerce & Alt. Dispute Resolution, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW. 415, 419 (2002) (defining ODR broadly).

41. Colin Rule, *Making Peace on eBay: Resolving Disputes in the World’s Largest Marketplace*, ACRESOLUTION, Fall 2008, at 8–11, <http://colinrule.com/writing/acr2008.pdf>.

42. *eBay Money Back Guarantee*, EBAY, <http://pages.ebay.com/help/policies/money-back-guarantee.html> (last visited Aug. 12, 2018).

43. *Id.*

44. *See id.*

ODR determinations via PayPal, eBay's payment system provider, by setting aside a seller's funds.<sup>45</sup>

eBay also provides an "Unpaid Item Policy," which allows sellers to submit claims through the online Resolution Center against buyers who do not pay for purchased items within two days.<sup>46</sup> If a buyer fails to provide proof of payment or a valid reason for not paying, eBay may grant the seller a final value fee credit and refund the fee for relisting the item.<sup>47</sup> Similarly, eBay provides a "Verified Rights Owner Program" ("VeRO") that allows intellectual property rights holders to submit a "Notice of Claimed Infringement" online with respect to items sold on eBay.<sup>48</sup> Such notice prompts eBay to remove an item listing that arguably infringes intellectual property rights.<sup>49</sup> The seller then may file a counter notice to have the item reinstated in ten days unless the holder of the intellectual property rights informs eBay that it is seeking a court order to restrain the relisting of the item in accordance with the Digital Millennium Copyright Act.<sup>50</sup>

At the same time, eBay recognizes the importance of reviews posted on its site to sellers' businesses. Accordingly, under eBay's "Independent Feedback Review" policy, a seller

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45. *Id.* (giving both parties thirty days to appeal any determinations).

46. *Unpaid Item Policy*, EBAY, <http://pages.ebay.com/help/policies/unpaid-item.html> (last visited Aug. 12, 2018).

47. Valid reasons for not paying include improper price changes or shipping costs, seller suspensions, or account hacking. *Id.* (noting that accumulated unpaid items on the buyer's account may result in a loss of buying privileges, although either party may appeal any determinations).

48. *Verified Rights Owner Program*, EBAY, <http://pages.ebay.com/help/policies/programs-vero-ov.html> (last visited Aug. 12, 2018) (noting how the right for an eBay member to file a counter notice to reinstate a listing after a notice of claims infringement is rooted in the DMCA).

49. *Id.*

50. *Id.*

may challenge a review posting.<sup>51</sup> eBay will then have an impartial third-party reviewer from a professional dispute resolution service examine the challenged posting and determine whether to affirm, withdraw, or take no action regarding the review.<sup>52</sup> Additionally, under eBay's "Vehicle Purchase Protection" program, eBay offers up to \$100,000 to cover payment for a vehicle that is not as promised or received by the customer.<sup>53</sup>

Despite these ODR programs, however, eBay also has a binding arbitration clause in its user agreement.<sup>54</sup> Consequently, if parties cannot resolve their disputes online, their only means of recourse is small claims court or to initiate binding F2F arbitration.<sup>55</sup> The only way for an eBay user to avoid this arbitration policy and retain the right to judicial action is for the user to file an opt-out form with eBay within thirty days after the date of accepting eBay's user agreement.<sup>56</sup> Arbitration, therefore, is the default for practical purposes, considering that few consumers will be sufficiently proactive to file the opt-out form in that time frame.

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51. *Handling Feedback Disputes with Sellers*, EBAY, <http://pages.ebay.com/help/feedback/feedback-disputes.html> (last visited Aug. 12, 2018); *Seller Performance and Feedback Policy: Manual Review*, EBAY, <https://www.ebay.com/help/policies/selling-policies/seller-performance-policy/seller-performance-defect-removal-policy?id=4352> (last visited Aug. 12, 2018).

52. *Disputing Feedback you Received*, EBAY, <http://pages.ebay.com/help/feedback/feedback-review.html> (last visited Aug. 12, 2018).

53. *Vehicle Purchase Protection*, EBAY, <http://pages.motors.ebay.com/buy/purchase-protection/> (last visited Aug. 12, 2018). If the buyer cannot resolve the issue with the seller, the buyer must request reimbursement no later than forty-five days after the listing end date. An independent service provider (the "VPP Administrator") unaffiliated with eBay administers this program. *Id.*

54. *eBay User Agreement*, EBAY, [http://pages.ebay.com/help/policies/user-agreement.html?rt=nc#17\\_](http://pages.ebay.com/help/policies/user-agreement.html?rt=nc#17_) (last visited Aug. 12, 2018).

55. *Id.* The arbitration will begin after a dispute remains unresolved after 30 days of the Notice of Claim under eBay's User Agreement. *Id.* Small claims court is also an option. *See id.*

56. *Id.*

PayPal has a nearly identical arbitration policy. However, it also offers free ODR programs similar those offered by eBay, which generally make arbitration unnecessary. For example, PayPal offers ODR for claims related to items not received and for items “significantly not as described.”<sup>57</sup> The PayPal policy allows parties to first attempt to settle their disputes through PayPal’s online “Resolution Center,” and then to escalate unresolvable disputes for determination by a third-party neutral.<sup>58</sup> The ODR neutral then determines refund eligibility and administers any necessary consequences to the losing party.<sup>59</sup>

Additionally, PayPal protects sellers from claims, chargebacks, or reversals based on unauthorized transactions or items not received.<sup>60</sup> Under this policy, sellers may submit a notification to PayPal regarding the unauthorized transactions or other errors.<sup>61</sup> PayPal will then investigate and issue a determination. Depending on its findings, PayPal may credit the seller’s account for the suspected error.<sup>62</sup> Nonetheless, any resolution sought through PayPal precludes a purchaser’s ability to contact a credit card company for chargeback rights.<sup>63</sup> This essentially prevents a buyer from “double-dipping” and obtaining the same remedy twice.

ODR programs run by PayPal and eBay have garnered customer support because these programs allow customers

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57. *PayPal User Agreement: PayPal’s Purchase Protection Program*, PAYPAL, <https://www.paypal.com/us/webapps/mpp/ua/useragreement-full#14> (last visited Aug. 12, 2018).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

to efficiently obtain remedies without the costs and hassles associated with traditional claims processes. Nonetheless, other websites also have ODR policies for limited types of claims, but they often go unused due to their limitations and ambiguous terms. For example, Facebook's terms of service seem to indicate that a user's only alternative is to submit all claims to litigation in California courts.<sup>64</sup> However, a closer reading of the terms reveals that Facebook does offer an ODR mechanism through TRUSTe, an Internet privacy management service, for resolution of certain privacy disputes.<sup>65</sup>

Through TRUSTe's ODR program, Facebook customers can submit privacy-specific complaints, subject to important exceptions, for any complaint that "seeks only monetary damages," "alleges fraud or other violations of statutory or regulatory law," or "has been resolved under a previous court action, arbitration, or other form of dispute resolution."<sup>66</sup> Any determinations on the privacy claims through this ODR program do not bar an individual's right to pursue other legal

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64. *Terms of Service*, FACEBOOK, <https://www.facebook.com/legal/terms> (last visited Aug. 12, 2018) (stating "[f]or any claim, cause of action or dispute that you have against us, which arises out of or relates to these Terms or the Facebook Products ("claim"), you agree that it will be resolved exclusively in the US District Court for the Northern District of California or a state court located in San Mateo County. You also agree to submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim, and that the laws of the State of California will govern these Terms and any claim, without regard to conflict of law provisions."). Notably, Facebook dropped its binding arbitration program in 2009. Greg Beck, *Facebook Dumps Binding Mandatory Arbitration*, CONSUMER L. & POL'Y BLOG (Feb. 26, 2009), <http://pubcit.typepad.com/clpblog/2009/02/facebook-dumps-binding-mandatory-arbitration.html>.

65. *Dispute Resolution FAQs*, TRUSTe, <https://www.truste.com/consumer-resources/dispute-resolution/dispute-resolution-faqs/> (last visited Aug. 12, 2018); see also Fran Maier, *Facebook & TRUSTe*, TRUSTARC BLOG (May 12, 2010), <http://www.truste.com/blog/2010/05/12/facebook-truste/> (noting Facebook and TRUSTe's business relationship).

66. *Dispute Resolution FAQs*, *supra* note 65 (answering "[w]hat constitutes an ineligible complaint?").

action.<sup>67</sup> However, parties must comply with TRUSTe's determination or face removal from the TRUSTe program and possibly enforcement action by an appropriate law-enforcement body.<sup>68</sup>

A global view suggests that ODR is the wave of the future. Merchants outside of the United States have embraced ODR, especially due to its ability to transcend borders and jurisdictional tensions. For example, the large online retailer Alibaba uses an ODR mechanism for resolution of buyer-seller disputes.<sup>69</sup> Under the program, both parties may submit a complaint to Alibaba; if the parties do not resolve their dispute within ten days, they may refer the dispute to Alibaba's online "Dispute Resolution Team."<sup>70</sup> Alibaba then makes a determination based on evidence provided by both parties.<sup>71</sup> Alibaba may also

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67. *Id.*

68. *Id.* Parties must first make a good faith attempt to resolve the privacy issue directly, and if that fails, then TRUSTe will facilitate settlement through e-mail communications. *Id.* (answering "[w]hat constitutes an eligible complaint?"). Based upon the facts of a particular complaint, TRUSTe may do any or all of the following: "[r]equire the Client to either correct or modify personally identifiable information, or change user preferences"; "[r]equire the Client to change its privacy statement or privacy practice"; "[r]equire the Client to submit to a third-party audit of its privacy practices to ensure both the validity of its privacy statement and that it has implemented the corrective action that TRUSTe required." *Id.* (answering "[w]hat remedies are available to me as a Complainant?"). If TRUSTe makes a determination on the issue, then it can require the party deemed to have violated privacy rights to take corrective actions. If that party does not comply, TRUSTe may refer the matter "to an appropriate government agency, remove it from the TRUSTe program, and/or sue the party for breach of its License Agreement with TRUSTe." *Id.* (answering "[w]hat remedies are available to me as a Complainant?").

69. *Definitions of Dispute and Resolution by Alibaba.com*, ALIBABA, <http://rule.alibaba.com/rule/detail/2060.htm> (last visited Aug. 13, 2018); *Rules of Enforcement Action against Non-Compliance of Transactions*, ALIBABA, <http://rule.alibaba.com/rule/detail/3310.htm?spm=a271m.8038972.1999288231.3.28f86d82Ao22Yr> (last visited Aug. 12, 2018) [hereinafter *Rules of Enforcement Action*].

70. *Rules of Enforcement Action*, *supra* note 69.

71. *Id.*



“blacklist guilty suppliers’ accounts,” and uses a system of penalty points.<sup>72</sup>

This section briefly outlined reasons for moving dispute resolution online, and examples of ODR in e-commerce. ODR is now growing and thriving in many companies. Furthermore, it has become common for e-commerce companies to provide e-chats instead of phone support for resolving complaints. While this can be frustrating in some cases, proper use of technology in dispute resolution can promote easy and effective access to remedies. It is therefore not surprising that courts are joining the bandwagon and exploring use of ODR.

## II. E-COURT INITIATIVES IN THE UNITED STATES

ODR is in its infancy in U.S. courts. This is surprising, considering the benefits of ODR in terms of efficiency and access to remedies. For example, misdemeanors and traffic tickets account for more than half of the state trial caseloads, but most people do not hire attorneys to contest these cases in court.<sup>73</sup> Furthermore, individuals do not really need an attorney in such minor cases because the decision-maker or prosecutor typically explains the rights, options, and consequences to the litigant.<sup>74</sup> Therefore, litigants mainly avoid court due to reasons that are economic (e.g. costs of missing work and finding child care), physical (e.g. difficulty of travel to court, especially for rural citizens or those with disabilities), or psychological (e.g. court causes feelings of anxiety or shame).<sup>75</sup> At the same time, with courts’ resources dwindling, it seems logical to move smaller matters online to both expand access to remedies and improve judicial

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72. *Id.*

73. Prescott, *supra* note 16, at 2001–03.

74. *Id.*

75. *Id.* at 2005–07.

efficiency.<sup>76</sup> Nonetheless, developments in several states, such as Michigan, Ohio, and New York, indicate a movement toward e-courts and judicial ODR.<sup>77</sup> Moreover, by the time this Article is published, there will be many more projects underway.<sup>78</sup>

#### A. *Pilot Programs*

In the U.S., individual state, county, and city courts act as laboratories for new initiatives aimed at improving access to justice as well as judicial efficiency. This is one of the tenets of federalism.<sup>79</sup> Accordingly, it is no surprise that most ODR experiments are occurring at the local level. This section describes these pilots per state. It also exemplifies how the courts are starting small by first deploying ODR for certain types of cases, such as tax, parking fines, and small claims. Furthermore, court administrators in these examples are gathering data during the pilot stages as they decipher best practices for moving forward into the new frontier of using technology to improve and expand access to justice.

##### 1. Michigan's Programs

In 2014, Michigan launched an ODR pilot program in collaboration with Matterhorn, a private ODR provider, for resolving traffic disputes in four counties: Bay, East Lansing, Highland Park, and Washtenaw.<sup>80</sup> The core of the program is an online portal for defendants to submit their cases,

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76. *Id.* at 2009–10.

77. *Id.* at 2010.

78. *See Court Related Online Dispute Resolution (ODR) is . . .*, NAT'L CTR. FOR ST. CTS., <https://www.ncsc.org/Topics/Technology/Online-Dispute-Resolution/ODR.aspx> (last visited Mar. 7, 2019).

79. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

80. News Release, Michigan Courts, Online ticket review helps make courts more accessible and efficient (June 8, 2015) [http://courts.mi.gov/News-Events/press\\_releases/Documents/Online%20Ticket%20Review%20news%20release.pdf](http://courts.mi.gov/News-Events/press_releases/Documents/Online%20Ticket%20Review%20news%20release.pdf) [hereinafter, Michigan Courts News Release].

including all arguments or explanations about why they cannot pay their fines.<sup>81</sup> It also allows police and prosecutors to review cases before a judge makes a decision.<sup>82</sup> In this way, the online format provides for the resolution of traffic disputes without the need for in-person court appearances.<sup>83</sup>

Since 2014, Michigan has expanded its ODR program beyond the original four counties, and some of the Michigan courts utilizing the program have broadened their use beyond traffic tickets to resolve warrant disputes and misdemeanors.<sup>84</sup> The ODR platform is fairly flexible and open to innovation, perhaps because it is a public/private partnership. Michigan essentially pays for Matterhorn software on a per case basis, instead of a subscription.<sup>85</sup> Courts can therefore choose which types of disputes are best suited for online resolution, versus those that require in-person appearances. This promotes more conscious decision-making; instead of simply pushing cases into ODR to maximize an expensive subscription, courts are free to keep fees low through per case use.

The Matterhorn software goes beyond merely providing a communication portal for citizens, police, judges, and prosecutors. It includes other tools for citizen empowerment.<sup>86</sup> For example, the software incorporates AI that searches court filings and informs individuals of their options when they have tickets to contest; it also provides users with information on whether they are eligible to have

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81. *Id.*

82. *Id.*

83. Anna Stolley Persky, *Michigan Program Allows People to Resolve Legal Issues Online*, A.B.A. J. (Dec. 2016), [http://www.abajournal.com/magazine/article/home\\_court\\_advantage/](http://www.abajournal.com/magazine/article/home_court_advantage/).

84. *Id.*

85. *Id.*

86. Prescott, *supra* note 16, at 2021–26.

their dispute determined online.<sup>87</sup> At the same time, the Matterhorn software benefits the decision-makers by letting them know what information individuals have submitted, and what additional documents will be necessary to proceed.<sup>88</sup>

The data collected in Michigan regarding use of Matterhorn indicates that this ODR program has helped to generate efficiencies and expand access to remedies. For example, most cases have closed within seven to nine days using ODR, compared with the months it took to resolve these disputes through regular F2F processes. One researcher found that the average case duration has dropped from fifty days to just fourteen for users who elect online resolution.<sup>89</sup> The program also has advanced access to remedies because it is mobile friendly, which is important in light of data suggesting that those of lower economic means often rely on mobile devices as their only access to the Internet.<sup>90</sup> In fact, data in Michigan showed that 40% of users of its pilot ODR program resolved their traffic cases on a mobile device.<sup>91</sup>

Defendants also benefit from reaching resolutions with city prosecutors that will not cost “points” that lead to high insurance costs.<sup>92</sup> Of course, individuals may strike such

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87. *Id.*

88. *Id.* at 2022–23.

89. *Id.* at 2030.

90. *Internet/Broadband Fact Sheet*, PEW RESEARCH CTR., <http://www.pewInternet.org/fact-sheet/Internet-broadband/> (last visited Feb. 25, 2019). See also Amy J. Schmitz, *There’s an “App” for That: Developing Online Dispute Resolution to Empower Economic Development*, 32 NOTRE DAME J. L. ETHICS & PUB. POL’Y 1 (2018) (republished in Russian, with permission, at Эми Дж. Шмитц, «Для этого есть приложение!», 1–2 ПОСРЕДНИЧЕСТВО И ПРИМИРЕНИЕ. МЕДИАЦИЯ И ПРАВО., 6 (2018)).

91. Michigan Courts News Release, *supra* note 80.

92. *Id.* Bay County’s website also allows for defendants with failure to pay or failure to appear warrants to resolve them online. *74th District Court Online Case Review*, COURTINNOVATIONS.COM, <https://www.courtinnovations.com/MID74> (last

bargains without ODR but the current processes for reaching such agreements can be complicated and unevenly available. For example, in some counties, one must have the time and resources to take a day off work to sit at the courthouse on the date of their hearing and wait in line for their time to talk to city prosecutors to plea bargain.<sup>93</sup>

At the same time, the online platform assists the government by encouraging easy ticket payment for those defendants found in violation of a traffic law. Only 2%, or less, of the cases heard on Matterhorn are likely to end in default, compared to 20% of traditional cases.<sup>94</sup> Courts using Matterhorn also are likely to collect 80% of fines within twenty-one days, compared to collecting 80% of fines within three months in regular court.<sup>95</sup> Surveys and interviews also reveal that 90% of Matterhorn users find it “easy to use” and 92% said they understood the status of their claims while using the online process.<sup>96</sup> Furthermore, more than a third of users said they would have been unable to participate in a F2F adjudication, while 30% of requests were made outside of business hours.<sup>97</sup> Moreover, Michigan’s program encourages people to deal with traffic tickets rather than ignore them because it allows for “virtual” action without the time, costs, or stress of traditional court. In fact, 80% of people who used the software would recommend it to a friend and 40% said they would not have addressed their legal issue without it.<sup>98</sup>

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visited Jan. 31, 2019).

93. I personally experienced this in Boulder County some years ago, and finally gave up waiting because I had to get to class to teach at the University of Colorado.

94. Prescott, *supra* note 16, at 2034.

95. *Id.* at 2038.

96. *Id.* at 2044.

97. *Id.* at 2044–45.

98. Persky, *supra* note 83.

## 2. Ohio's Pilot Projects

In 2017, the Franklin County Municipal Court Dispute Resolution Department started an ODR program using the Matterhorn platform.<sup>99</sup> However, the program is distinct from the programs noted above in that it provides ODR for small claims actions that mainly deal with city tax disputes.<sup>100</sup> It is available free of charge to its users, and provides parties with their own online “Negotiation Space” to communicate with the other parties, as well as a “court negotiator” (who is a third party mediator); the program also allows parties to upload files, and view, accept, or decline settlement offers.<sup>101</sup>

Franklin County's Matterhorn program is expected to catalyze other cities and counties in Ohio to adopt ODR.<sup>102</sup> Specifically, the pilot program has focused on individuals' disputes with the City of Columbus Division of Income Tax.<sup>103</sup> With respect to these disputes in the nine months before the ODR pilot began, 39% of cases were dismissed; 12% agreed to a judgment; and 49% were default judgments.<sup>104</sup> After the pilot began, 58% were dismissed; 17% agreed to a judgment; and 25% were default judgments.<sup>105</sup> This seems to indicate that ODR expanded access to negotiated remedies, thus leading to a 20% increase

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99. *Online Dispute Resolution Franklin County Municipal Court*, COURTINNOVATIONS.COM, <https://www.courtinnovations.com/ohfcmc> (last visited May 2017).

100. *Id.*

101. *Id.*

102. *See* MATTERHORN, <https://getmatterorn.com> (last visited Nov. 4, 2018).

103. *See* CASE STUDIES IN ODR, *supra* note 14, at 2; FRANKLIN CTY. MUN. COURT CLERK'S OFFICE, ONE HUNDRED [AND] SECOND ANNUAL REPORT 3 (2017) [http://www.fmcclerk.com/documents/annual-reports/FCMC\\_AR\\_2017.pdf](http://www.fmcclerk.com/documents/annual-reports/FCMC_AR_2017.pdf).

104. Memorandum from Alex Sanchez, Manager, Small Claims & Dispute Resolution, Franklin Cty. Mun. Court to Mun. Court Judges (June 19, 2018) (on file with author) [hereinafter Franklin Cty. Mun. Court Memorandum].

105. *Id.*

in dismissals and 24% decrease in default judgments.<sup>106</sup> This is important because the City had trouble collecting on these default judgments, while parties are much more likely to pay agreed settlements that result in dismissals.<sup>107</sup>

The Franklin County Dispute Resolution Department has been tracking the success of the ODR program on various levels within different time periods. The Department reported that “[a]s of May 22, 2018, 224 small claims tax cases and 183 non-tax small claims and general division cases have been negotiated/mediated online[,]” while ninety-one “pre-file” mediations were “initiated” online.<sup>108</sup> At the same time, nearly all of the sixty ODR users surveyed (97%) said that they would prefer to use ODR rather than go to court; 67% thought the agreement reached using ODR was fair, while 10% thought their agreements were not fair and 23% reached no agreement.<sup>109</sup> Furthermore, 93% said that they would recommend ODR to others and 29% “strongly” agreed, and not merely “agreed,” that ODR increased their control over the outcome of their case.<sup>110</sup>

The administrator of the ODR program’s data also showed that the majority of ODR processes began about thirty to forty-five days after filing a complaint, although in some cases it began as early as within three to four days of filing.<sup>111</sup> The longest interval between filing and commencing

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106. *Id.*

107. Telephone interview with Alex Sanchez, Manager, Small Claims & Dispute Resolution, Franklin Cty. Mun. Court (June 20, 2018) [hereinafter Sanchez Interview].

108. Franklin Cty. Mun. Court Memorandum, *supra* note 104.

109. *Id.* Admittedly, it would be beneficial to have comparison data, but none was available.

110. *Id.* The majority of survey respondents were white; 16% were black; and 4% were Hispanic. Most were between the ages of 35–54 (51%), 26% between ages 55–74; 18% between ages 18–34; and 3% age 75 and over (2% declined to provide this information). *Id.*

111. Spreadsheet prepared by Franklin Cty. Mun. Court, Dispute Resolution

ODR was seven months.<sup>112</sup> On average, it took thirty-one days from filing a case until starting ODR, and 102 days until case disposition.<sup>113</sup> The majority of the ODR processes took less than a day to complete, with one outlier case taking 137.4 days.<sup>114</sup> Most of the cases were tax claims brought against individual defendants (83%) while a minority were brought against businesses (17%).<sup>115</sup> Sixty percent of the cases were resolved and/or dismissed, while ODR was terminated 5% of the time, and 15% of the cases led to an agreed judgment (AJE).<sup>116</sup>

The Dispute Resolution Department also provided charts with data from 2016 to 2017. These were outcomes captured with respect to the 135 pilot cases in the charts by income:<sup>117</sup>

13% of claimants were low income (18 cases):

- 12 cases dismissed
- 4 cases defaulted
- 2 cases AJE

28% of claimants were moderate income (38 cases):

- 16 cases dismissed
- 12 cases defaulted
- 10 cases AJE

20% of claimants were middle income (27 cases):

- 16 cases dismissed
- 9 cases defaulted
- 2 cases AJE

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Dep't, on ODR 2016–2017 Data (on file with author) [hereinafter ODR 2016–2017 Data Spreadsheet].

112. *Id.*

113. Spreadsheet prepared by Franklin Cty. Mun. Court, Dispute Resolution Dep't, on ODR Charts for Ohio Income Tax ODR Data (2017) (on file with author) [hereinafter ODR Charts Spreadsheet].

114. ODR 2016–2017 Data Spreadsheet, *supra* note 111.

115. ODR Charts Spreadsheet, *supra* note 113.

116. *Id.*

117. *Id.*



23% of claimants were upper income (30 cases):

- 20 cases dismissed
- 6 cases defaulted
- 4 cases AJE

Interestingly, the moderate-income group reached agreed judgments at a greater rate than the other groups, and both the middle and moderate groups defaulted more often than the low and upper-income groups.<sup>118</sup>

For comparison purposes, the Department also looked at a random sample of non-ODR tax cases during the same 2016–17 period. A review of 280 claims showed that 54.3% were resolved between 1–100 days; 30.7% between 101–200 days; 14.2% in 201–300 days and < 1% in >300 days.<sup>119</sup> In contrast, the ODR cases took less time. The average ODR case took about three months to resolve (102 days).<sup>120</sup> In addition, nearly half of the non-ODR cases proceeded to court while the vast majority of ODR claims were resolved through the online process and dismissed or otherwise settled (AJE).<sup>121</sup> This means that ODR helped individuals end their disputes more quickly than they would in court, and to reach consensual solutions rather than face litigation. At the same time, this saved the courts from having to expend resources in providing the venue and personnel for trial.

Furthermore, the Franklin County Clerk reported that with the addition of 135 ODR pilot cases to the 2,057 non-ODR tax cases, the number of dismissals increased by 0.8% (seventy-seven cases), AJEs increased by 0.5% (twenty-three cases), and defaults decreased by 1.1% (thirty-three cases).<sup>122</sup>

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118. *Id.*

119. Spreadsheet prepared by Franklin Cty. Mun. Court, Dispute Resolution Dep't, on Non-ODR Sample Cases (on file with author) [hereinafter Non-ODR Sample Spreadsheet].

120. ODR Charts Spreadsheet, *supra* note 113.

121. *Id.*; ODR 2016–2017 Data Spreadsheet, *supra* note 111.

122. E-mail from Alex Sanchez, Manager, Small Claims and Dispute

This seems to indicate that ODR opened access to negotiated settlements (dismissals) and agreed judgments (AJE), which are generally more beneficial than court judgments or defaults for taxpayers.<sup>123</sup> It also assists with tax collection because defaults are very likely to go unpaid, especially when seeking payment is disproportionate to the likely amount collected.<sup>124</sup>

Speed and access to the process are important and seem to inspire greater satisfaction. As stated in the preceding paragraphs, the pre- and post-Program data shows that using ODR has cut down on the time it takes to reach resolutions. At the same time, 44% of the ODR pilot participants responded to the county's satisfaction survey (sixty individuals) and reported high levels of satisfaction.<sup>125</sup> Only 3% of the respondents said that they would rather go to court.<sup>126</sup> Meanwhile, 77% reached an agreement outside of court using ODR.<sup>127</sup>

In sum, the Program seems to be a success for both the court and the parties. The city of Columbus has saved on costs of negotiating and mediating income tax small claims and has increased its collection of unpaid taxes. This is

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Resolution, Franklin Cty. Mun. Court, to Amy J. Schmitz, Professor of Law, Univ. of Mo. (June 14, 2018, 07:36 CDT) (on file with author) [hereinafter Sanchez E-mail (June 14, 2018)]; ODR 2016–2017 Data Spreadsheet, *supra* note 111; ODR Charts Spreadsheet, *supra* note 113.

123. Sanchez E-mail (June 14, 2018), *supra* note 122.

124. This is a notable statistic, but it has no comparison data regarding ages of claimants in the non-ODR group. See Non-ODR Sample Spreadsheet, *supra* note 119. There was a slight indication that those from moderate and upper-income groups are more willing to participate in ODR, although that may change as ODR gains acceptance and trust. See ODR Charts Spreadsheet, *supra* note 113. Also, it was encouraging to find that all age groups were willing to use ODR, as the majority of participants in the pilot were between the ages of thirty-five and seventy-four. Franklin Cty. Mun. Court Memorandum, *supra* note 104.

125. Franklin Cty. Mun. Court Memorandum, *supra* note 104.

126. *Id.*

127. Sanchez Interview, *supra* note 107.

especially true with respect to those out of state, who generally defaulted in F2F processes. Accordingly, it appears that the program may continue to expand into non-tax civil cases. As with any pilot, however, it remains unclear how and where this expansion will occur in light of stakeholder resistance and start-up costs.

### 3. New York Proposals

Like Michigan, New York City (NYC) offers an online solution for traffic citations. Defendants can request an online hearing through which they may submit evidence.<sup>128</sup> After the online hearing, the judge e-mails the defendant his or her decision.<sup>129</sup> Additionally, NYC allows renters to file housing code complaints against their landlords online or through a mobile app.<sup>130</sup> This program does not offer ODR for solving tenant-landlord disputes, but it does offer online advice for both parties and makes an online infrastructure available.<sup>131</sup> By creating this online platform, NYC is primed to expand their ODR offerings in the future.

With this foundation, it is not surprising that the New York Unified Court System is also pursuing new ODR programs. It first proposed a program to alleviate legal issues with consumer debt through ODR.<sup>132</sup> This was in response to the high number of consumer debt cases in which consumer defendants appear without counsel or are unfamiliar with the courtroom process.<sup>133</sup> The Legal Services Corporation was expected to serve about one million

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128. *Dispute a Ticket Online*, N.Y.C. DEPT FIN., <http://www1.nyc.gov/site/finance/vehicles/dispute-web.page> (last visited Nov. 12, 2018).

129. *Id.*

130. *Complaints and Inspections*, N.Y.C. HOUSING & DEV., <http://www1.nyc.gov/site/hpd/renters/complaints-and-inspections.page> (last visited Nov. 12, 2018).

131. *Id.*

132. CASE STUDIES IN ODR, *supra* note 14, at 8–9.

133. *Id.*

Americans in 2017, only half the number of people without counsel in New York state courts alone.<sup>134</sup> With the help of a large grant, the ODR project aimed to provide consumers with online sources to determine the severity of their debt issues, find legal assistance, and enter into negotiations and mediation at the convenience of the parties involved.<sup>135</sup>

Experts believed that the process would have saved time and money for all involved.<sup>136</sup> Nonetheless, due to push back from legal service providers, the task force that initially recommended the ODR system has discontinued the project in favor of a different ODR pilot.<sup>137</sup> This project will focus on small claims ODR.

#### 4. Texas Projects

Texas is also in the beginning stages of offering ODR pilot projects in discrete areas that are set to expand. For example, it found that civil case filings in 2017 continued to rise across district, county, and justice courts, up 12% from 2016.<sup>138</sup> Moreover, 41% of civil filings occurred in municipal courts and 33% occurred in justice courts—with 30% of these filings resulting in a default judgment.<sup>139</sup> Accordingly, the Texas Judicial Council began to explore ODR as a possible solution.<sup>140</sup> Specifically, Travis County Justice of the Peace, Precinct Two will offer ODR in civil lawsuits.<sup>141</sup> This will be

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134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 10.

138. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY FISCAL YEAR 2017 3 (2017), <https://www.txcourts.gov/media/1441398/ar-fy-17-final.pdf>.

139. *Id.*

140. *Id.*

141. Press Release, Travis Cty. Tex., Travis County JP 2 First in the Country to use Online Dispute Resolution Technology (May 2018) <https://www.traviscountytexas.gov/news/2018/1644-travis-county-jp-2-first-in-the->

in partnership with software provider, Tyler Technologies, using a program called Modria:

Using Modria, the parties to a civil lawsuit will now be able to engage with each other with the desired outcome of reaching a resolution on their own, saving time, money and resources. In the event a resolution is not reached, members of the community will still have an opportunity for their day in court.<sup>142</sup>

Travis County includes Austin; therefore this is a large-scale project and will help many parties involved in a lawsuit to engage directly with each other to reach a resolution without going to court.<sup>143</sup> “We believe Tyler’s Modria solution will not only facilitate quicker resolution in legal disputes, but it will also create greater access to justice for the many members of our community who cannot easily travel to the courthouse,” said Randall Slagle, Travis County Justice of the Peace, Precinct Two.<sup>144</sup>

At the same time, the Williamson County Commissioners Court approved a pilot program that aims to “cut the number of court appearances for individuals filing small claims lawsuits through a required online mediation process.”<sup>145</sup> This program also uses Modria software and went into effect July 1, 2018.<sup>146</sup> The Williamson County Justice of the Peace for Precinct Three noted that the ODR program promises to help with the flood of small claims

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country-to-use-online-dispute-resolution-technology.

142. *Id.*

143. *Travis County, Texas, First in State to Select Tyler Technologies’ Modria Solution*, BUS. WIRE (June 12, 2018, 9:17 AM), <https://www.businesswire.com/news/home/20180612005118/en/Travis-County-Texas-State-Select-Tyler-Technologies%E2%80%99>.

144. *Id.*

145. Ali Linan, *Williamson County commissioners approve pilot program to speed up small claims lawsuits*, COMMUNITY IMPACT NEWSPAPER (June 5, 2018, 2:51 PM), <https://communityimpact.com/austin/georgetown/city-county/2018/06/05/williamson-county-commissioners-approve-pilot-program-to-speed-up-small-claims-lawsuits/>.

146. *Id.*

lawsuits that clog the justice of the peace courtrooms and consume valuable time and resources better spent elsewhere.<sup>147</sup> “[T]he software will free up time in the courtrooms that cost \$16,000 a day to operate by allowing judges to clear dockets and focus on jury and bench trials[.]”<sup>148</sup> Accordingly, the ODR program aims to help the parties reach consensual agreements that will prevent them from having to seek further assistance in litigation.

### 5. Utah Small Claims Initiative

Utah plans to implement an ODR program for small claims cases statewide.<sup>149</sup> The program began with an ODR Steering Committee formed by the Utah Judicial Council in June 2016, along with a working group aimed to improve access to remedies in small claims cases.<sup>150</sup> The idea is to lower costs and improve accessibility within the Utah court system.<sup>151</sup> Ultimately, the ODR program will be mandatory for small claims disputes, and provide users with means to access cases online, negotiate their resolution, and seek mediation assistance from facilitators.<sup>152</sup> If necessary, users will also have access to judges to have their cases heard either online or in a courthouse.<sup>153</sup>

The ODR program will follow stepped process. The first step, Education and Evaluation, will provide information about the users’ claims and possible defenses.<sup>154</sup> Users will

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147. *Id.*

148. *Id.*

149. UTAH ONLINE DISPUTE RESOLUTION STEERING COMM., UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT 3–4 (2017), <https://ncsc.contentdm.oclc.org/digital/api/collection/adr/id/63/download>.

150. *Id.* at 6–7.

151. *Id.* at 7.

152. *Id.* at 8.

153. *Id.*

154. *Id.* at 9.

also be able to create a MyCase account to “e-file [their] claim and generate a summons to be served on the defendant.”<sup>155</sup> Defendants will also be instructed to create a MyCase account in response to the summons.<sup>156</sup> The second step opens a chat function on the site to allow parties to communicate about their dispute and negotiate a settlement.<sup>157</sup> Parties who reach resolutions can then file their settlements online.<sup>158</sup> If parties are unable to negotiate a settlement on their own, they move to the third step of the process in which a facilitator helps mediate the dispute.<sup>159</sup>

If parties are unable to reach resolutions within thirty-five days, they move to the fourth stage, in which a trial will be arranged either online or in person depending upon the dispute’s complexity.<sup>160</sup> In this fourth stage, the parties access a portal for submitting evidence online, as well as an “On the Record” chat area.<sup>161</sup> After the parties obtain a judgment in the fourth stage, they still have access to a fifth stage for an appeal or enforcement measures.<sup>162</sup>

As of the writing of this article, the project is only in the pilot stage. Leadership in Utah hopes that this project will reduce the currently high number of default judgments in small claims courts.<sup>163</sup> It is expected that individuals will feel more empowered to respond to claims and engage in the

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155. *Id.*

156. *Id.* at 10.

157. *Id.* at 11.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 11–12.

162. *Id.* at 12.

163. E-mail from Clayson Quigley, Dist. Court Program Adm’r in the Greater Salt Lake City Area, Admin. Office of Utah Courts, to Andrew Johnson, Research Assistant to Professor Amy J. Schmitz, (Aug. 9, 2018, 12:27 CDT) (on file with author).

process with the online option; as one court administrator explained, “half the battle is getting people to appear in court.”<sup>164</sup> ODR opens new avenues to court that save the parties from the time and hassles of physically going to court. It also allows them to communicate at convenient times and places for all the parties involved. Utah plans to fully implement this new ODR program for all small claims case types statewide in late 2018 or early 2019.<sup>165</sup> At the same time, they will gather and learn from information during the pilot stage in order to determine what changes need to be made.<sup>166</sup>

## 6. Other Nascent Examples

There are at least fifty to sixty new courts looking to launch new projects. Many of these are not yet released, but they will be online soon.<sup>167</sup> Tyler Technologies, through Modria, is taking on quite a few of these projects. For example, the 8th Judicial District Court of Clark County in Las Vegas, Nevada, has launched Modria’s ODR program “for access to efficient and timely justice in divorce cases for Clark County citizens.”<sup>168</sup> This stepped process allows divorcing couples to “resolve differences online, avoiding delays in scheduling, driving to and from court, time off from work, and making it easier for residents to interact with the court.”<sup>169</sup> “Generally, mediation for divorce cases involving children is mandatory, requires the development of a

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164. *Id.*

165. *Id.*

166. *Id.*

167. See *NSCS/PEW Charitable Trusts ODR Project Announcement*, NAT’L CTR. TECH. & DISP. RESOL. (July 10, 2018), <http://odr.info/ncscpew-charitable-trusts-odr-project-announcement/>.

168. *Clark County Court Uses New Technology from Tyler to Resolve Disputes Online*, BUS. WIRE (Apr. 17, 2018, 9:17 AM), <https://www.businesswire.com/news/home/20180417005157/en/Clark-County-Court-New-Technology-Tyler-Resolve>.

169. *Id.*



parenting plan, may involve many trips to the courthouse, coordinating schedules between parties, and a significant involvement of staff resources. Tyler's Modria ODR solution provides a new option for citizens and courts to help complete these requirements."<sup>170</sup> Fulton County, Georgia, also recently signed a contract with Modria for Small Claims and Landlord Tenant cases.<sup>171</sup> Furthermore, Modria has been expanding its programs through Tyler Technologies, its parent company, which is a key player in court technology worldwide.<sup>172</sup>

### B. *Non-Court Complements*

Public sector legal services also have started to collaborate more closely with private ODR providers. These efforts have aimed at increasing access to justice for pro se litigants, especially in light of cutbacks in legal aid. Examples have included the American Bar Association (ABA) and family law ODR projects. Again, these are not "e-courts" or public projects, per se, but are instead collaborative efforts that give pro se litigants options for reaching consensual resolutions without need for judicial services. Nonetheless, these examples are worth mention because they show how public/private partnerships can open new avenues for consumers to resolve their disputes without

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170. *Id.*

171. *Travis County, Texas, First in State to Select Tyler Technologies' Modria Solution*, *supra* note 143.

172. *Tyler Technologies' to Provide Online Dispute Resolution Software to the Ohio Court of Claims*, BUSINESS WIRE (Dec. 14, 2017, 9:17 AM), <https://www.businesswire.com/news/home/20171214005058/en/Tyler-Technologies-Provide-Online-Dispute-Resolution-Software>. This will be important for assisting self-represented litigants in these matters, which can be substantial. It will save the court a great deal of time and money as well, considering that in 2016, "the Ohio legislature passed a law granting the court statewide jurisdiction over public records requests. With one physical court location in Columbus, the Ohio Court of Claims realized they needed support to handle these requests that could potentially be generated from any of the 88 counties in the state." *Id.*

consuming judicial resources. In this way, these programs assist efficiency as well as access to remedies.

### 1. ABA Free Legal Answers

ODR has become especially intriguing for its capacity to open doors to legal services and provide “justice” for those who cannot otherwise afford traditional legal services. Accordingly, the ABA and state bar associations have created technology-based solutions that focus on legal content.<sup>173</sup> For example, Tennessee Free Legal Answers was first developed by the president of the Tennessee Bar, Buck Lewis, as a way to expand access to justice for low-income individuals seeking legal advice in Tennessee.<sup>174</sup> Many low-income Tennesseans are unable to access courts due to travel difficulties, particularly in rural areas.<sup>175</sup> They also lack time and resources required to obtain attorneys, especially with cuts in legal aid.<sup>176</sup>

For these reasons, Mr. Lewis spearheaded a free online legal service provider that would match low-income Tennesseans with licensed attorneys who would answer legal questions in civil matters.<sup>177</sup> This project, formed in concert with the Tennessee Bar Association and the Tennessee Alliance for Legal Services, has helped

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173. See Marissa LaVette, *Giving Back: ABA Free Legal Answers*, A.B.A. (July 1, 2018), [https://www.americanbar.org/groups/gpsolo/publications/gp\\_solo/2018/july-august/giving-back-aba-free-legal-answers/](https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2018/july-august/giving-back-aba-free-legal-answers/).

174. Adam Faderewski, *Texas Legal Answers Celebrates its One-Year Anniversary*, ST. BAR TEX., <https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=41500> (last visited Mar. 15, 2019); *Former Access to Justice Chair Lewis Receives National Pro Bono Award*, TENN. STATE COURTS (June 1, 2016), <http://tncourts.gov/news/2016/06/01/former-access-justice-chair-lewis-receives-national-pro-bono-award>.

175. *Free Legal Assistance Available through New Website*, TENN. BAR ASS'N (May 4, 2011), <https://www.tba.org/press-release/free-legal-assistance-available-through-new-website>.

176. *Id.*

177. *Id.*

individuals since the late 2000s.<sup>178</sup> The program does limit access to those who prove their eligibility.<sup>179</sup> Eligible users must be low income, which is defined as having an income below 250% of the federal poverty line.<sup>180</sup> Qualified users pick a legal category and court date, then ask a question pertaining to civil legal issues.<sup>181</sup> These questions are provided to all attorneys using the system; the user receives notice when an attorney posts an answer.<sup>182</sup> The attorney and user will then privately communicate to protect the client's privacy from others using the system.<sup>183</sup>

Since that first project, the ABA Pro Bono and Public Service Committee has worked with others to launch ABA Free Legal Answers as a nationwide program following the Tennessee model.<sup>184</sup> Since 2016, the program has served over 2,000 clients and is available, in some form, in over forty states.<sup>185</sup> States also empower individuals pro se by allowing users to fill out legal documents online and then print, sign, and send them to the court.<sup>186</sup>

## 2. LawHelp Interactive

Similarly, LawHelp Interactive is an online tool meant to bridge the gap in legal access between those with few

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178. *Id.*

179. *ABA Free Legal Answers*, TENN. ALLIANCE FOR LEGAL SERVS. (last visited Jan. 10, 2017), <https://www.tals.org/abafreelegalanswers>.

180. *Id.* Additionally, users may not be incarcerated, have more than \$5,000 in total assets, or be under eighteen years of age. *Id.*

181. *Id.*

182. *Id.*

183. *TN Free Legal Answers*, JUST. FOR ALL, <http://justiceforalltn.com/i-can-help/tnfreelegalanswers> (last updated Jan. 2017).

184. *ABA Free Legal Answers*, *supra* note 179.

185. *See id.*

186. *See* Prescott, *supra* note 16, at 2012. Similarly, the Illinois Legal Aid Online system allows a user to submit confidential questions to a pro bono attorney, who can then respond. *Id.* at 2011.

available resources and the rest of the general public. This program was developed by Pro Bono Net, an organization founded in 1999 for the purpose of increasing access to disadvantaged individuals in the legal system.<sup>187</sup> It has built a large online document assembly platform for both low-income communities and legal aid providers, with 456,272 documents assembled and 817,839 guided interviews conducted in 2013.<sup>188</sup> LawHelp Interactive essentially allows users to create legal documents on its website by answering a series of questions through an online interview with a LawHelp representative.<sup>189</sup> Although family law issues remain the most significant subject for assistance, the site has also been useful for creating documents covering domestic violence, debt collection, foreclosures, evictions, and other areas.<sup>190</sup>

LawHelp Interactive operates in a number of jurisdictions, including twenty-five U.S. states, the District of Columbia, and Ontario, Canada, and includes numerous subdivisions of the program.<sup>191</sup> For example, LawHelpNY focuses on services to low-income New Yorkers with civil legal issues and provides information regarding free legal services available in New York. It provides information on legal rights in over thirty languages, as well as information regarding procedures specific to the New York state court

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187. *About Pro Bono Net*, PROBONO.NET, <https://www.probono.net/about/> (last visited Feb. 2, 2019).

188. *About Us*, LAWHELP INTERACTIVE, <https://support.lawhelpinteractive.org/hc/en-us/categories/203506128-About-Us> (last visited Nov. 15, 2018).

189. LAWHELP INTERACTIVE, <https://lawhelpinteractive.org/> (last visited Feb. 2, 2019). Users who wish to revisit their interview answers must create accounts with the website in order to save answers. *Id.*

190. *About Us*, LAWHELP INTERACTIVE, <https://support.lawhelpinteractive.org/hc/en-us/categories/203506128-About-Us> (last visited Nov. 15, 2018).

191. Benjamin P. Cooper, *Access to Justice Without Lawyers*, 47 AKRON L. REV. 205, 210 (2014).

system.<sup>192</sup>

Nonetheless, these mechanisms do not fully allow individuals to “go to court” online in the same manner as seen in the e-court initiatives noted above or the ODR programs used by companies such as eBay and Amazon.<sup>193</sup> Again, the legal justice system has been distrustful of automated and algorithmic processes and users may fear that the system is rigged against them.<sup>194</sup> Therefore, government bodies must pay special attention to due process in using online platforms for empowering individuals to obtain legal resolutions without the constraints of a physical setting.<sup>195</sup>

### 3. Family Law Partnerships

Family law ODR projects have developed alongside the courts to assist peaceful resolutions of conflicts during and after divorce cases. For example, coParenter is a private company that operates in Canada and the U.S. and serves an ADR-like purpose because its goal is to prevent custody from being litigated (or re-litigated) where possible.<sup>196</sup> The tool seeks to bring parents together through a neutral platform that allows them to communicate, track scheduling, and manage responsibilities with respect to a parenting plan.<sup>197</sup> In addition, the platform allows parents to set up online chats with mediators or therapists.<sup>198</sup> Parents can therefore ask such professionals to sign up with coParenter and keep

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192. *About Us*, LAWHELPNY, <https://www.lawhelpny.org/about-us> (last visited Oct. 3, 2017).

193. Prescott, *supra* note 16, at 2015.

194. *Id.* at 2017.

195. *See id.* at 2019.

196. *Courts*, COPARENTER, <https://coparenter.com/courts/> (last visited Mar. 22, 2019)

197. *Features*, COPARENTER, <https://coparenter.com/features/> (last visited Jan. 17, 2019).

198. *Id.*

secure records via an app that can be used on mobile phones, or downloaded to a computer.<sup>199</sup>

Our Family Wizard is a service similar to coParenter in that it also helps parties reach consensual agreements. The service offers tools to parents for scheduling and tracking childcare, as well as making reimbursement requests/payments, communicating with each other, and creating logs of the communication.<sup>200</sup> This platform also allows parents to create third party accounts for therapists, or similar professionals who are involved in assisting the parties with their parenting plans.<sup>201</sup> Professionals can use the platform for communication with clients, and may also use the app to monitor parent-to-parent communications in some cases with proper consents.<sup>202</sup> The app does not connect these communication channels, however, to allow for collaborative contracting. The basic cost for Our Family Wizard at the time of the article was \$99 per year per parent.<sup>203</sup>

### III. INTERNATIONAL EFFORTS TOWARD E-COURTS

Some of the most ambitious programs for ODR in the courts are occurring in Canada, the United Kingdom (U.K.), and China. They demonstrate how pilot projects again coalesce around small claims and less complex cases. These projects also add to the background by showing how pilot

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199. *Frequently Asked Questions*, COPARENTER, <https://www.coparenter.com/frequently-asked-questions/> (last visited Jan. 23, 2019).

200. OUR FAMILY WIZARD, <https://www.ourfamilywizard.com/> (last visited Jan. 17, 2019).

201. *Third-Party Accounts*, OUR FAMILY WIZARD, <https://www.ourfamilywizard.com/third-party-accounts> (last visited Nov. 26, 2018).

202. *Id.*

203. *Plans and Pricing*, OUR FAMILY WIZARD, <https://www.ourfamilywizard.com/plans-and-pricing> (last visited Nov. 26, 2018); *Family Law and Mental Health Practitioners*, OUR FAMILY WIZARD, <https://www.ourfamilywizard.com/professionals> (last visited Nov. 26, 2018).

projects that start small may lead to further developments built on proven success. These examples also show how larger e-court projects may nearly replace traditional courts, as we see with the Hangzhou Internet Court discussed below. At the same time, policymakers must remain vigilant in safeguarding fairness and transparency, and providing means for in-person processes as a fallback to protect the voluntariness of the process.

#### A. *Canada*

##### 1. Civil Resolution Tribunal and Other Online Programs in British Columbia (B.C.)

Canada has been a world leader in establishing ODR programs.<sup>204</sup> The British Columbia Ministry of Justice has created a robust ODR court called the Civil Resolution Tribunal (CRT).<sup>205</sup> It began when the British Columbia government passed the CRT Act in 2012 to call for creation of an ODR program to cover small claims and condominium property, or “strata,” disputes.<sup>206</sup> A main impetus for the Act was the exorbitant costs of litigation in Canada, with the average two-day trial costing \$31,330 in 2013, while the median Canadian family after-tax income was just over \$50,000 in the same year.<sup>207</sup> Additionally, the aim was to simplify the pursuit of strata disputes, and encourage faster resolution of neighbor disputes, which often involve pool access or pets.<sup>208</sup>

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204. Shannon Salter, *ODR and Justice System Integration: British Columbia's Civil Resolution Tribunal*, 34 WINDSOR Y.B. ACCESS TO JUST., 112, 112, 116 (2017).

205. CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/> (last visited Mar. 15, 2018).

206. Salter, *supra* note 204, at 118.

207. *Id.*

208. Ian Mulgrew, *B.C. Launches First-in-Canada Online Tribunal to Resolve Civil Disputes*, VANCOUVER SUN (July 15, 2016, 3:13 PM), <http://vancouversun.com/news/local-news/b-c-launches-first-in-canada-online->

After years of development, the CRT first opened for strata claims on July 13, 2016, and then expanded into small claims of up to \$5,000 Canadian Dollars (CAD) on June 1, 2017.<sup>209</sup> Furthermore, jurisdiction will expand significantly in 2019, as the CRT will be able to resolve claims for personal injuries arising out of vehicle accidents occurring after April 1, 2019.<sup>210</sup> Accident claims includes liability claims up to \$50,000, as well as determinations regarding whether an injury is a “minor injury” and therefore subject to a cap on pain and suffering damages.<sup>211</sup> This will also include disputes over accident benefits, such as medical and income benefits that insured British Columbians are entitled to, regardless of fault.<sup>212</sup>

The CRT process follows a stepped ODR process, thus beginning with a problem-solving wizard that helps complainants assess their problem and decide the best option for how to proceed in solving the issue.<sup>213</sup> This can be compared to a Turbotax for legal disputes in that it provides guidance on likely options. The guided pathways are mapped with the assistance of subject matter experts and plain

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tribunal-to-resolve-civil-disputes.

209. *The Civil Resolution Tribunal and Strata Disputes*, GOV'T B.C., <http://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal> (last visited Feb. 26, 2019).

210. *MVI Personal Injury Dispute Implementation*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/mva-personal-injury-dispute-implementation-february-update/> (last visited Mar. 15, 2019).

211. *Id.*

212. Insurance (Vehicle) Amendment Act, B.C. Reg. 253/2018 (Can.) (amending Insurance (Vehicle) Regulation, B.C. Reg. 447/83 (Can.), [http://www.bclaws.ca/civix/document/id/crbc/crbc/447\\_83\\_multi](http://www.bclaws.ca/civix/document/id/crbc/crbc/447_83_multi)); Civil Resolution Tribunal Act, B.C., Reg. S.B.C. 2012, c. 25, (Can.), [http://www.bclaws.ca/civix/document/id/complete/statreg/12025\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/12025_01) (amended by Civil Resolution Tribunal Amendment Act, 2018, B.C. Reg. 232/2018 (Can.), [http://www.bclaws.ca/civix/document/id/lc/bcgaz2/v61n23\\_232-2018](http://www.bclaws.ca/civix/document/id/lc/bcgaz2/v61n23_232-2018)).

213. E-mail from Richard Roberts, Exec. Dir. & Registrar, Civil Resolution Tribunal, to Amy J. Schmitz, Professor of Law, Univ. of Mo. (Nov. 13, 2018, 21:55 CST) (on file with author).



language “knowledge engineers.”<sup>214</sup> There is an opportunity to expand the knowledge base in the future using AI and links to the CRT and court decisions.<sup>215</sup>

If the user cannot resolve the issue through the wizard, the process moves to an ODR portal, which begins with party-to-party negotiation and moves to mediation, if that fails.<sup>216</sup> If the parties are still unable to reach a mutually agreeable solution, an online adjudicator will make the ultimate decision after online or telephonic hearings.<sup>217</sup> If hearings are not needed, the arbitrator may render a decision based solely on digital evidence and submissions.

This ODR program expands access to remedies in that it is available at any time of the day or night. Parties can access the portal on computers or mobile phones; the CRT also provides telephone services, and in rare cases, in-person hearings for oral presentations when requested and approved by the adjudicator.<sup>218</sup> Users pay fees linked to the type of dispute; fees to initiate strata claims range from \$125 to \$150, (CAD), while small claims court fees range from \$50 to \$150 (CAD).<sup>219</sup> There are also a number of other types of fees that might apply, such as a \$30 (CAD) fee to request a default judgment if the other party never responds, and a \$50 to \$100 (CAD) fee if the matter is not resolved and proceeds to a hearing.<sup>220</sup> All of the judgments rendered, whether voluntarily or through the adjudicator, are enforced by the

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214. *Id.*

215. *Id.*

216. *See The Civil Resolution Tribunal and Strata Disputes, supra* note 209.

217. *See id.*; *see also How the CRT Works*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/how-the-crt-works/> (last visited Aug. 2, 2018) (these decision makers are independent decision makers appointed by government for fixed terms).

218. *The Civil Resolution Tribunal and Strata Disputes, supra* note 209.

219. *Civil Resolution Tribunal Fees*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/resources/crt-fees/> (last visited Aug.2, 2018).

220. *Id.*

court.<sup>221</sup>

CRT is working toward the provision of processes that typically ends most issues within sixty days, with overall costs that are much lower than they are for F2F proceedings.<sup>222</sup> Additionally, the CRT seeks to ease costs for those with little income or assets by exempting them from filing and other fees in most cases.<sup>223</sup> Furthermore, the CRT has used what it learned in the development and pilot stages to implement changes aimed to improve the process.<sup>224</sup> The goal is to provide an understandable and simple process for the average Canadian to understand.<sup>225</sup> This is especially important in that parties to claims in the CRT generally may not be represented by legal counsel, unless permitted due to minor status or other special permission.<sup>226</sup>

At the same time, consumers in B.C. also have access to a range of online resources through the non-profit, Consumer Protection, B.C.<sup>227</sup> This group even offers an online platform for resolving debt claims with collection agencies that have

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221. See *FACTSHEET: Civil Resolution Tribunal*, GOV'T B.C. (Feb. 7, 2017, 12:57 PM), <https://news.gov.bc.ca/factsheets/civil-resolution-tribunal> [<http://web.archive.org/web/20180709201704/http://news.gov.bc.ca/factsheets/civil-resolution-tribunal>].

222. ELIZABETH CORDONIER, AN INTRODUCTION TO BRITISH COLUMBIA'S CIVIL RESOLUTION TRIBUNAL 1 (2016), <https://wt.ca/app/uploads/An-Intro-to-BC-Civil-Resolution-Tribunal.pdf>.

223. *Id.* at 1–2.

224. *See id.* at 1.

225. *See id.* at 5.

226. *Helpers and Representation*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/how-the-crt-works/tribunal-process/starting-a-dispute/helpers-representation/> (last visited Nov. 27, 2018). This restriction will not apply with respect to the personal injury process that will come online in 2019. *Id.*

227. Mulgrew, *supra* note 208. Consumer Protection B.C. registers and licenses the following industries: cemetery and funeral services, debt collection and repayment agencies, home inspectors, motion pictures, payday loans, telemarketing, and travel. *About us*, CONSUMER PROTECTION BC, <https://www.consumerprotectionbc.ca/> (last visited Feb. 17, 2019).

registered as participants.<sup>228</sup> Similarly, the Property Assessment Appeal Board of B.C. provides ODR for residential claims once they are deemed eligible.<sup>229</sup> This ODR platform provides a chatroom for users to connect with a representative of the appeals board, where they can negotiate.<sup>230</sup> If direct negotiation is not successful, the parties will have a mediator enter their chatroom to assist.<sup>231</sup> If mediation is not successful, the ODR process will end, and the appeals board will assign a new representative to the case to make the final decision.<sup>232</sup>

## 2. Cyberjustice Laboratory Projects

The Cyberjustice Laboratory in Montreal, Canada has been active in creating pilot ODR projects to advance access to justice. For example, it created the open source applications that were the foundation for the CAT-ODR system to resolve condominium disputes in Ontario, Canada.<sup>233</sup> The CAT-ODR program uses a stepped process in which users first create an account and move through a negotiation phase where both parties can settle their dispute by posting proposals to one another to help negotiate a solution.<sup>234</sup> The aim is for most disputes to end amicably through this initial negotiation process. This is especially

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228. *Debt collection*, CONSUMER PROTECTION BC, <https://www.consumerprotectionbc.ca/consumer-help/debt-collection/> (last visited Feb. 17, 2019).

229. *Online Dispute Resolution More Details*, PROP. ASSESSMENT APPEAL BOARD, <http://www.assessmentappeal.bc.ca/SubmitAnAppeal/ODRMoreDetails.asp> (last visited Dec. 2, 2018).

230. *Id.*

231. *Id.*

232. *Id.* At this time, the process is not mandatory.

233. *CAT*, LABORATOIRES DE CYBERJUSTICE, <https://www.cyberjustice.ca/en/parole-3/nos-etudes-de-cas/tasc> (last visited Dec. 2, 2018).

234. *The CAT Process*, CONDOMINIUM AUTHORITY ONT., <https://www.condoauthorityontario.ca/en-US/tribunal/the-cat-process/> (last visited Mar. 15, 2019).

important with respect to condo disputes, as the disputing owners are generally neighbors who must live together in harmony (of some kind). Nonetheless, if the parties are unable to negotiate a settlement at this point, then they may ask for an online hearing “in front of” a tribunal member tasked with rendering a decision through the platform.<sup>235</sup> This decision-making phase allows the member to manage the schedule, obtain documents, and hear witness testimony electronically.<sup>236</sup>

This CAT-ODR program is similar to the Platform to Aid in the Resolution of Litigation (PARLe), which the Cyberjustice Laboratory created as a pilot project with the Consumer Protection Agency in Quebec.<sup>237</sup> The PARLe project has touted its success: “Almost 70% of the more than 1,300 cases filed through PARLe in its first year were settled. Furthermore, satisfaction rates with the process range from 86% (for merchants) to 96% (for mediators). Consumer satisfaction is at 89%.”<sup>238</sup> This process also has saved parties’ time by providing resolutions in an average of twenty-eight days versus the twelve months it takes to obtain decisions through the courts.<sup>239</sup> This faster timeline also frees time for courts, thus allowing them to allocate more resources to resolving complex cases that demand in-person processes.

### B. *Hangzhou Internet Court*

The Hangzhou Internet Court in China seeks to move

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235. *Stage 3: Tribunal Decision*, CONDOMINIUM AUTHORITY ONT., <https://www.condoauthorityontario.ca/en-US/tribunal/the-cat-process/stage-3-tribunal-decision/> (last visited Dec. 2, 2018).

236. *Id.*

237. Karim Benyekhlef & Nicolas Vermeys, *Ontario’s First Online Tribunal*, SLAW (Dec. 18, 2017), <http://www.slaw.ca/2017/12/18/ontarios-first-online-tribunal/>.

238. *Id.*

239. Telephone interview with Nicolas Vermeys, Assoc. Dir., Cyberjustice Labs. (July 10, 2018).

the entire litigation process to the Internet, including “prosecution, filing, proofing, court hearing, and ruling[.]”<sup>240</sup> The online process brings disputants across the country together to increase efficiency and “save judicial resources.”<sup>241</sup> The court has a broad reach to cover copyright, contract disputes related to e-commerce, product liability, internet service provider disputes, conflicts over loans obtained online, and domain name disputes.<sup>242</sup> Experts have viewed the court as one of the most ambitious of its kind.

The court’s process begins when the plaintiff registers on the site and is verified as a legitimate claimant.<sup>243</sup> The plaintiff fills out an online form describing the conflict and allows the Internet Court to retrieve the case information.<sup>244</sup> Each party obtains a “My Litigation” tab and enters a “query code” provided in the notice in order to review the complaint.<sup>245</sup> Within fifteen days of filing the case, a mediator contacts both parties and conducts pre-trial mediation via the internet, phone or videoconference.<sup>246</sup> If mediation fails, the lawsuit goes to the court’s “Case Filing Division” where the parties can track the case, and gather information about similar cases in order to determine likely outcomes that may assist them in reaching settlements before litigation.<sup>247</sup>

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240. Guanyu Hulianwang Fayuan (关于互联网法院) [About the Internet Court] Hangzhou Hulianwang Fayuan Susong Pingtai (杭州互联网法院诉讼平台) [Hangzhou Internet Court Litigation Platform], <https://www.netcourt.gov.cn/portal/main/domain/wikiIntroduce.htm>. (last visited Dec. 2, 2018).

241. *Id.*

242. *Id.*

243. LITIG. PLATFORM HANGZHOU INTERNET CT., <http://www.netcourt.gov.cn/portal/main/en/index.htm> (last visited Feb. 17, 2019) [hereinafter HANGZHOU INTERNET CT.].

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

As of February 2018, the experience in the four Hangzhou courts hearing online cases has been “encouraging” for advancing efficiency.<sup>248</sup> During its first year, the court received filings for over 6,000 cases, of which about two-thirds were resolved or dismissed through online means.<sup>249</sup> Participation is voluntary and defendants can demand that the case be heard off-line.<sup>250</sup> Typical cases involved purchases from large e-commerce companies based in Hangzhou, which include Alibaba, Taobao and NetEase.<sup>251</sup> This has caused some concern regarding power imbalances, as well as questions regarding the influence that these e-commerce giants may have in the court itself.<sup>252</sup>

Nonetheless, the Hangzhou Internet Court has been so successful in creating efficiencies that China plans to set up internet courts in Beijing and Guangzhou, according to a statement from China’s Supreme People’s Court (SPC).<sup>253</sup> Furthermore, the Hangzhou Court is setting trends broadly in consideration of technology’s role in litigation. Recently, the court in Hangzhou became the country’s first to accept “legally valid electronic evidence using blockchain

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248. Dani Deahl, *China launches cyber-court to handle internet-related disputes*, THE VERGE (Aug. 18, 2017, 4:33 PM), <https://www.theverge.com/tech/2017/8/18/16167836/china-cyber-court-hangzhou-internet-disputes>.

249. Hou Na, *Defendant appears via video chat at China’s 1st Internet court*, CGTN (March 9, 2018, 7:03 PM), [https://news.cgtn.com/news/7955544d786b7a6333566d54/share\\_p.html](https://news.cgtn.com/news/7955544d786b7a6333566d54/share_p.html). See also HANGZHOU INTERNET CT., *supra* note 243.

250. Dr. Falk Lichtenstein & Dr. Dorothee Ruckteschler, *Virtual court proceedings in China*, BUS. L. MAG., Mar. 1, 2018, at 13, 13.

251. *Id.*

252. See *id.* at 14. For example, in one case, a Chinese plaintiff bought a collectible battery-powered bank on Taobao, a popular shopping site, and tried to return it because the product was a counterfeit. *Id.* Next, he sued Taobao claiming breach of contract for allowing a seller to market counterfeit goods, but the court dismissed the claim. *Id.*

253. *China to launch internet courts in Beijing, Guangzhou, Guangdong China*, CHINA DAILY, [http://www.chinadaily.com.cn/regional/2018-07/26/content\\_36656841.htm](http://www.chinadaily.com.cn/regional/2018-07/26/content_36656841.htm) (last updated July 26, 2018).

technology.”<sup>254</sup> The plaintiff in an infringement case conducted an automatic capture of infringing webpages and the source code through a third-party platform, and uploaded them and the logs to Factom’s blockchain for document verification.<sup>255</sup> The court accepted this means for submitting evidence, after finding that the blockchain technology complied with relevant standards to ensure the reliability of the electronic data.<sup>256</sup> Chinese courts require strict verification procedures, and this case established that blockchain can be used as a legal method to determine the authenticity of an item of evidence, similar to a traditional notarization service commonly used in China.<sup>257</sup>

### C. *United Kingdom*

In the United Kingdom (U.K.), Her Majesty’s Courts & Tribunals Services (HMCTS) has begun a very ambitious court reform project that seeks to update the system to keep pace with technological changes.<sup>258</sup> As part of this program, the Civil Justice Council released a 2015 report suggesting the creation of an online court, referred to as Her Majesty’s Online Courts (HMOC).<sup>259</sup> Two major purposes of creating this online court would be to eliminate the need for judges in many cases, thereby increasing access to judges where they

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254. Tang Shihua, *Hangzhou Court Uses Blockchain-Based Evidence For First Time*, YICAI GLOBAL (June 30, 2018, 12:41 PM), <https://www.yicai.com/news/hangzhou-court-uses-blockchain-based-evidence-first-time>.

255. Wolfie Zhao, *Blockchain Can Legally Authenticate Evidence, Chinese Judge Rules*, COINDESK (June 29, 2018, 4:36 PM) <https://www.coindesk.com/blockchain-can-legally-authenticate-evidence-chinese-judge-rules/>.

256. *Id.*

257. *Id.*

258. *HMCTS Reform Programme*, GOV.UK (Nov. 9, 2018), [www.gov.uk/government/news/hmcts-reform-programme](http://www.gov.uk/government/news/hmcts-reform-programme).

259. Graham Ross, *Her Majesty’s Online Court*, MEDIATION ROOM (Feb. 16, 2015), <https://www.themediationroom.com/single-post/2015/02/16/Her-Majestys-Online-Court>.

are necessary for the resolution.<sup>260</sup> Judges in the U.K. have been vocal in explaining the virtues of an online court and fostering public relations that should assist its implementation.<sup>261</sup>

In this context, England and Wales have been touting reforms for “a courts and tribunal system that is just, and proportionate and accessible to everyone.”<sup>262</sup> Under the Constitutional Reform Act of 2005, the judiciary has been vested with a significant leadership role in the reformation.<sup>263</sup> Ultimately, the court system will reduce its staff by about 5,000 employees, and the number of cases heard in court by about 2.4 million per year.<sup>264</sup> More than fifty initiatives have been designed toward that end.<sup>265</sup>

The proposal for online determinations of low value, or small, claims envisions a three-tiered ODR system similar to that used elsewhere.<sup>266</sup> The first tier is online evaluation, or problem-solving, which would help users diagnose their issues and options.<sup>267</sup> The second tier offers online

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260. *Id.* See also SUSAN BLAKE ET AL., THE JACKSON ADR HANDBOOK 261–63 (2d ed. 2016) (discussing creation of the online court in the U.K. and suggesting that international ODR courts would be developed).

261. See The Right Honorable the Lord Burnett of Maldon, Lord Chief Justice of Eng. & Wales, Remarks at the Dinner for Her Majesty’s Judges (July 4, 2018) (transcript available at <https://www.judiciary.uk/wp-content/uploads/2018/07/20180704-lcj-speech-mansion-house-speech.pdf>).

262. N. BYROM, LEGAL EDUC. FOUND., DEVELOPING THE DETAIL: EVALUATING THE IMPACT OF COURT REFORM IN ENGLAND AND WALES ON ACCESS TO JUSTICE 6 (2019), <https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/02/Developing-the-Detail-Evaluating-the-Impact-of-Court-Reform-in-England-and-Wales-on-Access-to-Justice-FINAL.pdf>.

263. *Id.*

264. *Id.*

265. *Id.* at 7.

266. CIVIL JUSTICE COUNCIL, ONLINE DISPUTE RESOLUTION FOR LOW VALUE CIVIL CLAIMS 6, 19–21 (Feb. 2015), <https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>.

267. *Id.* at 6.



facilitators to assist the parties in reaching resolutions through mediation and negotiation conducted over the Internet.<sup>268</sup> Portions would be automated in order to reduce the need for human intervention, but the system would allow for telephone conferencing when needed.<sup>269</sup> The third tier would utilize online judges to provide a final resolution based on online pleadings.<sup>270</sup>

This online court for small claims is just one piece in the larger reform puzzle in the U.K. The U.K. also provides for online pleading for traffic offenses, as well as a divorce project, which seeks to allow for most divorces to be granted online by a “suitably trained and legally qualified professional judge.”<sup>271</sup> The divorce project was launched in January 2017, when couples in the East Midlands began filing for divorce online.<sup>272</sup> At the same time, the U.K. launched an online system for representatives of deceased persons to deal with the deceased’s property. Nonetheless, both the probate and the divorce processes are still working on devising means for authenticating documents such as birth certificates and marriage certificates.<sup>273</sup>

Despite the excitement for online courts in the U.K., some have argued that the Ministry of Justice is advancing technology in the interest of efficiency over fairness.<sup>274</sup> As Roger Smith has noted, it will be essential to articulate goals and audit the system to be sure it is safeguarding fairness.

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268. *Id.*

269. *Id.*

270. *Id.*

271. PUB. LAW PROJECT, THE DIGITALISATION OF TRIBUNALS: WHAT WE KNOW AND WHAT WE NEED TO KNOW 16–17 (Apr. 5, 2018), [https://www.sheffield.ac.uk/polopoly\\_fs/1.775487!/file/The-Digitalisation-of-Tribunals-for-website.pdf](https://www.sheffield.ac.uk/polopoly_fs/1.775487!/file/The-Digitalisation-of-Tribunals-for-website.pdf).

272. *Id.* at 17.

273. *Id.*

274. Roger Smith, *Court-based ODR: the Need for an Access to Justice Audit*, LAW, TECH. & ACCESS TO JUST. (May 30, 2018), <https://law-tech-a2j.org/odr/court-based-odr-the-need-for-an-access-to-justice-audit/>.

He states:

We might divide the prospective audit up into three parts. We need to be able to interrogate a court digital project's conception; its practical implementation; and its monitoring. If you accept an overall practical limit of ten questions then these sections get about three questions each. That implies one limitation. A further comes from the fact that we actually know very little in many jurisdictions about existing use of the courts and we may also lack any measure of calculating need. We will have to do the best we can.<sup>275</sup>

#### D. *Additional European Examples*

As part of the continuing process of integration among European Union (E.U.) countries, policymakers have been pushing technology-based resolutions of cross-border disputes.<sup>276</sup> For example, the E.U. created the E-Justice Portal in 2010 as a “one-stop shop” for E.U. citizens and legal professionals desiring legal documents regarding the E.U. The site is quite robust, containing over 12,000 pages of content on both E.U. law and the laws of the E.U.’s member states.<sup>277</sup> Furthermore, the portal provides information in a variety of E.U. spoken languages, which furthers the ideals of cross cultural collaboration.<sup>278</sup> Despite this goal, however, the portal has met criticism.<sup>279</sup> For example, the E-Justice Portal is currently voluntary for E.U. member states.<sup>280</sup>

Furthermore, the E.U. has established an ODR platform guided by two important principles: the provision of a “legal framework obliging member states to enable consumers and traders to submit disputes to ADR[,]” and the provision of

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275. *Id.*

276. Xandra E. Kramer, *Access to Justice and Technology: Transforming the Face of Cross-Border Civil Litigation and Adjudication in the EU*, in *EACCESS TO JUSTICE* 351, 351–52 (Karim Benyekhlef et al eds., 2016).

277. *Id.* at 353.

278. *Id.* at 364–65.

279. *See id.* at 363–64.

280. *Id.*

“tools facilitating independent, impartial, transparent, effective, fast, fair out-of-court resolution of disputes.”<sup>281</sup> This system was created under the E.U. ADR Directive and ODR Regulation calling for the establishment of an ODR platform to serve as “a single point of entry for the out-of-court resolution of online disputes, through ADR entities which are linked to the platform and offer ADR through quality ADR procedures.”<sup>282</sup> Member States also must “ensure that ADR entities make publicly available on their websites, . . . and by any other means they consider appropriate, annual activity reports.”<sup>283</sup> This E.U. ODR platform is revolutionary by serving as “an interactive website which can be accessed electronically and free of charge in all the official languages . . . of the Union.”<sup>284</sup>

The E.U. ADR Directive requires that procedures should “preferably be free of charge” or limited to only a nominal fee for the consumers.<sup>285</sup> “This Directive should be without prejudice to the question of whether ADR entities are publicly or privately funded or funded through a combination of private and public funding.”<sup>286</sup> The Directive also “establishes a set of quality requirements which apply to all

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281. *Id.* at 361. Notably, Russia intends to imitate the online dispute resolution platform released by the European Union; the platform will focus upon contract disputes involving online purchases. *Russia intends to create online dispute resolution for e-commerce*, EURASIATX.COM (Aug. 4, 2016, 11:01 AM), <http://eurasiatx.com/economia/> (search “online dispute resolution for e-commerce; then follow “read more” hyperlink). Thus far, it does not appear that this plan has been implemented or been given a launch date.

282. Directive 2013/11 of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165) 63, 64 [hereinafter Directive 2013/11].

283. *Id.* at 74.

284. Regulation 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) 2006/2004 and Directive 2009/22, 2013 O.J. (L 165) 1,6.

285. Directive 2013/11, *supra* note 282, at 67.

286. *Id.* at 68.

ADR procedures carried out by an ADR entity which has been notified to the Commission.”<sup>287</sup> “In order to ensure that ADR entities function properly and effectively . . . each Member States should designate a competent authority . . . [to] perform that function.”<sup>288</sup> The goal is to ensure that “consumers have access to high-quality, transparent, effective, and fair out-of-court redress mechanisms no matter where they reside in the Union.”<sup>289</sup>

The E.U. ODR Regulation seems to be a step forward for consumers in the E.U., although there is a lack of empirical data on use and satisfaction.<sup>290</sup> The ODR platform, however, is only available for consumers and merchants within the E.U., and it is only a platform and not a provider. There is no assurance how each Member State will implement the ODR processes, making this a far cry from an internet court, or holistic ODR court.

At the same time, smaller ODR processes have been appearing in various areas outside of the E.U. Platform. For example, the Dutch *Rechtwijzer* sought to use ODR in the Dutch court system.<sup>291</sup> However, financial issues led to its replacement with an online divorce mechanism, called *Justice42*.<sup>292</sup> *Justice42* aims to cut lawyers out of the divorce process and steer the parties toward settlement through guided mediation.<sup>293</sup> Its leadership has stated a focus on meeting the needs of parents that want to make a parenting

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287. *Id.* at 67.

288. *Id.* at 69.

289. *Id.* at 70.

290. The system is still very new, and hopefully the data will be available soon.

291. See Roger Smith, *Goodbye, Rechtwijzer: hello, Justice42*, LAW, TECH. & ACCESS TO JUST. (Mar. 31, 2017), <https://law-tech-a2j.org/advice/goodbye-rechtwijzer-hello-justice42/>.

292. *Id.*

293. *Justice42*, SI<sup>2</sup> FUND, <http://www.si2fund.com/portfolio/justice42/> (last visited Dec. 6, 2018).

plan, as well as partnering with other services such as mental health and financial services.<sup>294</sup> This new program has been in operation since September 2017.<sup>295</sup>

#### IV. ESSENTIALS FOR DEVELOPING BENEFICIAL ODR

International dialogue and comparative research regarding online courts must help inform system design.<sup>296</sup> Many countries are beginning to integrate technology into their administrative justice processes and move certain dispute resolution processes online. Each provides a laboratory for investigation, from which others can learn. Furthermore, it is essential that policymakers consider core due process requirements and maintain healthy skepticism of the use of artificial intelligence (AI) and algorithms in making final case determinations. Indeed, any dispute resolution system is ineffective if it is unfair. Efficiency should not overshadow fairness. It is therefore essential to build ODR systems for particular contexts in consideration of due process standards.<sup>297</sup>

##### A. *Ensuring Due Process*

Due Process is the bedrock of the United States judicial system, and every nation of the world strives for procedural justice in its courts. Accordingly, any establishment of ODR

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294. Roger Smith, *Online Dispute Resolution (ODR) and Access to Justice*, LAW, TECH. & ACCESS TO JUST. (May 1, 2018), <https://law-tech-a2j.org/odr/online-dispute-resolution-odr-and-access-to-justice/>.

295. *About*, JUSTICE42, <http://justice42.nl/en/home-3/> (last visited Dec. 8, 2018). As another example, the Energy Customer Dispute Settlement Service is an online dispute resolution process for Italian energy suppliers and customers to resolve disputes via video chats. See Giuseppe Leone, *Italian Energy Customers Can Now Resolve Disputes Online*, VIRTUAL MEDIATION LAB (May 29, 2018), <https://www.virtualmediationlab.com/tag/online-dispute-resolution-in-italy/>.

296. See PUB. LAW PROJECT, *supra* note 271, at 27–35.

297. See Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 MICH. J. INT'L L. 485, 492 (2014).

in public courts must be procedurally fair and abide by standards of due process.<sup>298</sup> As Professor Leah Wing has noted, however, it is difficult to set strict standards or codes of conduct for ODR due to its evolving nature. Nonetheless, the ODR community has begun to articulate shared values that help shape the ethical principles governing ODR practices.<sup>299</sup> Professor Wing also explains that the “the tension of universality or generality” requires that the ethical principles be general enough to be applicable in different settings, cultures and jurisdictions, while also reflecting an overarching cohesion and offering durability over time.<sup>300</sup>

Policymakers in Europe have similarly emphasized ODR fairness standards. The E.U. ADR Directive in conjunction with the ODR Regulation, safeguards due process by calling for exclusion of ODR providers from the E.U. ODR platform if they do not abide by prescribed standards. Of course, that only deals with private providers listed on the public platform in the E.U.<sup>301</sup>

Safeguarding due process rises to an even higher level when dealing with public e-courts. At a very minimum, they must abide by the bedrock standards of confidentiality, impartiality, competence, and quality of process.<sup>302</sup> This means that courts and practitioners involved in the processes

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298. Leah Wing, *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, 3 INT'L J. ONLINE DISP. RESOL. 12, 26 (2016).

299. *Id.* at 17.

300. *Id.*

301. See generally Joasia A. Luzak, *The new ADR Directive: designed to fail? A short but hole-ridden stairway to consumer justice* (Ctr. for the Study of European Contract Law, Working Paper No. 2015-12, 2015) <https://ssrn.com/abstract=2685655> (examining the ADR Directive to reveal its shortcomings in providing justice to consumers, and proposing solutions overcome those shortcomings).

302. See Daniel Rainey, *Third-Party Ethics in the Age of the Fourth Party*, 1 INT'L J. ONLINE DISP. RESOL. 37, 42–52 (2014).

must understand confidentiality risks and communicate those risks to clients and users.<sup>303</sup> They also must ensure that all parties have an adequate opportunity to participate in the process and that parties can make voluntary and informed choices surrounding the procedures and outcome.<sup>304</sup>

The International Center for Online Dispute Resolution (ICODR) has articulated standards for ODR that add to these core standards for courts to consider as they digitize. The ICODR list is as follows:

Accessible: ODR must be easy for parties to find and . . . should be available through both mobile and desktop channels, minimize costs to participants, and be easily accessed by people with different physical ability levels.

Accountable: ODR systems must be continuously accountable to the institutions, legal frameworks, and communities that they serve.

Competent: ODR providers must have the relevant expertise in dispute resolution, legal, technical execution, language, and culture required to deliver competent, effective services in their target areas.

Confidential: ODR must maintain the confidentiality of party communications in line with policies that must be made public around a) who will see what data, and b) how that data can be used.

Equal: ODR must treat all participants with respect and dignity. ODR should enable often silenced or marginalized voices to be heard, and ensure that offline privileges and disadvantages are not replicated in the ODR process.

Fair/Impartial/Neutral: ODR must treat all parties equally and in line with due process, without bias or benefits for or against individuals, groups, or entities. Conflicts of interest of providers, participants, and system administrators must be disclosed in advance of commencement of ODR services.

Legal: ODR must abide by and uphold the laws in all relevant jurisdictions.

Secure: ODR providers must ensure that . . . communications

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303. *Id.* at 43.

304. *Id.* at 46.

between [participants are] not shared with any unauthorized parties. Users must be informed of any breaches in a timely manner.

Transparent: ODR providers must explicitly disclose in advance a) the form and enforceability of dispute resolution processes and outcomes, and b) the risks and benefits of participation. Data in ODR must be gathered, managed, and presented in ways to ensure it is not misrepresented or out of context.<sup>305</sup>

The standards and principles noted are fairly self-explanatory, but they have varied applications when it comes to public use of ODR and e-courts. ICODR's list was created for ODR more generally, and is not specifically for public courts per se. For starters, security and accountability have special import in a public setting. Courts will have to take special care to ensure that their systems cannot be "hacked," and remain accountable to the taxpayers. Courts already have this security struggle when it comes to e-filing and similar digitalization, but this becomes even more pronounced with online mediations and court-connected ODR. Accordingly, e-courts and judicial ODR programs should be subject to security audits on a regular basis.

However, it is noteworthy that courts are already managing security issues by working with providers such as Modria (operated under Tyler Technologies) to provide court-connected ODR that is secure. Although Modria, through tylertech.com, collects some general information such as a user's name, e-mail address, IP address, and access times, Modria and Tyler Technologies never sell, rent, or release

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305. This list of ODR Standards comes from the International Council for Online Dispute Resolution (ICODR). *ICODR Standards*, ICODR, <http://icodr.org/index.php/standards/> (last visited Nov. 13, 2018). The standards were based on the ODR Ethical Principles. Wing, *supra* note 298, at 24–27. Those principles can also be found at the National Center for Technology and Dispute Resolution. *Ethical Principles for ODR*, ODR.INFO, <http://odr.info/ethics-and-odr/> (last visited Aug. 28, 2017). See also Amy J. Schmitz, *Consumer Redress in the United States*, in *THE NEW REGULATORY FRAMEWORK FOR CONSUMER DISPUTE RESOLUTION 325* (Pablo Cortés ed., 2016) (discussing remedy systems, and ODR, and emphasizing the importance of preserving fairness and ethics).



customer mailing lists to third parties.<sup>306</sup> Moreover, tylertech.com protects personal information (e.g., a credit card number) entered into the ODR program by complying with industry security standards.<sup>307</sup> Furthermore, users who choose to customize a resolution flow for their case are also protected, as the Modria resolution flows are backed by a security certified, API-enabled case management system.<sup>308</sup>

Nonetheless, such public/private partnerships, as seen with Modria and Matterhorn,<sup>309</sup> raise impartiality concerns. Accordingly, the courts hiring outside providers will have to take special care to be sure that this public/private collaboration does not create even the appearance of bias, let alone bias. Of course, governments hire third parties to conduct many services, and this can be cost effective while allowing for greater innovation. However, these collaborations may be subject to higher levels of scrutiny when it comes to operating the justice system. That means that system audits will be very important to ensure that no conflicts of interest or biases infect the courts.

Audits and transparency go hand-in-hand. Transparency means not only that individuals have full information about a process at the outset. It also means that administrators should publish reports on the system and provide these reports to auditors with power and expertise to assess whether the use of technology is not only saving the government time and money, but also assisting individuals to obtain fair redress in the courts. For example, courts using ODR should gather data to analyze cost savings pre- and post-system implementation. They also should gather data

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306. See *Tylertech.com Privacy Statement*, TYLER TECH., <https://www.tylertech.com/Privacy> (last visited Sept. 6, 2017); *PCI Compliance*, TYLER TECH., <https://www.tylertech.com/about-us/compliance/pci-compliance> (last visited Mar. 23, 2019).

307. *Id.*

308. MODRIA, FEATURE COMPARISON CHART (2017), <https://www.tylertech.com/Products/Modria/Modria-Feature-Comparison-Chart.pdf>.

309. See discussion *supra* Part II.

on how many individuals are using and benefitting from a new system, when they are accessing the system, and whether they are able to access the system using a mobile device. Examining the time it takes to complete the process or otherwise obtain a remedy is also important.

Gathered data should not be limited to this quantitative information. It also should include qualitative research regarding satisfaction, perception, and user experience. This should include not only e-surveys, but also focus groups of system users who can offer more precise feedback and ideas for improvements. In this vein, proper survey design is essential for capturing unbiased reviews. Focus groups would also allow for deeper queries.

Indeed, the importance of transparency cannot be overstated. Each of the ICODR principles—and accompanying standards—deserves attention, but transparency remains especially important as courts develop and adopt ODR. Data collection and transparency open the door to conversations and comparative analysis that lead to improvements. As each pilot project completes a cycle, policymakers should gather to compare notes. International discussions will further inform this process, and ultimately a set of best practices will emerge.

Policymakers from around the world are already calling for this type of data collection and robust study of technology in the courts. For example, The Legal Education Foundation (LEF) in the U.K. is seeking to determine how best to measure the success of the new ODR programs in the U.K., discussed in Section III.C.<sup>310</sup> It is calling for an evaluation of data related to the fairness of the justice system in relation to persons in vulnerable populations.<sup>311</sup> The Foundation has stated that access to justice must include: “i. Access to the formal legal system; ii. Access to an effective hearing; iii.

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310. See BYROM, *supra* note 262, at 6–7.

311. *Id.*

Access to a decision in accordance with substantive law; [and] iv. Access to remedy.”<sup>312</sup> Data collection related to the pilot projects must therefore include a wide variety of metrics, as detailed in the LEF’s recent report.<sup>313</sup>

### B. *Cautious Use of AI and Algorithms*

The discussion above regarding due process and ethical standards is only a starting point for developing best practices. Indeed, any conversations must also take into account the growing use of AI and algorithms in nearly every industry, including law.<sup>314</sup> While it is true that ODR programs may facilitate negotiation or mediation without any predictive analysis, there is a growing use of such analysis and use of AI in helping parties determine case value and likely outcomes as a catalyst for reaching a settlement.<sup>315</sup> It is even feasible that an e-court program could use AI to determine results based on an analysis of similar cases. Accordingly, this section will discuss some of the ways courts have used AI and algorithms and raise attendant cautions for policymakers to consider.

Actuarial scientists have long used predictive systems and algorithms to determine probabilities in the insurance industry, and now law enforcement and courts are joining the bandwagon with the advent of user-friendly programs

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312. *Id.* at 14.

313. *Id.*

314. *See generally* Robert H. Sloan & Richard Warner, Alien Intelligence: Ensuring Fairness in Algorithmic Decision-Making 1, 2–7 (Apr. 16, 2018) (unpublished manuscript) (<https://ssrn.com/abstract=3163664>) (discussing the disruptions caused by AI, and noting “[h]umans—businesses, governments, and individuals—embrace the program, and many (humans) propose using AI systematically in the widest possible range of contexts as a basis for prediction and action”).

315. Bernard Marr, *How AI and Machine Learning Are Transforming Law Firms and the Legal Sector*, FORBES (May 22, 2018, 12:29 AM), <https://www.forbes.com/sites/bernardmarr/2018/05/23/how-ai-and-machine-learning-are-transforming-law-firms-and-the-legal-sector/#3d6ef0b032c3>.

powered by AI.<sup>316</sup> The problem is that these systems are not always accurate. For example, the blood alcohol ratio used for DUIs might be either too high or low for some individuals even if it is a helpful statistic taken together.<sup>317</sup> Furthermore, individuals may game a system by strategically changing their behavior or entering false inputs.<sup>318</sup> Coding errors and coders' biases also may lead to skewed results.<sup>319</sup>

Nonetheless, AI and well-built algorithms may help individuals make determinations that are more objective in some cases.<sup>320</sup> They also may produce determinations without the delay involved with traditional in-court battles of the experts, deploying costly expert testimony put for by each party. For example, a judge in a personal injury case may have subjective reasons for skepticism about a plaintiff's case, or the judge may have an inherent dislike of "AI attorneys." Furthermore, it is typical for injury cases to involve hours or days of "expert" testimony on damages. In such a case, an AI-powered program could provide the judge with a case assessment that would help her arrive at a fair judgment, perhaps without the need for a long trial involving hired experts. Similarly, a consumer in a small claims action may benefit from a case value prediction in reaching a

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316. See Jane Bambauer & Tal Zarsky, *The Algorithm Game*, 94 NOTRE DAME L. REV. 1, 6 (2018).

317. *Id.* at 7.

318. *Id.* at 12–14. While this is sometimes problematic, designers of algorithms can respond to or preempt gaming through increasing model complexity, frequently changing the model, and gathering more or differently sourced information about the proxies to make gaming more difficult.

319. See Richard C. Kraus, *Artificial Intelligence Invades Appellate Practice: The Here, The Near, and The Oh My Dear*, A.B.A. (Feb. 5, 2019), [https://www.americanbar.org/groups/judicial/publications/appellate\\_issues/2019/winter/artificial-intelligence-invades-appellate-practice-the-here-the-near-and-the-oh-my-dear/](https://www.americanbar.org/groups/judicial/publications/appellate_issues/2019/winter/artificial-intelligence-invades-appellate-practice-the-here-the-near-and-the-oh-my-dear/).

320. Pamela S. Katz, *Expert Robot: Using Artificial Intelligence to Assist Judges in Admitting Scientific Expert Testimony*, 24 ALB. L.J. SCI. & TECH. 1, 41 (2014).

resolution with a contractor. In these ways, AI and algorithms may lead to faster and more accurate determinations or mutual resolutions.<sup>321</sup>

At the same time, there are understandable concerns regarding biases that may lurk behind AI.<sup>322</sup> As the Commissioner for Human Rights for the Council of Europe Parliamentary Assembly stated: “Artificial intelligence can greatly enhance our abilities to live the life we desire. But it can also destroy them. It therefore requires strict regulations to avoid morphing into a modern Frankenstein’s monster.”<sup>323</sup>

One area that has seen a rise in use of AI is criminal law. Some judges use AI to set bail, or to help determine sentences for convicted persons.<sup>324</sup> For example, courts in Arizona, Kentucky, and New Jersey now consider computer generated statistics in setting bail, rather than relying solely on judges’ discretion and intuition.<sup>325</sup> Policymakers behind these programs argue that this allows judges to use objective algorithms based on facts in determining the flight risk of releasing defendants on bail. In other words, using AI helps eliminate disparities in treatment caused by judges’ implicit biases.<sup>326</sup> AI programs now play a role in targeted policing as

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321. *Id.*

322. See Dunja Mijatović, *Safeguarding Human Rights in the Era of Artificial Intelligence*, COUNCIL OF EUR.: COMMISSIONER’S HUM. RTS. COMMENTS (July 3, 2018), <https://www.coe.int/en/web/commissioner/-/safeguarding-human-rights-in-the-era-of-artificial-intelligence?inheritRedirect=true>.

323. *Id.*

324. Matt O’Brien & Dake Kang, *AI in the court: When algorithms rule on jail time*, PHYS.ORG (Jan. 31, 2018), <https://phys.org/news/2018-01-ai-court-algorithms.html>; Caleb Watney, *It’s time for our justice system to embrace artificial intelligence*, BROOKINGS: TECHTANK (July 20, 2017), <https://www.brookings.edu/blog/techtank/2017/07/20/its-time-for-our-justice-system-to-embrace-artificial-intelligence/>.

325. See O’Brien & Kang, *supra* note 324.

326. Subjective human determinations in assessing the magnitude of an individual’s flight risk have been known to cause a substantial disparity in the treatment of poor and wealthier arrestees. See *id.* Using AI, courts can release

well.<sup>327</sup> Furthermore, researchers are testing a program that recognizes human deception better than juries do.<sup>328</sup>

AI may also play a part in legal discovery. In *Winfield v. City of New York*, the court looked at the use of predictive coding to sort and gather documents relevant to a discovery request.<sup>329</sup> In *Winfield*, plaintiffs charged that the City's use of algorithms to influence document requests led to the underrepresentation of relevant documents in this case.<sup>330</sup> The argument was that this resulted in skewed document review, and thus skewed results.<sup>331</sup> The court disagreed, and

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all individuals who pose the least threat of danger or flight; wealth is immaterial because money is not needed as a safeguard when the system deems an individual unlikely to commit another crime or skip court hearings. *See id.* One program, now used by New Jersey courts, is the "Public Safety Assessment" score; the program speeds up the process of arraignment by immediately sending the judge an individual's risk score for use during a jailhouse video conference hearing. *Id.* There is minimal delay if the party is eligible for release, because no bail is required. As added insurance against failure to appear, the party receives text alerts reminding him of court dates. *Id.*

327. Stephen Buranyi, *Rise of the racist robots—how AI is learning all our worst impulses*, GUARDIAN (Aug. 8, 2017, 2:00 PM) <https://www.theguardian.com/inequality/2017/aug/08/rise-of-the-racist-robots-how-ai-is-learning-all-our-worst-impulses>.

328. Michael Byrne, *AI System Detects 'Deception' in Courtroom Videos*, VICE: MOTHERBOARD (Dec. 19, 2017, 9:17 AM), [https://motherboard.vice.com/en\\_us/article/zmqv7x/ai-system-detects-deception-in-courtroom-videos](https://motherboard.vice.com/en_us/article/zmqv7x/ai-system-detects-deception-in-courtroom-videos). One juvenile court in Ohio is testing case "care-management" software. Andrew Tarantola, *Watson is helping heal America's broken criminal-sentencing system*, ENGADGET (Aug. 25, 2017), <https://www.engadget.com/2017/08/25/watson-heal-america-criminal-sentencing/>. In Montgomery County, OH, Judge Anthony Capizzi has partnered with IBM to use Watson in developing digital case files of information most relevant to his juvenile cases. *Id.* He distinguishes his "care-management system" from other case-management systems, in that the information in his system is not merely a record of past events but includes data such as recommendations by law enforcement, probation officers, and mental health providers, upon which he can make predictive decisions. *Id.* The pilot program is a "hybrid solution," balancing any potential AI bias with "human decision-making." *Id.*

329. *Winfield v. City of New York*, No. 15-cv-05236 (LTS) (KHP), 2017 WL 5664852, at \*10–11 (S.D.N.Y. Nov. 27, 2018).

330. *Id.* at \*5

331. *Id.*

affirmed that predictive coding was a viable means of achieving reasonable and proportional document production.<sup>332</sup>

As another example of using AI in the law, courts across China have introduced a robot called Xiao Fa to answer questions submitted via a keyboard or verbally.<sup>333</sup> The government continually updates the platform with new information, which already houses details of over 40,000 legal procedures, 30,000 frequently asked questions (adapted to regions), 7,000 laws, and 5,000,000 cases.<sup>334</sup> Referring to relevant case histories, verdicts, laws and expert opinions, the robot provides individuals with information about how to bring a lawsuit, how to investigate their legal rights, and how to obtain evidence.<sup>335</sup> This approaches the sort of robo-lawyer that some have feared. As of November 2017, the robots were receiving 30,000 requests for information daily and answering 85% of them immediately.<sup>336</sup>

At the same time, a Cornell study has concluded that AI is better at recognizing deception than humans.<sup>337</sup> In 90% of Cornell's courtroom simulations, the computer correctly determined when the subject was lying.<sup>338</sup> The Cornell study also found that AI is better and fairer than judges are in making bail determinations.<sup>339</sup> It therefore concluded that AI systems can cut crime rates by 24.8% by increasing the

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332. *Id.* at \*11–12 (so holding but allowing plaintiffs to review a random sample of non-relevant documents to determine whether relevant documents which should have been produced were improperly omitted).

333. Cao Yin, *Courts embrace AI to improve efficiency*, CHINA DAILY (Nov. 16, 2017, 7:55 AM), [http://www.chinadaily.com.cn/china/2017-11/16/content\\_34595221.htm](http://www.chinadaily.com.cn/china/2017-11/16/content_34595221.htm).

334. *Id.*

335. *Id.*

336. *Id.*

337. Byrne, *supra* note 328.

338. *Id.*

339. Tarantola, *supra* note 328.

accuracy of determinations to deny bail.<sup>340</sup> It also found that AI systems for bail reduce the prison population by 42% without increasing the crime rate by suggesting the release of arrestees who are least likely to commit another crime.<sup>341</sup>

In contrast, programs such as Compas, which courts have used for sentencing, have faced sharp criticism.<sup>342</sup> Compas determines an outcome based on the statistical analysis of 100 factors including sex, age, and criminal history, to assess an individual's likely rehabilitation or recidivism.<sup>343</sup> However, a study by ProPublica found that Compas is incorrectly flagging black convicts as likely to be recidivists at twice the rate it incorrectly flags white convicts.<sup>344</sup> This raises serious questions regarding the built-in biases of the algorithms Compas uses for its predictions.

Again, concerns about AI also flow into the development of e-courts. AI and algorithms may be used in e-courts and court-connected ODR to provide parties with predictive analysis of case outcomes, or even final determinations. Predictive analytics that provide case assessments based on prior similar cases can help parties reach fair decisions and may even help eliminate implicit and explicit biases that infect F2F interactions and determinations. Nonetheless, there is evidence that people tend to defer to statistical data instead of using the data to help form an independent judgment.<sup>345</sup> Furthermore, AI and algorithms reflect the value judgments and priorities of the individuals who create

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340. *Id.*

341. *Id.*

342. Annie Dike, *Would You Trust an Artificially-Intelligent Expert?* THE NAT'L L. REV. (Oct. 25, 2017), <https://www.natlawreview.com/article/would-you-trust-artificially-intelligent-expert>.

343. *Id.*

344. O'Brien & Kang, *supra* note 324.

345. *Id.*



and design them.<sup>346</sup> A “garbage in, garbage out” problem occurs when the foundation for AI is skewed data. Although AI may arguably learn and improve over time, it is susceptible to human bias, especially where “the underlying data reflects stereotypes, or if you train AI from human culture.”<sup>347</sup>

Accordingly, it is essential that individuals in the court system and societal watchdogs have access to the datasets and rules used by the algorithms.<sup>348</sup> In addition, policymakers should consider the ICODR standards and principles noted above as they create best practices for ODR platforms and software design.<sup>349</sup> Policymakers may also consider using open-source software to improve transparency and seeking public input to improve court processes.<sup>350</sup> Moreover, AI cannot replicate essential human capabilities necessary for good governance and reasoned decision-making.<sup>351</sup> Legal futurists who predict that “robot lawyers” will eventually perform all legal work may view the rule of law as providing a “clear prescription” that can be plugged into algorithms to produce legally correct

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346. *See id.*

347. Buranyi, *supra* note 327.

348. *See id.* In criminal cases, it is clear that parties must be able to understand why they were denied bail or how their sentence was determined. A 2016 study by San Francisco-based Human Rights Data Analysis Group showed that PredPol software (used by police departments to identify areas likely to experience high crime rates), targeted mostly-black neighborhoods at twice the rate of white neighborhoods in Oakland. *Id.* But when statisticians modelled the likely criminal activity based on national statistics, “hotspots” were more evenly distributed across the city. *Id.* Because the software relies on prior arrest data, the learning process leads to over-policing in certain areas. *Id.* The system becomes self-reinforcing, sending law enforcement back to areas where arrests were made, thus leading to more arrests in that area and further reinforcing the prediction that crime will occur in that location. *Id.*

349. *See supra* pp. 142–43 and note 305.

350. Watney, *supra* note 324.

351. *See* Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 GEO. WASH. L. REV. 1, 29–30 (2019).

determinations.<sup>352</sup> However, it is often impossible to reduce laws or regulations to simple inputs, and it “is almost impossible . . . to reduce knowledge and judgment to a series of propositions a machine could apply.”<sup>353</sup>

Rather than seek to replace humans with machines, humans should seek to use machines to improve their performance.<sup>354</sup> AI can serve as a tool to aid decision-makers in analyzing information, while mitigating bias and other human failings.<sup>355</sup> Technology has immense potential to help individuals assess fair settlements of small claims, for example, and may inform judicial determinations in these and similar cases. However, it is again imperative that the algorithms and AI be transparent, and that legal professionals and court administrators remain vigilant in abiding by “cyberethics” and best practices built on ICODR standards and principles.<sup>356</sup>

Moreover, e-courts and public ODR programs should allow individuals to maintain control over the process. Professor Ayelet Sela conducted an experiment at Stanford University using sixty-eight undergraduate and eighteen graduate students to assess their experiences using a semi-synchronous ODR program.<sup>357</sup> She asked: 1) is a disputant’s

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352. *Id.* at 44.

353. *Id.* at 48.

354. *Id.* at 47.

355. See Robin Tible, *Note de lecture: Yannick Meneceur, Quel avenir pour la justice prédictive? – Enjeux et limites des algorithmes d’anticipation des décisions de justice* [Reading note: Yannick Meneceur: “What future for predictive justice? Challenges and limits of anticipation algorithms of court decisions] LA SEMAINE JURIDIQUE EDITION GÉNÉRALE no. 7, Feb. 12, 2018, (Fr.), <http://www.cyberjustice.ca/en/publications/note-de-lecture-quel-avenir-pour-la-justice-predictive-enjeux-et-limites-des-algorithmes-danticipation-des-decisions-de-justice/>.

356. *Id.*

357. Ayelet Sela, *Can Computers Be Fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 33 OHIO ST. J. ON DISP. RESOL. 91, 146 (2018). Using a “lean, text-

perception of procedural justice affected by whether she engages with a person or AI software?; and 2) is her perception of procedural justice affected by the degree of control she has over the outcome?<sup>358</sup> In assessing the data, Professor Sela concluded: 1) people's perception of fairness varies with their control over process and decision-making, and 2) people are less comfortable giving up their control over decision making to software than to other people.<sup>359</sup>

Again, ODR is slowly becoming part of the judicial system, as it opens new avenues for cost-effective access to remedies.<sup>360</sup> Accordingly, courts should continue to expand their use of technology to assist settlement and provide determinations, where necessary, with greater efficiency and personalization of the process.<sup>361</sup> Nonetheless, caution is necessary. Technology may be a "fourth party" to assist dispute resolution, but it should not take over and become the only and final decision-maker.<sup>362</sup> Instead, courts should use stepped processes as noted above in some of the pilots (with online negotiation and mediation as a precursor to online determinations), with the help of predictive analysis to assist parties in negotiations and mediation prior to a final determination. As Professor Sela's study confirmed, participants perceive such hybrid processes as more

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based" ODR system, the students resolved simulated e-commerce disputes with anonymous sellers through mediation, binding arbitration, or "med-arb." *Id.*

358. *Id.* at 97.

359. *Id.* at 115.

360. *Id.* at 94.

361. *Id.*

362. *See Id.* at 98–110. The author distinguishes "instrumental" from "principal" ODR systems. *Id.* at 100. In the instrumental model, the system acts as a "specialized communication platform" through which the parties and a (human) third party neutral submit information and engage in dispute resolution. *Id.* In the principal model, AI automates the role of the third party in identifying the parties' interests, deciding which rules apply, "calculating optimal results," and suggesting options for resolving the dispute. *Id.* Most systems today are hybrid models, starting with an automated process and allowing human intervention only if necessary. *Id.* at 101.

procedurally just and leading to the greatest satisfaction.<sup>363</sup>

### C. *Considering Particularities and Politics*

Due process and cautious use of AI and algorithms are essential in designing e-court and public ODR projects. However, there are also particularities and politics that often connect with fairness and efficiency concerns for courts to consider before implementing ODR. The following includes discussion of several of these issues, including determining case type, keeping it voluntary, addressing the digital divide, and considering lost jobs and political difficulties.

#### 1. Case Types

First, courts need to decide which types of cases are appropriate for ODR because some cases are too complex, or otherwise improper for online determination. For example, complex business cases may not fit the confines of an online process. Furthermore, final determinations of child custody in family law cases that need special attention for the best interests of the child, are generally not proper for e-court or online processes. Instead, ODR processes should assist divorcing parties in reaching their own mutual agreements and monitoring parenting plans as noted in some of the pilots

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363. The participants' experience of procedural justice varied with their perception of the process as instrumental (human) or principal (machine). Disputants experienced a higher level of procedural justice in mediation when they engaged with a "perceived software mediator" than with a human. Yet the opposite was true in the binding arbitration process. In that case, participants experienced a higher level of procedural justice when the neutral was a human. In both instances, the primary factor affecting participants' sense of procedural justice was their ability to have a "voice" that is, to "effectively participate" in the dispute resolution process. Interestingly, participants perceived the software to be more fair, effective and attentive than human neutrals, and experienced greater certainty and fewer negative emotions during the process. They perceived themselves to have nearly 30% greater "voice" in the instrumental mediation. Nonetheless, the instrumental arbitration participants rated human neutrals as more respectful and trustworthy, and felt that they had more voice and greater informational justice in a human-powered process. *See id.* at 107–136.

discussed above. For example, the Modria ODR program in Las Vegas sets a nice example for using ODR to promote consensual resolutions as a precursor to (and preventer of) litigation.<sup>364</sup>

Specific case types that are appropriate for ODR include small claims, parking fines and driving misdemeanors, property and income tax disputes, and other government fine cases that individuals may otherwise have no feasible avenue to contest due to disproportionate costs of litigation. Additional case types may arise, such as landlord tenant and condominium disputes, as noted in Canada. Of course, as pilot projects progress, courts will be able to learn from their experiences and improve the process. As ODR programs improve, they will expand and encompass further case types. However, this must proceed with caution with a focus on fairness and due process.

## 2. Voluntariness

The rush to digitize should expand access to justice, but should not eliminate an individual's access to in-person processes all together. For example, it is questionable whether online hearings should be mandatory in small claims cases. Utah and the CRT seem to be striving for mandatory ODR for small claims, along with online hearings.<sup>365</sup> Telephonic and in-person meetings should, however, still be available; this is especially true for those who do not have access to or comfort with online processes. The digital divide is most acute when it comes to age. The Pew Research Center found, in 2013, that smartphones virtually eliminated the digital divide among races and ethnicities, with 80% of "White, Non-Hispanic," 79% of "Black, Non-Hispanic," and 75% "Hispanic" having some

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364. See *Clark County Court Uses New Technology from Tyler to Resolve Disputes Online*, *supra* note 168.

365. See discussion *supra* Sections II.A.5, III.A.1

Internet access once you add smartphone access to home broadband.<sup>366</sup> However, that same 2013 study indicated that smartphones widen the divide between eighteen and twenty-nine year-olds and those who are over age sixty-five. The gap was thirty-seven percentage points when only considering home broadband access, and the gap increased to forty-nine percentage points when taking smartphones into account.<sup>367</sup>

At the same time, e-court processes should not be mandatory to the extent that they preclude access to class action relief. It is true that opening online access that is free or cheap for pursuing small claims may ease need for class actions by lowering the barriers to entry that currently exist for consumers seeking remedies on small dollar claims.<sup>368</sup> Note also that e-courts in small claims may assist companies by eliminating the need for class actions in some situations. In some cases, consumers will have better access to remedies through e-courts for small claims than they would obtain in a class action. For example, a consumer with a broken cell phone may be more likely to collect full redress through a cheap or nearly free e-court than a class action that may take many years to complete and result in each consumer getting five cents on the dollar.<sup>369</sup>

Nonetheless, there are claims that deserve attention that consumers will forego even with access to ODR and e-courts. For example, a consumer is unlikely to file a small court claim of any kind to contest a “cramming” charge,

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366. KATHRYN ZICKUHR & AARON SMITH, PEW RESEARCH CTR., HOME BROADBAND 2013 4–5 (2013).

367. *Id.* at 4.

368. *See generally* Amy J. Schmitz, *Remedy Realities in Business to Consumer Contracting*, 58 ARIZ. L. REV. 213 (2016) (emphasizing the difficulty consumers face when seeking remedies on low dollar claims, especially when arbitration clauses cut off their access to class actions).

369. *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254–64, 292 (2006) (proposing that pre-dispute arbitration clauses benefit companies and consumers).

which occurs when a phone company adds third-party charges to one's phone bill. However, most consumers would gladly join a class action to obtain some redress and bring light to this generally deceptive practice. Indeed, class actions serve private attorney general functions that go beyond merely providing remedies.<sup>370</sup>

Accordingly, ODR should remain voluntary in the courts and e-courts should not cut off consumers' access to class actions. ODR and online hearings will still be very effective in saving courts time and money, as most individuals with small or simple claims will choose to resolve their disputes through these new avenues. ODR also will help individuals to access remedies on their small dollar or lower significance claims, as explained above. This is especially true when the processes are free or low-cost, user-friendly, fair, impartial and transparent.<sup>371</sup> In this way, technology is simply adding another door to the "multi-door courthouse."<sup>372</sup>

### 3. Digital Divide

Judicial ODR and e-courts must be mobile friendly to help ease the digital divide. As noted above, mobile phones have opened new avenues to the Internet and ODR for those with lower income and resources.<sup>373</sup> Furthermore, mobile access to the Internet and technologically assisted communications have become central in connecting individuals with each other. This is especially true for

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370. *Id.* at 261–62.

371. See Schmitz, *Remedy Realities*, *supra* note 368, at 240–61 (2016) (discussing need for fast, fair, and low-cost access to remedies in low dollar claims).

372. A *Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse*, 5 U. ST. THOMAS L.J. 665, 670 (2008).

373. Flávia de Almeida Montingelli Zanferdini & Rafael Tomaz de Oliveira, *Online Dispute Resolution in Brazil: Are We Ready for This Cultural Turn?*, 24 REVISTA PARADIGMA, Jan./June 2015, at 68, 69 (Braz.) (emphasizing how mobile phones have been a game-changer for Brazilian expansion of Internet access and e-commerce).

younger generations that have grown up using cell phones as their primary communication device. Accordingly, it seems logical that citizens should be able to connect with the government and judicial remedies through mobile devices.

Mobile friendly ODR methods that individuals can complete on a cell phone also helps ease fear of the courts in that they promote a social aspect of dispute resolution. Cell phones have become an avenue to social connections. Moreover, phone users can rely on voice and video recording, rather than text-based interaction, which is far more effective in reaching users with less education or facility with language than traditional e-mail systems.<sup>374</sup> Mobiles would also allow dispute professionals an easier means for coordinating meetings, and would enable non-present parties to be kept in the loop while away from their computers.<sup>375</sup> The key is to develop easy-to-use systems that help lower the digital divide, while providing meaningful access to justice.

That said, some cases may be too complex for resolution through a smartphone or mobile device. Although smartphones have increased their utility with the advent of new technologies, they may not be as usable as a computer with a home Internet connection—i.e., uploading and editing documents, and costs of data usage under smartphone plans. Accordingly, those with greater resources with home computers and broadband access may have an advantage over those with less means who are limited to mobile access. To address this, there should be court kiosks available for those without adequate devices or online access. Court kiosks could provide a cost-effective avenue for parties to resolve disputes without the time and money involved with in-person court processes.

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374. Colin Rule & Chittu Nagarajan, *Crowdsourcing Dispute Resolution over Mobile Devices*, in *MOBILE TECHNOLOGIES FOR CONFLICT MANAGEMENT* 93, 95–96 (Marta Poblet ed., 2011).

375. *Id.* at 98.



For example, courts would still save time and money in moving resolution of traffic ticket disputes online, even after paying the costs of providing computer kiosks in the court lobby or libraries for individuals to use in resolving their claims. This would also allow individuals to contest their tickets cheaply without the time and stress of facing a judge or city prosecutor in person at the court during an allotted time that may or may not be convenient for the individual.

#### 4. Politics and Job Loss

Politics and concern for lost jobs has prevented implementation of e-court and other court ODR programs. Many of the administrators in the courts fear that technology will replace them, or they will have trouble learning new systems. To address this issue, courts may be wise to start with small projects, train the individuals in that area, and then have the newly trained administrators train the next group—and so on. A county could adopt online resolution for traffic disputes, and then after a successful pilot, the individuals in that county could help the next county to move traffic disputes online. Individuals learn by doing. Furthermore, they generally feel most comfortable learning from others who can explain the process in regular language (minus tech jargon). Court administrators who had been bogged down shuffling papers under the old system could move their talents to better uses, and spend time assisting consumers with using the new online processes.<sup>376</sup>

Technology is a “disruptor” and its use in the courts may lead to some job elimination or changes. While this may save costs for the courts, it may cause distress to those impacted. However, some predict that there will be new and better jobs created with technology as individuals will have more time to focus on tasks that require human empathy and logic that

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<sup>376</sup>. See *Law firms climb aboard the AI wagon*, *ECONOMIST* (July 12, 2018), <https://www.economist.com/business/2018/07/12/law-firms-climb-aboard-the-ai-wagon>.

go beyond AI.<sup>377</sup> Furthermore, judges will have more time to focus on the cases that need human resolutions. Online processes also may cut down on judicial backlog and lead to faster resolutions. The CRT, noted above, exemplified how online processes can dramatically save consumers time and money in resolving small claims.<sup>378</sup> This generates greater satisfaction, and opens doors to remedies in cases that consumers may otherwise “give up” on out of exhaustion with traditional F2F processes.

At the same time, politics and start-up costs should not dissuade cities, counties and states from developing ODR and e-courts. Again, these projects are showing success in expanding access to remedies and saving government costs and time. As noted regarding the CRT, it is much cheaper for a court to hire an online mediator than to pay for in-person mediations with court-annexed mediation programs.<sup>379</sup> When it comes to fines and taxes, ODR also increases tax collections. Governments make money by cutting down on default judgements and creating means for individuals to reach tax and fine resolutions that they can and will pay.<sup>380</sup> Moreover, this is especially true for individuals who do not live in the jurisdiction issuing the fine or tax.<sup>381</sup>

Of course, these are only starting points for development as we are slowly devising and implementing public ODR. Most of the examples above are pilot projects, which will produce data for policymakers to use in reforming and constructing further systems. Again, the key is to foster transparency in the use of technology and engage developers on a global level to share experiences and devise best practices; ODR systems should take heed of the ICODR

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377. *See id.*

378. *See discussion supra* Section III.A.1.

379. *See discussion supra* Section III.A.1.

380. *See discussion supra* Section III.A.1.

381. *See discussion supra* Section II.A.2.

principles and standards noted above.<sup>382</sup> It is an exciting time for ODR developers and access to justice advocates to work together for a common good.

## V. CONCLUSION

Virtual courthouses, AI, and algorithmic analysis for all types of legal issues have captured the interest of judges, lawyers, and policymakers. At the same time, technology has become the “fourth party” in dispute resolution through the growing field of ODR, which includes the use of computer-mediated-communication and other technologies in negotiation, mediation, arbitration, and other dispute resolution processes. ODR has gained traction because it saves parties’ time and money. It also has capacity to expand access to remedies and improve process satisfaction, especially in small dollar claims. For these reasons, e-commerce companies like eBay and Alibaba implemented ODR for consumers’ purchase claims many years ago. They learned that individuals crave the fast and easy resolutions ODR can provide.

In contrast, e-court and public ODR pilot projects are in early stages, contained to particular contexts such as tax, traffic, and small claims disputes. Nonetheless, these projects are demonstrating how technology can be used to further efficiency and access to remedies if implemented with intentional, and user-centric, design. Projects in Michigan and Ohio, for example, make it easier for individuals to resolve traffic ticket and property tax disputes, while Utah and New York are developing ODR programs for small claims cases. Outside of the U.S., the CRT in Canada and the Hangzhou Internet Court in China are paving the way for use of e-courts to save the governments’ time and money.

That said, it is imperative for policymakers to be cautious in crafting ODR systems that do not myopically

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382. See *supra* pp. 142–43 and note 305.

strive for efficiency to the detriment of fairness. Balance is essential. Accordingly, this Article has explored e-courts and public ODR projects with a critical eye for ensuring fairness, due process, and transparency, as well as efficiency, in public dispute resolution. The ICODR principles and standards provide a starting point for developing best practices to further these goals. However, policymakers from around the world should compare notes based on data from pilot projects in order to inform further development of public ODR to advance access to justice.