ACCESS TO DIGITAL JUSTICE:
FAIR AND EFFICIENT PROCESSES
FOR THE MODERN AGE

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I. INTRODUCTION

A recent New York Times article described a floating courthouse operating in rural Brazil, traversing the Amazon River in an attempt to bring the rule of law to the far ends of the country and overcome the many barriers in approaching Brazilian courts.1 Other countries, such as Pakistan, have relied on mobile courtbuses,2 while others still have proposed “pop-up courts”3 as a solution to over-crowded, inaccessible, and costly court proceedings.

The problem of access to justice is not new. Over-crowded, slow-paced, and costly court proceedings have made courts the target of fierce critiques and the object of ongoing reform attempts for decades. The Pound Conference of 1976 was an important turning point in the thinking about courts and access to justice, as various sources of discontent merged into a call for the adoption of alternatives to litigation as a means for improving the pace of proceedings and the quality of justice.4 With the institutionalization of alternative dispute resolution (“ADR”) processes into the formal court system, a new approach to accessing justice was adopted, one

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2 Id.


that recognized that justice could be delivered “in many rooms,” extending beyond the courtroom.

In the 1990s, digital technology and internet communication spread, giving rise to new challenges to access to justice, as well as creating new opportunities for lowering barriers to justice. As communication and commerce between distant parties became widespread, a growing number of disputes emerged for which courts and ADR processes provided no feasible avenue of redress. At the same time, new technologies and online communication also became a means for making existing dispute resolution avenues more accessible and for designing novel online processes and institutions for delivering justice. Just recently, the Briggs Report in the U.K. laid the foundation for a major reform of the courts, a principal component of which will be the establishment of a civil online court. While in the 20th century “justice from below” replaced “justice from above,” the 21st century is moving in the direction of “digital justice” in lieu of “traditional justice.”

In Part I, we examine the rise of ADR in the last quarter of the 20th century and the hopes that the adoption of alternatives would improve access to justice, expectations that were only partially realized. Part II analyzes the new challenges to access to justice that have accompanied the spread of digital technology and internet communication as of the 1990s, making both court proceedings and ADR processes inaccessible for a wide range of online disputes. In those instances, online dispute resolution (“ODR”) emerged as a possible avenue of redress. In Part III, we demonstrate the growing need for ODR as online interaction has become the dominant means for communicating and transacting with close and distant individuals and entities alike. Given the scope and nature of disputes that are linked to online communication, traditional face-to-face processes are very often inappropriate. These trends are reinforced by growing expectations that courts become more “user friendly” and allow for convenient ac-

7 Id.
cess from afar. Alongside the growing need for ODR, the paper cautions that ODR processes sometimes fail to deliver digital justice. As these processes come to occupy a growing portion of our justice system, we must ensure that they deliver efficiency and fairness, that they be accessible and just.

II. Access to Justice and the Pound Conference: The Shift from “Justice from Above” to “Justice from Below”

A. Courts and Challenges to Access to Justice

In the 1970s mediation and, to a lesser extent, arbitration, were introduced into community and court settings. These processes were intended to be avenues for addressing conflict in lieu of litigation.10 A major impetus for adopting ADR was growing discontent with the courts and the desire to enhance access to justice, moving beyond a court-centric approach. This state of affairs led Chief Justice Warren Burger to convene a conference in 1976 where leading practitioners, academics, and judges discussed the ills of the legal system and potential solutions to the problems.11 The principal problems discussed were the high costs associated with a slow, complex, and overburdened system.12

During the Pound Conference, Professor Frank Sander of Harvard Law School presented his vision of a “multi-door courthouse,” a place that would offer many processes for addressing different types of conflicts with varying characteristics.13 This approach was developed by Sander further as he advocated “fitting the forum to the fuss,” matching particular kinds of disputes to particular kinds of processes.14 By doing so, courts would reduce

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11 Carrie Menkel-Meadow, Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the “Semi-Formal,” in REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 419 (Felix Steffek et al. eds., 2013).
some of their caseload, channeling appropriate disputes to quicker, less expensive and more flexible processes while handling only those disputes for which litigation was the preferred route. Sander’s approach became a leading paradigm for the growing number and variety of alternative dispute resolution programs. In addition, the basic insight regarding the need to tailor dispute resolution processes to the characteristics of the dispute and the parties also influenced the sub-field of dispute systems design some years later and, to a large extent, justified the need for ODR in addressing digital disputes in the early years of internet communication.

The adoption of ADR held a promise for reducing caseload and costs that was attractive not only for the justice system, but was also significant for those parties with the ability of disadvantaged disputants to bring their disputes before the courts. An expensive court system serves as a barrier to the voicing of complaints and the filing of claims. While all disputants are subject to this state of affairs, disputants of low socio-economic backgrounds are obviously impacted more significantly. In response, an “access to justice” movement emerged in the 1970’s, calling for equal access to the legal system, as well as just results, individually and socially. As its agenda matured, the access to justice movement came to view the adoption of ADR processes as a key component for realizing its goals.

B. Reforms and the Rise of ADR

A major source for adopting ADR had to do with the vision of justice advanced through such processes: the appeal of interest-based dispute resolution in terms of the quality of outcomes reached, a higher level of party satisfaction with the procedure employed, and the impact of the resolution on the disputing parties’ relationship and future interactions, as well as considerations

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relating to the broader community.\textsuperscript{20} Courts were criticized for their “limited remedial imagination,”\textsuperscript{21} with most cases resulting in some form of monetary compensation, typically somewhere between the positions of the disputing parties.\textsuperscript{22} Critique of court remedies was in fact part of a much broader criticism of litigation as a process that was adversarial and rule-oriented, instead of addressing parties’ needs, interests and feelings.\textsuperscript{23} In this respect, negotiation and mediation were expected to provide a real alternative, shifting the parties’ focus from rights, rules, and positions to their underlying needs and interests.\textsuperscript{24} In particular, mediation was perceived to be more suitable than litigation for parties who had an ongoing relationship,\textsuperscript{25} by providing a channel for addressing the underlying problem and by providing a more intimate and informal setting than litigation.

Research on dispute resolution approaches uncovered the significant, even principal, role that procedural components such as voice and impartiality of the third party play in how the parties perceive the fairness of what occurs.\textsuperscript{26} Courts, because of their case overload and complex procedures, often stifled opportunities for voice. For many disputants, having their “day in court” was more likely to materialize in ADR settings where the more relaxed atmosphere and emphasis on party direct participation, allowed them to share their perspective. Later, as digital technology became part of the design of certain dispute resolution processes, the question of what constitutes procedural justice arose, with elements such as speed of the process becoming more central than other features traditionally associated with procedural justice and disputant expectations.\textsuperscript{27}

\textsuperscript{20} Carrie Menkel-Meadow et al., Dispute Resolution: Beyond the Adversarial Model 228 (2d ed. 2010).
\textsuperscript{21} Menkel-Meadow, \textit{supra} note 18, at 7.
\textsuperscript{22} Martin Shapiro, \textit{Courts: A Comparative and Political Analysis} 10 (1986).
Much of the appeal of ADR processes had to do with benefits to individual disputants—the promise of a quicker, less expensive, more pleasant, flexible, and satisfactory process that could yield better, long-lasting solutions. Other voices, however, emphasized broader considerations, focusing on the needs of minorities and other disempowered groups. Mediation provided an opportunity to empower such individuals and communities by expanding their problem-solving skills and allowing community members to cite local norms, thereby enhancing the legitimacy of the process and its outcome. Interestingly, the broader “group perspective” was also at the heart of much of the criticism that would later be voiced against the institutionalization of ADR in the courts, which took place full steam as of the 1990s with the enactment of The Civil Justice Reform Act of 1990 and the Dispute Resolution Act of 1998.

C. ADR and Challenges to Access to Justice

The expanded use of ADR was also accompanied by fierce critiques questioning the degree these processes actually enhanced “access to justice.” One source of discontent was the belief that courts should be the principal arenas in which disputes are resolved. This approach, voiced most prominently by Professor Owen Fiss of the Yale Law School, advanced the idea that courts are a public body, endowed with the responsibility for resolving legal grievances justly and fairly. For others, it was the confidential nature of ADR processes that posed a danger to such processes’ degree of “justice.” Researchers found that private processes could prove harmful for women, minorities, and consumers vis-à-vis their more powerful, wealthy, and experienced counterparts. Still other critics of ADR warned of the potential of private dispute resolution to depoliticize potential claims, trans-

28 Hensler, supra note 10, at 170.
29 Judith Resnik, Procedure as Contract, 80 Notre Dame L. Rev. 598, 609 (2005); Menkel-Meadow, supra note 11.
30 Owen Fiss, Against Settlement, 93 Yale L.J. 1073 (1984); Menkel-Meadow, supra note 11.
forming them into private misunderstandings rather than uncovering the broader context in which they grew.32

Criticism, however, extended beyond that voiced by court-philes, and included even avid supporters of alternatives who were disappointed by the evolution of ADR. Some of the disillusionment related to the fact that ADR processes did not divert cases from trial, and therefore, disappointed hopes of increased speed and efficiency defeating even the hopes for increased “access.”33 Perhaps more disturbingly, research revealed that in some instances, mediation failed to deliver a process that was qualitatively different than litigation. Instead, ADR processes often became pale versions of court proceedings, lacking important procedural protections and public scrutiny.34

Despite critiques, adoption of ADR schemes expanded greatly.35 In many respects, the debate over privatization of justice, the role of courts and the need for ADR had vanished and the vision of “justice in many rooms” became widely accepted. By the dawn of the 21st century, ADR processes came to dominate the dispute resolution landscape in the U.S. and litigation became a path of last resort. Nevertheless, court decisions maintained their centrality as mediated resolutions and arbitrated decisions were shaped by the “shadow of the law.”36 The institutionalization of ADR within courts and the infiltration of legal norms into ADR outcomes dimmed the stark opposition between formal and informal justice that accompanied the debate about the adoption of ADR over the years, giving rise to “semi-formal” dispute resolution.37 This approximation between courts and ADR was further


33 Hensler, supra note 10, at 178; Menkel-Meadow, supra note 11 (summarizing the mixed empirical evidence on the effectiveness of ADR programs).

34 Auerbach, supra note 12, at 135–36; James J. Allini, Trashing, Bashing and Hashing It Out: Is This The End of “Good Mediation?”, 19 Fla. St. U. L. Rev. 47 (1991); Leonard L. Riskin & Nancy A. Welsh, Is That all There Is: The Problem in Court-Oriented Mediation, 15 Geo. Mason L. Rev. 863 (2007); Hensler, supra note 10, at 192 (stating that from the little that is known on court mediation programs, these seem to resemble traditional judicial settlement conferences in which parties rarely participate and mediators rarely encourage integrative negotiation).

35 Riskin & Welsh, supra note 34, at 870.


37 Menkel-Meadow, supra note 11.
buoyed by the spread of digital technology and internet communication, as courts and ADR came to occupy the same camp, with both types of processes (1) being premised on the physical presence of the parties and the dispute resolver, (2) requiring intervention by a human “third party,” and (3) making little use of data generated by the resolution process. These similarities are what made both courts and ADR “traditional” dispute resolution mechanisms, ones that were an ill fit for online disputes.


A. The Rise of Disputes in Cyberspace and Challenges to Access to Justice

The internet was invented in 1969, but it was not until the ban on commercial activity online was lifted in the early 1990s that disputes began to require attention and planning. For most of the first twenty-five years of its existence, almost all users connected to the internet belonged either to the military or to academia. Disputes were few because the population using the internet was relatively small and focused on research. Using the internet in its early days was technically challenging and what the internet could be used for was limited in functionality and regulated by the government. In those rather homogenous settings where many of the users knew one another, social norms proved an effective means for preventing conflict and addressing those disputes that did arise. While there were some notable incidents of hurtful communication under the guise of online anonymity, these remained the exception in the internet’s early years. During that time, there were no internet service providers and there was, therefore, no easy way for the general public to connect to the internet.

38 Katsh & Rabinovich-Einy, supra note 6.
39 The National Science Foundation, which, in 1985, began managing what was then called the NSFNET, required all users to adhere to its Acceptable Use Policy. Cybertelecom, http://www.cybertelecom.org/notes/nsfnet.htm#aup; prohibitions against commercial use of the Internet remain in many, if not most, university acceptable use policies. See, e.g., California State University Long Beach, https://daf.csulb.edu/offices/vp/information_security/policies/elec_comm_sys.html (last visited Jan. 16, 2017).
Only with the lifting of the ban on commercial activity in 1992, the development of graphical Web browsers in 1993, and the appearance of the first internet service providers shortly thereafter, were visually appealing sites developed, attracting new users and making information easily accessible. As this occurred, disputes began to appear. By the turn of the 21st century, the landscape of disputes on the internet had changed significantly from its rather tranquil and sparsely populated state a decade earlier. New types of disputes emerged online, often in large numbers, stemming from frequent interactions that took place virtually, often globally, in very short time frames, relying on algorithms and thin textual communication. For the disputes that were arising online, traditional dispute resolution mechanisms—courts and ADR—were, for the most part, unavailable. Novel means for addressing conflicts were needed; ones that could handle masses of disputes, at a low cost, in short time frames and provide access to justice for wrongs experienced online.

1. The Difference between ODR and Online ADR

Initially, ODR was viewed as relevant solely for disputes that arose online, for which traditional dispute resolution mechanisms were unavailable or too costly. This was most relevant in the e-commerce setting. eBay launched on Labor Day 1995. Disputes were present almost from the start. In February 1996, Pierre Omidyar, the founder of eBay, established a Feedback Rating system where parties to a transaction could praise or criticize each other. This allowed users to acquire a reputation, thus establishing a level of trust, reducing perceived risk and, it was hoped, reducing the number of contested transactions. This did not, however, cure the dispute problem and several years later, eBay asked the National Center for Technology and Dispute Resolution at the University of Massachusetts to conduct a pilot project to see whether disputes between buyers and sellers could be mediated online. During a two-week period, two hundred and twenty five buyers and sellers found the link and filed complaints. The mediator used email to communicate with the parties, a labor-intensive ap-

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proach, but also one that succeeded in reaching a positive resolution in more than half of the disputes. This provided the foundation to what would later become a full-fledged ODR system, developed by a startup called SquareTrade and later by eBay itself as part of the system developed in-house by Colin Rule and his team.

Similar interest in ODR followed the growth of domain names. Domain names, such as google.com, are a kind of address and, in the days before search engines, were helpful in finding a particular Website. During the 1990s, the number of .com domain names increased from 1151 in October 1990\textsuperscript{43} to 1,301,000 in July 1997 to more than twenty million in November 2000.\textsuperscript{44} Even in 1995, however, many corporations were unaware of what a domain name was or how valuable it might be. A company called Network Solutions was the sole source of domain names and the cost to register a domain name was one hundred dollars for two years. In October 1994, Joshua Quittner, a journalist for Wired Magazine,\textsuperscript{45} registered McDonalds.com and then contacted McDonalds to see if they were interested in owning it. They did not seem to be aware of what domain names were or how they worked. Later, as domain names grew in both number and value, an elaborate system for addressing disputes over domain name registration and use was developed by Network Solutions’ successor, the Internet Corporation for Assigned Names and Numbers (“ICANN”), offering online non-binding arbitration.\textsuperscript{46}

ODR emerged from an online environment that was rich with misunderstandings and disputes, but deficient in avenues for effectively addressing them. Originally, developers of ODR mechanisms sought to mimic traditional ADR processes and offer online equivalents to these dispute resolution channels. This was evidenced in the early attempts to offer equivalents of familiar offline ADR processes such as negotiation, mediation, and arbitration. More significantly perhaps, the desire to imitate traditional processes was evident in the principal assumption underlying the design of ODR systems: that such processes would be appropriate


solely for small value, large scale, non-emotional, e-commerce disputes where the reduced privacy of communications and the lack of rich face-to-face communication would be less important.

Over time, though, it became clear that ODR processes differed from traditional dispute resolution in important aspects: (1) they lacked face-to-face interaction; (2) they automatically recorded all dispute data; and (3) they relied on the intelligence of the machine. While many of these features were initially viewed as shortcomings, over time they have come to be seen as potentially advantageous. Thus, for example, while the lack of face-to-face interaction reduces the richness of communication, it also conveys advantages for those who benefit from asynchronous communication (time to consult and conduct research before replying). Similarly, the decrease in privacy due to documentation can assist in quality control and dispute prevention efforts, as we discuss below. Finally, the intelligence of the machine can enhance efficiency through automation, allowing ODR systems to handle staggering numbers of small-scale conflicts.

2. ODR as Digital Justice

In the first two decades of the 21st century, e-commerce provided a proof of concept for ODR. eBay’s system was brought in-house and expanded substantially, offering new types of processes that included “automated negotiation” and crowd-sourced jury decision-making, while handling tens of millions of disputes annually.47 Alibaba, the Chinese e-commerce mega-platform has adopted similar ODR processes and handles something in the range of hundreds of millions of disputes a year.48 Some form of ODR has been offered in online labor contexts,49 social media,50

48 Alibaba Presentation Notes, INT’L CONF. ON ONLINE DISP. RESOL. (Beijing, China, Sept. 19-20, 2016) (on file with authors).
and virtual games.\textsuperscript{51} As technology developed and algorithms could play an important role in tailoring the dispute resolution process to party needs, preferences, and interests, ODR came to represent a deep shift from traditional dispute resolution, laying the foundation for realizing digital justice—offering fair and efficient processes that are designed for the digital era.

Instead of lamenting the loss of qualities associated with traditional face-to-face dispute resolution, the new generation ODR processes came to celebrate the unique qualities of online interaction and the shifts associated with the transition to digital means of addressing conflict: (1) the shift from physical to online communications, (2) the shift from a human “third party” to the “fourth party,” and (3) the shift from a “data-less” mentality to processes that revolve around data.

Each of the shifts associated with ODR holds enormous potential for increasing access to justice. Each also creates opportunities for frustrating access and giving rise to digital injustice. On the one hand, efficiency and justice can be enhanced by enabling easy, distant, and round the clock communication without having to miss work and pay for travel. The simple language and tailored options offered in the newly designed platforms also allow non-represented parties to better understand their rights and options and figure out their interests and needs. In addition, the enhanced capacity associated with the “fourth party”\textsuperscript{52} that is not dependant on human capacity or on physical space allows for huge numbers of claims to be processed, allowing access to some avenue of dispute resolution for problems that in the past were in the “lump it” category. Also, the pre-designed algorithmic options and pre-configuration associated with software can help curb some of the biases associated with human decision-making resulting, perhaps, in more fair outcomes for various parties. Often, Big Data can allow monitoring the quality of processes and outcomes, uncovering biases and problems in the operation of dispute resolution algorithms, and even allowing for dispute prevention. Instead of waiting for human third parties to analyze their experiences post-dispute resolution, the data on disputes can signal disputes before parties are aware of them, in some cases, even before they occur.

\textsuperscript{51} Laura Hudson, \textit{Curbing Online Abuse Isn’t Impossible. Here’s Where We Start}, Wired (May 15, 2014), https://www.wired.com/2014/05/fighting-online-harassment/ (last visited on Jan. 16, 2017).

\textsuperscript{52} ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 94 (1st ed. 2001).
On the other hand, it is undoubtedly true that for some people and some problems, digital communication is still unavailable and inaccessible. While the digital divide has become less of a problem with the spread of smartphones and preferences regarding online use have changed, there is still a group for whom such communication remains out of reach. More significantly, perhaps, are the potential biases and lack of transparency associated with algorithms, in particular learning algorithms. While some solutions have been brought forth, this challenge seems far from resolved and will need to be addressed seriously as our reliance on algorithms continues to increase. No less worrisome is the motivation of the bodies performing dispute resolution activities, in particular mega-platforms on which we have to rely in supplying our most basic online needs—e-mail accounts, search engines, data storage, and social media. Who are these entities offering ODR services to and for what types of problems? What are the norms for resolving these problems? What is being done with the data collected while addressing disputes? Which disputes are being prevented, by whom and according to what criteria? How do we define and measure access to justice in this environment?

IV. The Future of Digital Justice

A. The Spread of ODR and Enhanced Access to Justice

In the last decade, with the spread of smartphones and the rise of social media, the nature of online interactions has been transformed. The availability of the internet via the phone and the spread of online communication as a means for interacting with those closest to us, have dramatically increased the scope of online communications and, consequently, have rendered the online-offline distinction insignificant, some would say meaningless. The changing nature of online communication has meant that conflicts now arise online with respect to issues that used to be handled offline and that individuals increasingly feel comfortable interacting about such conflicts online and, indeed, they may expect online avenues to be available in many contexts, including by public entities such as courts.

It should therefore come as no surprise that in recent years increasing numbers of ODR processes are being offered for addressing conflicts that arise between parties who are geographically close to one another, in such contexts such as small claims, harassment allegations, and neighbor disputes. At the forefront of these developments, there are now several pioneering courts and tribunals that have adopted (or will shortly adopt) ODR for various types of proceedings, including small claims (British Columbia, the U.K.), divorce proceedings and neighbor disputes (the Netherlands), and outstanding warrants (certain U.S. state courts). The adoption of ODR in these courts is challenging our traditional understanding of a court, as well as the meaning of access to justice. The focus on data that comes with the introduction of online systems today is infiltrating the courts and impacting the ways in which courts function. The study of this kind of data was not feasible for a bureaucratic, under-budgeted institution in the pre-digital era. Where courts have begun to study this new rich and easily available resource seriously, results have been surprising and sometimes counterintuitive—revealing, for example, that case management has not made civil litigation faster and cheaper. Data will allow courts to justify new processes, uncover sources of claims, and cooperate with other public entities to prevent future disputes from arising and reaching the courts again.

These developments raise new kinds of questions about access to justice, alongside the new kinds of data we are seeing. These new questions will begin to guide court policies as well: such as questions regarding party preferences, the nature of the dispute, or other considerations. At first blush, some of these considerations may echo those that guided the adoption of ADR in the courts in the previous century. The adoption of ADR and the criteria that were developed for court referral to these processes changed which cases went to court. But with technology, court processes them-
selves are undergoing transformation, challenging existing assumptions on what is and is not appropriate for online resolution and adjudication as the boundary between online and offline activities becomes more and more porous.

Courts and other public entities will inevitably adopt more ODR. Frustration with adversarial proceedings continues to grow, heavy caseloads continue to present a problem, and costs associated with lawyers and litigation continue to be very high—too high for a significant number of individuals. But even if not for these issues, other characteristics associated with the legal process, namely, its rigid, top-down, and adversarial nature, makes ODR an attractive tool for improving court procedures. More and more, people expect their interactions with and access to public entities to resemble their dealings with private entities—courts included. This expectation often translates into increased involvement through consultation and feedback, online interaction, and more flexible and tailored options. ODR can, where properly designed, meet these expectations.

It is important to recognize that despite growth in courts’ capacity in handling disputes, the vast majority of disputes will continue to be resolved outside the court system. In a reality in which a growing portion of our interactions will be conducted through digital communication, such disputes will need to be addressed through ODR mechanisms that are not court-connected. Increased access to courts will never obviate the need for alternative fora for addressing disputes, as aptly stated by Lawrence Friedman:

How much access to justice do we really want? Let us imagine a world in which everyone who had any claim whatsoever could get a hearing, had inexpensive and convenient access to counsel, and presumably could get his claim resolved in his favor. Would this be a good society? It could be an Orwellian nightmare.59

Currently, the development of systems that can provide access to justice in cyberspace is accelerating. Given the growing numbers of disputes, there are still far fewer avenues of dispute resolution than needed. There are several reasons we expect ODR to be a growth area in the future. The first has to do with the increase in the number of disputes, many of which represent new types of disputes that challenge traditional, face-to-face dispute resolution mechanisms. We can expect the scope of digital disputes to expand

in light of the growing reliance on, and familiarity with, digital communication in people’s lives in modern-day society. We use digital communication to interact with those closest to us, as well as those at a distance, touching on mundane interactions like ordering toothpaste, but also more sensitive and complicated matters like memorializing a lost one. The line between online “space” and physical surroundings is increasingly blurred. Even our understanding of what can be done online is changing, making ODR tools seem more appropriate and appealing over time for a much broader range of disputes, including some that arose online but also for offline, which are potentially more complex and intimate, disputes.\textsuperscript{60}

The growth of ODR also has to do with the potential of technology to remedy some of the persistent problems with our justice system. As we mention earlier, a major driver for the adoption of ADR processes was the search for a remedy for an expensive, slow, complex, inaccessible, and overburdened court system.\textsuperscript{61} These considerations were reinforced by calls for dispute resolution approaches that would go beyond rights to address interests, needs, and feelings, resulting in more satisfactory processes and imaginative outcomes.\textsuperscript{62} We also saw, however, that the institutionalization of ADR was accompanied by fierce critiques, ranging from the dangers posed to parties belonging to disadvantaged groups,\textsuperscript{63} to the curtailment of law development and precedent-setting.\textsuperscript{64} To a large extent, this criticism has reflected the understanding that there is an inherent trade-off between the enhanced efficiency through flexible and tailored processes of ADR on the one hand, and formal court processes’ fairness and consistency through due process protection on the other.

Technology may be able to overcome the seemingly inherent trade-off between efficiency and fairness by enhancing both the efficiency of courts, as well as the quality of these processes. In this regard, various features of ODR that were initially viewed as shortcomings, such as documentation, are now seen as potentially advantageous by facilitating better monitoring, quality control, consistency, and a higher degree of transparency in informal dis-

\textsuperscript{60} Katsh & Rabinovich-Einy, supra note 6.
\textsuperscript{61} See supra notes 11–17 and accompanying text.
\textsuperscript{62} See supra notes 18–25 and accompanying text.
\textsuperscript{63} See supra notes 31–32 and accompanying text.
\textsuperscript{64} See supra note 30 and accompanying text.
pute resolution. Technology also provides opportunities for users’ interests and preferences to shape the design of new processes. It will make courts and others offering dispute resolution services more attuned to data and the need to analyze it, measure user satisfaction and trust, evaluate court procedures, and direct attention toward the prevention of disputes.

Another reason we can expect to see expanded use of ODR involves the growing reliance on algorithms. Problems can be resolved quickly and efficiently with machines guiding decisions based on the data provided by users or the company. Unfortunately, algorithms can also seriously damage the level of trust users have in a system. As a recent study found,

> [w]ith the realistic possibility of machine learning-based systems controlling industrial processes, health-related systems, and other mission-critical technology, small-scale accidents seem like a very concrete threat, and are critical to prevent both intrinsically and because such accidents could cause a justified loss of trust in automated systems. The risk of larger accidents is more difficult to gauge, but we believe it is worthwhile and prudent to develop a principled and forward-looking approach to safety that continues to remain relevant as autonomous systems become more powerful. While many current-day safety problems can and have been handled with ad hoc fixes or case-by-case rules, we believe that the increasing trend towards end-to-end, fully autonomous systems points towards the need for a unified approach to prevent these systems from causing unintended harm.

Decision-making by machines is only likely to grow and also likely to increasingly challenge ODR systems. As algorithms shape more and more aspects of our lives, we will need to design systems that will help citizens to understand how they are being affected and how problems may be resolved. Given the pace and scale at which such problems can be expected to occur, traditional, face-to-face dispute resolution mechanisms, whether private or public, will no longer be the primary source for addressing such issues. ODR systems will need to be put in place to address algorithm-related problems and prevent them from recurring in the future.

As ODR is institutionalized in public settings, both locally and internationally, its appeal and legitimacy can be expected to rise.

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65 Katsh & Rabinovich-Einy, supra note 6.

66 Dario Amodei et al., Concrete Problems in AI Safety, ARXIV.ORG (June 21, 2016), https://pdfs.semanticscholar.org/e86f/71ca2948d17b003a5f068db1ecb2b78727f7.pdf (last visited on Jan. 16, 2017).
resulting in increased adoption of ODR systems and tools. Courts in various parts of the world are already in different phases of introducing ODR schemes. The European Union has required that member states take part in an ODR platform that can address local and cross-border e-commerce disputes between consumers and businesses of member states. The United Nations Commission on International Trade Law (“UNCITRAL”) was responsible for an extensive effort to generate an international ODR system for cross-border consumer disputes.

Finally, expansion of ODR systems will accompany the growth of mega-platforms. In the not-too-distant past, there were very few platforms that handled millions, even billions of users. The number of these large platforms, many of which deliver products and services for which there is no real alternative, is growing rapidly. Even for those platforms, which claim to occupy an intermediary role of “merely” connecting users with one another, it is no longer tenable to keep them from addressing problems and complaints. Several of the large “sharing economy” and social media platforms have learned over time that they must address such problems if they are to keep their status as market leaders. Whether they do so in a manner that truly enhances access to digital justice is a key question for the future.

B. Addressing the Digital Justice Gap

Our focus is on the problems that individuals face in a technologically advanced and changing environment and how they are (or could be) addressed. Nevertheless, law and courts still have a presence. Lawsuits over claims of libelous online reviews; court orders shutting down file-sharing sites; a class action by Uber drivers over their status as employees; liability for errors in electronic health records; a court decision recognizing the “right to be forgotten;”

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70 Supra note 50 and accompanying text.
all of these are examples of digital disputes being litigated. Technology is also present in the procedural aspects of these types of litigation, as ODR is introduced into and applied toward the resolution of disputes that arose in those various settings.

The “shadow of the law” will continue to have influence beyond the courtroom. Law can motivate websites to address problems: by promising immunity from legal liability if complaint systems are established (as in the case of intellectual property rights infringement), or providing incentives in the opposite direction if such intervention would expose sites to liability. Law can also shape the type of procedures for dispute resolution provided by online entities, by limiting certain procedural arrangements—as the Consumer Financial Protection Bureau and the Health and Human Services Department are working, each in their own domain, to ban pre-dispute mandatory arbitration clauses.72 And law will also inevitably permeate the procedural and substantive realms of ODR, shaping designers’ and users’ perceptions of fair procedural arrangements and just substantive outcomes. Indeed, where the law has been silent on questions of procedural design of online redress systems, the avenues that emerged, such as the “notice and takedown” regimes or flagging procedures, have raised serious concerns as to their fairness and degree of due process. Similarly, technology is increasingly permeating the governmental sphere—which could bring about a novel understanding of justice by, transcending the deep-rooted distinctions between formal and informal/public and private dispute resolution, on the one hand, and the distinction between digital disputes and offline conflicts on the other. Under “digital justice,” digital technology is adopted in both private and public settings to enhance access to justice in a broad sense, both in and out of courts, based on the understanding that limiting access to justice to the court setting is neither possible nor desirable.73

Despite the potential of digital technology to enhance access to justice, what we call a “digital justice gap” exists. Technology has generated a large number of disputes for which there are currently limited channels of redress. Where such mechanisms do ex-


73 Katsh & Rabinovich-Einy, supra note 6.
ist, it is difficult to ascertain their fairness and efficiency. This is unfortunate in light of the need for avenues of redress and the unavailability of courts and alternative dispute resolution processes for many disputes arising online. Many large platforms, however, have thus far thrived without providing full-fledged avenues for raising and addressing complaints. The public setting has only recently made efforts to implement comprehensive ODR schemes. While there are strong reasons to believe that use of ODR will expand, it is unclear whether such expansion will apply evenly to different users and whether ODR mechanisms will operate in a fair and efficient manner.

Digital justice must enhance both “access” and “justice” through the use of technology. Access is enhanced through the wide availability of online redress and prevention mechanisms, as well as by algorithms that can handle large numbers of disputes and employ easy-to-use, plain language, and tailored processes. Justice can be enhanced where algorithms impact parties in an even-handed manner, and are subject to quality control. Dispute data aimed at dispute prevention is a recent development and needs to be used fairly, targeting problems related to a variety of stakeholders, while respecting individual privacy and legal restrictions on use of private information.

To be effective, digital justice will require extensive monitoring of the impact of design choices on both efficiency and fairness. This is no simple task and will require innovative regulatory approaches. Despite challenges, however, this new dispute resolution and prevention landscape holds the promise of many important improvements, including our basic understanding of how justice works. No longer will it be dependent on a physical, face-to-face environment, or even subject to the limitations of human decision decision-making.

V. Conclusion

As innovation proceeds rapidly and new kinds of disputes emerge, the goal is not—and should not be—to eliminate all conflict. This is neither possible nor desirable. A dispute-free environment might be safer, but it would also be stagnant and less interesting. Innovation is both a product of conflict and a contributor to it.
Marc Galanter has described the inevitability and value of conflict as follows:

We will not approach a problem-free world, for people are capable of identifying or inventing new problems as quickly as the old ones are solved. This is not a cynical observation about an insatiable appetite for a “risk free world.” Rather, it is premised in the notion that the very same human capabilities that create solutions for existing problems—by fulfilling existing needs and wants—discover or create new needs, new wants, and new problems. But in the process, as more things are capable of being done by human institutions, the line between unavoidable misfortune and imposed injustice shifts . . . . What was seen as fate may come to be seen as the product of inappropriate policy. Advances in human capability and rising expectations result in a moving frontier of injustice.74

While it is true that some degree of conflict is both desirable and inevitable for an expanding economy and an innovative society, it is also true that too much conflict will interfere with creative endeavors and suppress economic and intellectual growth. A society with too few disputes is unlikely to be highly innovative, while one with too much risk, too much uncertainty, and too many disputes will also deter innovation.

As we struggle to modify old institutions and develop new ones, we are in the midst of a shift from relying principally on conflict resolution to one focused in novel ways on conflict prevention. Prevention requires understanding patterns of behavior and practices, something that can only be discovered by following the path of data. And this, unfortunately, this is hard for public institutions and researchers to do, since much of the data is buried behind the walls of privately controlled software and algorithms. Anticipating conflict and developing new responses to conflict gives us the opportunity to increase access to justice in an environment where there are currently increasing arenas of injustice.
