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## MEASURING “ACCESS TO JUSTICE” IN THE RUSH TO DIGITIZE

Amy J. Schmitz\*

*Access to Justice (A2J) is the hot topic of the day, energizing Twitter and judges alike. Meanwhile, professors and policymakers join in song, singing the praises of online dispute resolution (ODR) as means for expanding A2J. This is because ODR uses technology to allow for online claim diagnosis, negotiation, and mediation without the time, money, and stress of traditional court processes. Indeed, courts are now moving traffic ticket, condominium, landlord/tenant, personal injury, debt collection, and even divorce claims online. The hope is that online triage and dispute resolution systems will provide means for obtaining remedies for self-represented litigants (SRLs) and those who cannot otherwise afford traditional litigation. Nonetheless, there is danger that the rush to digitization will ignore due process and transparency in the name of efficiency. Accordingly, research is underway to “test” ODR programs to determine whether they are in fact advancing A2J. This raises the question of what justice is and leads to further questions regarding how we should assess these ODR programs. This Article addresses these inquiries and aims to delineate variables and questions that should be considered as we examine ODR’s successes and failures in advancing justice.*

### INTRODUCTION

The ideas of “justice” and “access to justice” (A2J) raise varied considerations. Rebecca Sandefur raises poignant questions in her article “Access to What?,” noting that not all problems are legal and the meaning of “justice” depends on how one frames the problem to be solved.<sup>1</sup> As she notes:

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1. Rebecca L. Sandefur, *Access to What?*, 148 *DÆDALUS* 49, 51 (2019).

When the relevant substantive and procedural norms govern resolution, that resolution is lawful and we have access to justice, whether or not lawyers are involved in the resolution and whether or not the problem comes into contact with any kind of dispute-resolving forum. Access to justice is a good in itself. Its effects reach powerfully into people's lives.<sup>2</sup>

As Professor Sandefur highlights, however, we have a massive crisis in America in terms of restricted access to that "good." Moreover, systematic inequality deprives some of that access to problem resolutions, be it financial or legal (or social, for that matter).<sup>3</sup>

Different people get different deals and have different access to lawyers and courts—with the most vulnerable generally having the least and worst access. As I have argued, this differential access to remedies or justice is acute in business-to-consumer dealings, producing a "squeaky wheel system" in which only the most sophisticated squeaky wheels are sufficiently proactive in pursuing their complaints to get the limited assistance, remedies, and other benefits that companies provide.<sup>4</sup> Meanwhile, the majority of consumers remain silent because they lack the knowledge, experience, or resources to artfully and actively pursue their interests.<sup>5</sup> As a result, the individuals who already enjoy disproportionate bargaining power due to social or economic status are usually the "squeaky wheels" that receive the benefits—thus perpetuating the divide between the consumer "haves" and "have-nots."<sup>6</sup> Furthermore, privately satisfying the informed squeaky wheel consumers with rationed remedies may prevent these consumers from leading class actions or otherwise informing the majority about purchase problems.<sup>7</sup>

In fact, individuals often forgo their rights for financial, social, and other reasons, which hinders or precludes their access to problem solutions. The goal is to find ways to expand means for lawfully resolving problems and to expand A2J. With this in mind, alternative dispute resolution (ADR) aims to create new avenues for remedies through face-to-face (F2F) processes outside of the courts—including negotiation, mediation, and arbitration. However, with the growth of the internet, it is no surprise that ADR is giving way to online dispute resolution (ODR). ODR includes problem diagnosis tools, as well as online negotiation, mediation, arbitration, community courts, and variations thereof.

Some of us have been researching and writing about ODR for many years because we saw it as means for expanding A2J and adding a "virtual" door

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2. *Id.*

3. *Id.*

4. Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 280 (2012).

5. *See id.* at 282–83.

6. *See* Peter A. Alces & Jason M. Hopkins, *Carrying a Good Joke Too Far*, 83 CHI.-KENT L. REV. 879, 895–96 (2008). *See generally* Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating Consumer "Haves" from "Have-Not,"* 2014 MICH. ST. L. REV. 1411.

7. David Hill Koysza, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 789 (2003).

to the courthouse à la the Pound Conference.<sup>8</sup> ODR provides promise for opening new avenues to remedies due to its low cost, accessibility, and ease of use.<sup>9</sup> When properly designed, ODR allows individuals to resolve disputes quickly and cheaply, without the cost or hassle of travel or time away from work. This is especially true with respect to smaller dollar claims or minor infractions, such as parking tickets and driving misdemeanors. ODR processes may also help ease the stress of entering a courthouse and facing a judge or prosecutor F2F. Well-designed ODR should also be user-friendly and should help with timely resolutions by empowering individuals, through online “wizards,” to obtain case diagnostics, quickly fill out forms, and upload related documents.

At the same time, these online processes may ignore due process and become “click-through” sifters that perhaps fall outside what is rightfully considered ODR because there is no facilitation involved. Click-through forms that provide limited options and give no ability to explain one’s case may not feel like the type of just resolutions we crave in a system that is largely legal.<sup>10</sup> However, some may argue that quick “click” remedies do provide a type of rough justice that is appropriate for consumers who do not think of their problems as legal and simply want easy access to assistance without needing to consult lawyers or spend time negotiating.<sup>11</sup> Furthermore, ODR, which allows for choice, self-empowerment, and facilitated solutions, enhances fairness and process satisfaction. Still, there should be accreditation rules for systems designers and the neutrals who may facilitate online mediations and arbitrations.<sup>12</sup>

Building on these ideals and the momentum toward digitization, public courts have joined in adopting and developing ODR and e-courts (though some seem to be limited to click-through sifters).<sup>13</sup> Courts in U.S. jurisdictions like Utah are launching ambitious small claims ODR programs in hopes of replacing in-person hearings.<sup>14</sup> Furthermore, states have initiated e-courts for handling traffic violations with reported success. Michigan, for example, reports that 92 percent of its users recommend the system and 87

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8. See generally Amy J. Schmitz, “Drive-Thru” Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178 (2010).

9. See generally AMY J. SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION (2017); Amy J. Schmitz, *Building on OArb Attributes in Pursuit of Justice*, in ARBITRATION IN THE DIGITAL AGE: THE BRAVE NEW WORLD OF ARBITRATION 182 (Maud Piers & Christian Aschauer eds., 2018).

10. 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).

11. See Jean Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 WIS. L. REV. 1405, 1405–06, 1413–47.

12. Amy J. Schmitz, *Building Bridges to Remedies for Consumers in International eConflicts*, 34 U. ARK. LITTLE ROCK L. REV. 779, 779–95 (2012).

13. See Amy J. Schmitz, *Expanding Access to Remedies Through E-court Initiatives*, 67 BUFF. L. REV. 89, 101–63 (2019).

14. See Paul Embley, *U.S. Courts and Online Dispute Resolution: International Forum on Online Courts*, GOV.UK 13, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/761379/US.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761379/US.pdf) [<https://perma.cc/7DR4-6QYW>] (last visited Apr. 12, 2020).

percent found the process to be fair.<sup>15</sup> These systems also benefit the state by promoting faster fine payments and utilizing less court personnel time.<sup>16</sup> Public ODR projects in Canada, China, and elsewhere are also taking shape with seeming success with respect to the parties' and courts' time and money.<sup>17</sup>

Although the research is fairly limited regarding these processes, initial reports are generally positive.<sup>18</sup> Reports have indicated that ODR expands access to remedies for self-represented litigants (SRLs) who cannot afford the time and costs of in-person processes. Furthermore, problem diagnosis tools built into ODR programs may prevent disputes from escalating into lawsuits, and online negotiation and mediation may lead to consensual resolutions. This saves the courts from the administrative burden of trial proceedings and may generate greater process satisfaction.<sup>19</sup>

Nevertheless, there are reasons to be cautious in pushing ODR programs. First, data suggests that some users report not being particularly excited about using ODR. A recent National Center for State Courts (NCSC) poll found that U.S. citizens are not as enthusiastic about using ODR as some may suspect.<sup>20</sup> For example, only 44 percent of those surveyed who earn \$75,000 or more were likely to want an online resolution for tenancy disputes.<sup>21</sup> Furthermore, "poorer, older and also less educated people generally—according to this survey—seem less willing to engage with ODR."<sup>22</sup> This seems contrary to arguments that ODR will be particularly beneficial for providing access to justice for disadvantaged people.

Second, there is concern that online processes may diminish empathy and satisfaction that otherwise come from "being heard" in court. Although some may feel protected from bias due to the relative anonymity of communicating online, others may be intimidated by the use of technology. In fact, online hearings may not provide the same results as in-person hearings due to human dynamics. For example, researchers in the United Kingdom found that immigration detainees received different outcomes in hearings via video than F2F.<sup>23</sup>

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15. *Id.*

16. *Id.*

17. Schmitz, *supra* note 13, at 162.

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

19. *Id.*; see also Amy J. Schmitz, *A Blueprint for Online Dispute Resolution System Design*, J. INTERNET L., Jan. 2018, at 3, 3–11 [hereinafter Schmitz, *A Blueprint*]; 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, 1–45 (2018) [hereinafter Schmitz, *There's an "App" for That*].

20. *Online Dispute Resolution Faces Major Challenges—Survey*, ARTIFICIAL LAW. (Mar. 19, 2019), <https://www.artificiallawyer.com/2019/03/19/online-dispute-resolution-faces-major-challenges-survey/> [https://perma.cc/J3UZ-VV3B].

21. *Id.*

22. *Id.*

23. Jo Hynes, "Hello Dungavel!": *Observations on the Use of Video Link Technology in Immigration Bail Hearings*, UK ADMIN. JUST. INST. (May 6, 2019),

The Bail Observation Project notes that of 211 immigration bail hearings observed for their 2013 report, 50% of those heard via video link were refused bail, compared to 22% of those heard in person. My court observations of immigration bail hearings in Hatton Cross, Taylor House (both London) and Eagle Building (Glasgow), demonstrate a similar pattern. During my observations, bail was refused in 31% of the cases heard via video link and never refused in instances where cases were heard in person. Many detainees say they prefer appearing by video link, as it means they don't have to make the journey to a hearing centre and potentially lose their room in the detention centre or prison in which they are being detained.<sup>24</sup>

Of course, that does not mean that online processes deliver different results in all contexts. Moreover, that study was conducted in 2013,<sup>25</sup> and individuals have become more comfortable with technology in recent years.<sup>26</sup> Nonetheless, these are important cautions as we approach the assessment of ODR in the courts and consider whether ODR actually furthers A2J.

Accordingly, there is a need to empirically analyze and test these ODR processes by asking whether they expand A2J. In fact, the Pew Charitable Trusts has teamed up with NCSC to study selected ODR pilots and has issued a list of questions to research.<sup>27</sup> This Article is not connected with that project and will not simply rehash Pew's plans. Instead, this Article hopes to spark additional projects with a "functional analysis" approach to exploring ODR aimed to advance A2J and to "fit the forum to the fuss." Specifically, this Article begins with a brief background regarding ODR's quest to expand A2J and follows with a framework for empirically analyzing and testing A2J with a focus on who, how, and what: who is using or benefitting from ODR programs in comparison to F2F; how do individuals feel using the ODR processes, including gauging process satisfaction in comparison to F2F; and what types of outcomes are achieved in comparison to F2F processes. It concludes with a call for better means and more projects enabling a deeper and more thoughtful study of ODR programs, which are usually well-meaning but may not be all that they promise.

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<https://ukaji.org/2019/05/06/hello-dungavel-observations-on-the-use-of-video-link-technology-in-immigration-bail-hearings/> [https://perma.cc/AS9Q-BCWR].

24. *Id.*

25. *Id.*

26. Monica Anderson & Andrew Perrin, *Tech Adoption Climbs Among Older Adults*, PEW RES. CTR. (May 17, 2017), <https://www.pewresearch.org/internet/2017/05/17/tech-adoption-climbs-among-older-adults/> [https://perma.cc/QJ8R-WWGM].

27. See generally *Civil Legal System Modernization*, PEW CHARITABLE TR., <https://www.pewtrusts.org/en/projects/civil-legal-system-modernization> [https://perma.cc/47B7-WD29] (last visited Apr. 12, 2020).

## I. HOW DID ODR EVOLVE WITH RESPECT TO A2J?

A. *Basic Reasons for ODR*

Consumers crave fast and easy means of 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 with less time and expense. ODR goes beyond merely providing portals for consumers to post complaints. It uses online processes to end disputes without the travel, stress, inconvenience, and other costs of traditional F2F measures.<sup>28</sup> ODR systems may use automated negotiation processes, as well as online mediation and arbitration, aimed at ending disputes and resolving complaints.<sup>29</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.

At the same time, the American system for resolving disputes is largely legal, even for consumer complaints.<sup>30</sup> This is true even though most consumers do not think of their problems as legal.<sup>31</sup> Furthermore, those without educational and economic resources tend to go without legal services.<sup>32</sup> This highlights the need for standardized consumer-centric dispute system designs, which consider individual needs and allow for self-empowerment.<sup>33</sup> ODR has the capacity to provide this type of access to remedies.<sup>34</sup> It adds a virtual door to justice, although it should not close all F2F doors—especially in light of consumers’ differing levels of comfort with, and access to, technology.<sup>35</sup>

Accordingly, ODR systems may expand A2J because of their convenience and low cost.<sup>36</sup> Asynchronous communications and translation programs give ODR the advantage of allowing parties to access multilingual processes and communications at their own convenience.<sup>37</sup> In addition, there is

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28. See *What Is Online Dispute Resolution?: A Guide for Consumers*, A.B.A. (Mar. 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) [<https://perma.cc/P2QF-5SUU>] (draft).

29. *Id.*

30. Sandefur, *supra* note 10, at 950–54.

31. See Braucher, *supra* note 11, at 1406, 1449–50.

32. See generally Katherine Alteneder & Linda Rexer, *Consumer Centric Design: The Key to 100% Access*, 16 J.L. Soc’y 5 (2014).

33. *Id.* at 10.

34. *Id.* at 12–15. Ideally, F2F self-help centers should also be available. For example, in Michigan, a self-help task force created the Michigan Legal Help program, which now offers hundreds of self-help centers, legal aid, and private lawyers to help those in need across the state. *Id.* at 14–20.

35. *Id.* at 27–28.

36. 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 the use of ODR for consumer small claims); see also Public Roundtable on Dispute Resolution for Online Business-to-Consumer Contracts, 66 Fed. Reg. 7491 (Jan. 23, 2001).

37. See generally Schmitz, *There’s an “App” for That*, *supra* note 19.

movement to establish best practices for ODR, and private groups have already put forth ethical standards.<sup>38</sup>

That said, these standards are not mandatory and online communications come with dangers.<sup>39</sup> There is always fear that information shared will be hacked or that the anonymity of computer-mediated communication (CMC) may inspire an increase of abusive or combative language that parties would otherwise feel uncomfortable using in person or on the phone.<sup>40</sup> CMC also may diminish empathy and create misinterpretations in online negotiations. However, individuals have become increasingly adept at expressing themselves through standardized textual cues and emotive characters.<sup>41</sup> CMC has become less sterile as individuals have developed means for building rapport over the internet.<sup>42</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>43</sup> This is especially true for consumers who fear stereotypes or biases.<sup>44</sup> For example, a man with a strong Hispanic accent may worry that customer service representatives will not understand him and ignore his complaints over the telephone. In addition, some individuals are less adversarial when communicating online than they are in person because the asynchronous nature gives them time to digest thoughts and dissipate anger before replying.<sup>45</sup> Individuals also may be more cautious in composing messages through a system that saves and records past communications.<sup>46</sup>

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38. See, e.g., *ICODR Standards*, INT'L COUNCIL ONLINE DISP. RESOL., <http://icodr.org/index.php/standards/> [<https://perma.cc/G7JA-4S3D>] (last visited Apr. 12, 2020). These standards were based on the ODR ethical principles put forth by Leah Wing. See Leah Wing, *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, 3 INT'L J. ON ONLINE DISP. RESOL. 12, 12–15 (2016); see also Schmitz, *supra* note 12, at 787–89; Schmitz, *supra* note 8, at 178–244; *Ethical Principles for ODR Initiative*, NAT'L CTR. FOR TECH. & DISP. RESOL., <http://odr.info/ethics-and-odr/> [<https://perma.cc/3UHC-XFA3>] (last visited Apr. 12, 2020).

39. JARON LANIER, *YOU ARE NOT A GADGET: A MANIFESTO* 60–63 (2010) (noting the antihuman approach fostered by the expansion of internet life).

40. See 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> [<https://perma.cc/GZA6-UQ7Y>].

41. 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).

42. David Allen Larson & Paula Gajewski Mickelson, *Technology Mediated Dispute Resolution and the Deaf Community*, HEALTH L. & POL'Y BRIEF, Spring 2009, at 15, 18 (noting the benefits and drawbacks of CMC).

43. 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 the emotion involved with F2F communications).

44. See *id.* at 125–26 (noting the benefits and drawbacks of ODR processes).

45. See Susan C. Herring, *Computer-Mediated Communication on the Internet*, 36 ANN. REV. INFO. SCI. & TECH. 109, 144–45 (2002).

46. See *id.*; David A. Larson & Paula G. Mickelson, *Technology Mediated Dispute Resolution Can Improve the Registry of Interpreters for the Deaf Ethical Practices System:*



In sum, ODR is growing, and it may advance A2J due to its low cost and convenience. It also may allow for more self-help options for consumers and open efficient and effective avenues for justice. This is especially true with respect to SRLs. However, it may not be a panacea and we need to be cognizant of those left out of the “ODR party,” such as older individuals or those who do not trust online processes.

## B. ODR Examples and Evolution

### 1. Beginnings at eBay

ODR systems already exist, and their use is growing as companies, consumers, and policymakers embrace their efficiencies and other beneficial attributes. For example, the retail website eBay has been at the forefront of providing ODR free of charge to its consumers.<sup>47</sup> eBay’s 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>48</sup> The seller then has three business days to respond in the online “resolution center.”<sup>49</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 about the dispute.<sup>50</sup> If necessary, eBay may enforce ODR determinations via PayPal, eBay’s payment provider, by setting aside a seller’s funds.<sup>51</sup>

eBay also has an unpaid item policy, which allows sellers to submit claims through the resolution center against buyers who do not pay for purchased items within two days.<sup>52</sup> Amazon, Alibaba, and other platforms have established similar ODR programs for resolving other e-commerce disputes. Indeed, it is no surprise that ODR evolved from e-commerce, considering that online purchasers would expect to use, and be comfortable with using, the internet for not only purchasing but also resolving their claims.

### 2. Growth in the Courts

The states act as “laboratories” for new pilot programs, allowing for states to learn from one another and establish best practices.<sup>53</sup> Accordingly, it is no surprise that most ODR pilots and experiments are occurring at the local

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*The Deaf Community Is Well Prepared and Can Lead by Example*, 10 CARDOZO J. CONFLICT RESOL. 131, 140–41 (2008).

47. See generally Colin Rule, *Making Peace on eBay: Resolving Disputes in the World’s Largest Marketplace*, ACRESOLUTION, Fall 2008, at 8.

48. *eBay Money Back Guarantee Policy*, EBAY, <http://pages.ebay.com/help/policies/money-back-guarantee.html> [<https://perma.cc/3JCK-XTB5>] (last visited Apr. 12, 2020).

49. *Id.*

50. *Id.*

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

52. *Unpaid Item Policy*, EBAY, <http://pages.ebay.com/help/policies/unpaid-item.html> [<https://perma.cc/877J-795L>] (last visited Apr. 12, 2020).

53. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

level. This section describes some of these pilots that are mainly aimed at furthering access to the courthouse. As noted above, these pilots are expanding as the NCSC is partnering with the Pew Charitable Trusts to assist with and assess judicial ODR projects.<sup>54</sup>

*a. New York's Incremental Inclusion of ODR*

New York has slowly joined the ODR movement. The New York City (NYC) online traffic court allows defendants to request an online hearing, submit evidence, and contest traffic citations.<sup>55</sup> NYC also allows renters to file housing code complaints against their landlords online or through a mobile application.<sup>56</sup> This program does not offer ODR per se, but it does offer online advice for both parties and makes an online infrastructure available.<sup>57</sup>

Simultaneously, New York is developing an ODR platform for small claims. Initially, the project focused on ODR for credit card collections, but the plan met opposition that prevented its implementation.<sup>58</sup> Accordingly, policymakers shifted the focus to creating an online system that would help pro se litigants with small claims. Specifically, the proposed system would provide guidance and tutorials before negotiations and explain any applicable defenses a defendant may have.<sup>59</sup> Through the platform, consumer-defendants would have access to a list of legal services that could assist in

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54. See *Interactive Online Portals Offer Targeted Legal Resources on Demand*, PEW CHARITABLE TR. (Jan. 4, 2019) <https://www.pewtrusts.org/en/research-and-analysis/factsheets/2019/01/interactive-online-portals-offer-targeted-legal-resources-on-demand> [https://perma.cc/BJ7R-HKFS]; *NCSC/PEW Charitable Trusts ODR Project Announcement*, NAT'L CTR. FOR TECH. & DISP. RESOL. (July 10, 2018), <http://odr.info/ncsepew-charitable-trusts-odr-project-announcement/> [https://perma.cc/7N8L-YQSD]. The Pew Charitable Trusts is also funding teams from Stanford University and Suffolk University to train a natural language processor (NLP) to help people identify their own legal issues. See Erika Rickard & Lester Bird, *How Artificial Intelligence Could Improve Access to Legal Information*, PEW CHARITABLE TR. (Jan. 24, 2019), <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/01/24/how-artificial-intelligence-could-improve-access-to-legal-information> [https://perma.cc/Z2KB-T6CG]. An NLP is a type of artificial intelligence that focuses on understanding context in speech. *Id.* An NLP would be able to match legal terms with more commonly used words or phrases after further artificial intelligence training. *Id.*

55. *Dispute a Ticket Online*, NYC DEP'T FIN., <http://www1.nyc.gov/site/finance/vehicles/dispute-web.page> [https://perma.cc/DL9H-TZSN] (last visited Apr. 12, 2020).

56. *Report a Complaint: Report a Quality or Safety Issue*, NYC HOUSING PRESERVATION & DEV., <https://www1.nyc.gov/site/hpd/services-and-information/report-a-maintenance-issue.page> [https://perma.cc/YE4Q-6UPM] (last visited Apr. 12, 2020).

57. *Id.*

58. See generally David Allen Larson, *Designing and Implementing a State Court ODR System: From Disappointment to Celebration*, 2019 J. DISP. RESOL. 77. The original plan was to address debt collection. *Id.* at 84–95. The ODR pilot project hoped to decrease the number of defaults against debtors by giving broader and easier access to the courts. *Id.* The ODR system would have contained template “debt substantiation” letters that defendants could send to the debt collectors, which would require the debt collector to disclose and inform the defendant about the alleged debt. *Id.* The parties could negotiate or elect to mediate the dispute and courts would enforce agreements. *Id.*

59. See *id.* at 84.

the process of defending a claim in court.<sup>60</sup> Although the small claims project is not yet complete, it will build on lessons learned from the failed debt settlement project.<sup>61</sup>

*b. Utah's Stepped ODR Program*

Utah also has implemented an ODR program for small claims cases statewide.<sup>62</sup> The efforts toward ODR began in 2016 under the auspices of a steering committee exploring the use of technology to expand A2J.<sup>63</sup> The ODR program uses a stepped process, beginning with “education and evaluation,” which provides information about the users’ claims and possible defenses.<sup>64</sup> The second step opens a chat function on the site to allow parties to discuss their disputes and negotiate settlements.<sup>65</sup> Parties who reach resolutions can then file their settlements online.<sup>66</sup> If parties are unable to negotiate a settlement on their own, they move to the third step of the process—a facilitated mediation of the dispute.<sup>67</sup> If parties are unable to reach resolutions within thirty-five days, they move to the fourth stage, in which a trial is arranged either online or in person.<sup>68</sup>

Utah’s program took off with strong support from judicial leadership, and early results are positive. Since the process was implemented in family court, the number of in-person hearings has dropped 27 percent.<sup>69</sup> Additionally, 22 percent more cases have been resolved and 36 percent fewer warrants have been issued for failure to appear.<sup>70</sup> In the small claims/tax department, 93 percent of cases that used ODR reached agreement, as compared to 46 percent of the cases that did not use ODR.<sup>71</sup>

In fact, Utah’s “Technology Impact Award” for 2019 went to the “Online Dispute Resolution, Utah State Courts” project.<sup>72</sup> The project was cited for advancing the accessibility and affordability of the civil justice system “by bringing the courthouse to the litigants in small claims cases (cases with a value of \$11,000 or less).”<sup>73</sup> Notice of the award declared:

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60. *See id.* at 86.

61. *See id.* at 100–01. It is essential for ODR projects to have the backing of judges and court staff from the outset. Their support will lend immediate credibility to the projects.

62. MELISSE STIGLICH, UTAH ONLINE DISPUTE RESOLUTION PILOT PROJECT 1–3 (2017), <https://ncsc.contentdm.oclc.org/digital/api/collection/adr/id/63/download> [<https://perma.cc/4CDQ-Q8W7>].

63. *Id.* at 6–7.

64. *Id.* at 9.

65. *Id.* at 11.

66. *Id.*

67. *Id.*

68. *Id.*

69. Embley, *supra* note 14, at 12.

70. *Id.* at 13.

71. *Id.* at 15.

72. 2019 Best of Utah Awards, UTAH.GOV (June 6, 2019), <https://dts.utah.gov/news/2019-best-of-utah-awards-winners> [<https://perma.cc/HS39-BN8E>].

73. *Id.*

ODR has dramatically increased efficiency in Justice Courts. The amount of time required for clerks to file small claims cases has been reduced by nearly seventy-five percent (from eight minutes to two minutes and twenty seconds per case). In light of the fact that Utahns filed 25,914 small claims cases in 2018, it is hard to overstate the impact of this efficiency gain on the judicial system.<sup>74</sup>

*c. Michigan's Matterhorn Projects*

Michigan was one of the first U.S. states to launch an ODR pilot program in collaboration with Matterhorn, a private ODR provider, for resolving traffic disputes.<sup>75</sup> The core of the program is an online portal for defendants to submit their claims, including arguments contesting their tickets or explanations for why they cannot pay their fines.<sup>76</sup> Police and prosecutors then review cases through the portal before a judge makes a decision.<sup>77</sup> In this way, the online format provides for the resolution of traffic disputes without the need for F2F court appearances.<sup>78</sup> The Matterhorn software also assists defendants by providing them with options,<sup>79</sup> while helping decision makers remain apprised of the case's status.<sup>80</sup>

One researcher found that the average case duration has dropped from fifty days to just fourteen for users who elect to use ODR.<sup>81</sup> Research also revealed that 2 percent or fewer of the cases heard on Matterhorn are likely to end in default, as compared to 20 percent of traditional cases.<sup>82</sup> Courts using Matterhorn are also likely to collect 80 percent of fines within twenty-one days, as compared to 80 percent within three months traditionally.<sup>83</sup> Surveys and interviews also reveal that 90 percent of Matterhorn users find it easy to use and more than a third of users said they would have been unable to participate in an F2F adjudication.<sup>84</sup> As a result, 30 percent of requests were made outside of business hours.<sup>85</sup> Additionally, 80 percent of people who used the software said they would recommend it to a friend and 40 percent said they would not have addressed their legal issue in person.<sup>86</sup>

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74. *Id.*

75. Press Release, John Nevin, Commc'ns Dir., Mich. 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) [<https://perma.cc/T72M-PWKM>].

76. *Id.*

77. *Id.*

78. Anna Stolley Persky, *Michigan Program Allows People to Resolve Legal Issues Online*, A.B.A. J. (Dec. 1, 2016, 4:10 AM), [http://www.abajournal.com/magazine/article/home\\_court\\_advantage/](http://www.abajournal.com/magazine/article/home_court_advantage/) [<https://perma.cc/CM4B-D37W>].

79. Prescott, *supra* note 18, at 2017–25.

80. *Id.* at 2023.

81. *Id.* at 2030.

82. *Id.* at 2034.

83. *Id.* at 2038.

84. *Id.* at 2044.

85. *Id.* at 2045.

86. *Id.*

*d. Tip of the ODR Iceberg*

These cited examples are merely the tip of the ODR iceberg. Texas, California, Georgia, Iowa, Kansas, Hawaii, and many other states are starting to offer ODR pilot projects.<sup>87</sup> For example, Travis County, Texas, now offers ODR for civil claims.<sup>88</sup> The project is a partnership with a software provider, Tyler Technologies, which uses a program called Modria and seeks to save parties and courts the time and money associated with F2F hearings.<sup>89</sup> Similarly, another county in Texas approved a pilot program for ODR to resolve small claims lawsuits.<sup>90</sup> A similar small claims resolution project is underway in Georgia.<sup>91</sup> Additionally, ODR is available in Las Vegas for divorce cases.<sup>92</sup> This stepped process allows divorcing couples to resolve differences online while avoiding delays caused by scheduling, driving to and from court, and securing time off from work.<sup>93</sup>

This is only the beginning, as new programs develop daily.<sup>94</sup> For the most part, ODR emerged from companies that wanted to resolve consumer complaints quickly and earn customer goodwill. However, the growth of internet communication has provided additional fuel for building the future of ADR in an online world. ADR has moved online, giving birth to ODR as a new door to the now multifaceted courthouse. While ODR may not be right for every individual or dispute, it has promise for opening new avenues for justice. The goal, however, is to determine whether, when, and how ODR will prove most useful for advancing A2J.<sup>95</sup>

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87. See NSCS/PEW Charitable Trusts ODR Project Announcement, *supra* note 54; see also Embley, *supra* note 14, at 1–15.

88. Travis County JP 2 First in the Country to Use Online Dispute Resolution Technology, TRAVIS COUNTY TX, <https://www.traviscountytx.gov/news/2018/1644-travis-county-jp-2-first-in-the-country-to-use-online-dispute-resolution-technology> [https://perma.cc/5TRZ-FG9T] (last visited Apr. 12, 2020).

89. *Id.*

90. Ali Linan, *Williamson County Commissioners Approve Pilot Program to Speed Up Small Claims Lawsuits*, COMMUNITY IMPACT NEWSPAPER (June 5, 2018, 8:51 PM), <https://communityimpact.com/austin/georgetown/city-county/2018/06/05/williamson-county-commissioners-approve-pilot-program-to-speed-up-small-claims-lawsuits/> [https://perma.cc/HF9C-UWVU].

91. *Fulton County, Georgia, Helping Resolve Small Claims Online with Tyler Technologies' Modria Solution*, BUSINESSWIRE (Jan. 15, 2019, 9:19 AM), <https://www.businesswire.com/news/home/20190115005118/en/Fulton-County-Georgia-Helping-Resolve-Small-Claims> [https://perma.cc/XZ7B-HA3A].

92. *Clark County Court Uses New Technology from Tyler to Resolve Disputes Online*, BUSINESSWIRE (Apr. 17, 2018, 9:17 AM), <https://www.businesswire.com/news/home/20180417005157/en/Clark-County-Court-New-Technology-Tyler-Resolve> [https://perma.cc/CXL9-5XM3].

93. *Id.*

94. See *Courts Using ODR*, NAT'L CTR. FOR TECH. & DISP. RESOL., <http://odr.info/courts-using-odr/> [https://perma.cc/F97U-SV6A] (last visited Apr. 12, 2020).

95. For further reading on ODR projects in the courts and ODR's A2J functions, see, for example, Schmitz, *supra* note 13. See also Schmitz, *A Blueprint*, *supra* note 19; Schmitz, *There's an "App" for That*, *supra* note 19.

## II. WHY SHOULD WE CARE ABOUT A2J RESEARCH REGARDING ODR?

A2J has traditionally been defined as access to the courts. The National Center for Access to Justice describes it this way:

Justice depends on having a fair chance to be heard, regardless of who you are, where you live, or how much money you have. At minimum, a person should be able to learn about her rights and then give effective voice to them in a neutral and nondiscriminatory, formal or informal, process that determines the facts, applies the rule of law, and enforces the result. That is Access to Justice.<sup>96</sup>

Unfortunately, however, the United States is not doing very well on delivering this A2J. The same center, affiliated with Fordham Law School, created a Justice Index for scoring A2J with respect to language, disability, self-representation, and attorney representation in the United States and generally found states severely lacking.<sup>97</sup> Similarly, the World Justice Project's 2019 review of 126 countries ranked the United States number 20 (down from number 19) regarding A2J based on the independence and fairness of its court systems.<sup>98</sup>

These studies were generally focused on court access, but true A2J must look beyond the basic data regarding the courts themselves. This is because most justiciable issues that arise in society never get as far as consultation with a lawyer, let alone reach the courts.<sup>99</sup> Consumers, for example, rarely realize when they may have a justiciable claim, and it is usually too costly or stressful to file a suit.<sup>100</sup> For many, the courts are a scary place to visit, often associated with crime or other negative legal situations. Therefore, researching A2J must include a broader scope of study—capturing the aspects of justice that never reach the courthouse.

Even our understanding of the courthouse is often limited when discussing A2J. For example, there is often little attention paid to what happens in the lowest levels of the state and city judicial systems: informal and limited jurisdiction courts that cover a range of issues impacting daily life. This includes tax, traffic, family, small claims, and housing courts. It has been said that at least nineteen million civil cases are filed each year in these courts, and the majority of these cases involve SRLs who are generally low-income and belong to vulnerable populations.<sup>101</sup> Although these courts often

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96. *Measuring Access to Justice*, JUST. INDEX 2016, [https://justiceindex.org/\[https://perma.cc/Y5QD-2VHR\]](https://justiceindex.org/[https://perma.cc/Y5QD-2VHR]) (last visited Apr. 12, 2020).

97. The center is a nonprofit organization working to accomplish change; it helps people obtain access to justice and is affiliated with Fordham Law School. See *Justice Index 2016 Findings*, JUST. INDEX 2016, <https://justiceindex.org/2016-findings/#site-navigation> [<https://perma.cc/2LJN-REM4>] (last visited Apr. 12, 2020) (indexing the center's findings).

98. Daniel Rainey, *Access to Justice and ODR*, BOLD MEASURES ODR (Mar. 12, 2019), <https://odr2019.blogspot.com/2019/03/access-to-justice-and-odr-by-daniel.html> [<https://perma.cc/2NRD-4VZM>].

99. See generally Amy J. Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 ARIZ. L. REV. 213 (2016).

100. *Id.*

101. See Jessica Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 748–49 (2015).

have the most impact on social welfare, they suffer tremendous budgetary pressures.<sup>102</sup>

To make matters worse, the data deficit regarding our civil justice system fuels a lack of understanding regarding A2J.<sup>103</sup> To demonstrate how this stifles development in A2J, Sandefur highlights how data has been used to improve other areas such as education.<sup>104</sup> Indeed, solid data can estimate student dropout trends across different communities and demographics and provide the basis for reforms.<sup>105</sup> However, the same quality of data does not exist with respect to access to remedies or justice. Accordingly, we must aim not only to gather information about people's actionable events and how they deal with them but also to follow and compare trends over time among differing social groups/demographics. Moreover, to inform policy changes, we must understand these pieces of information in context and not in a vacuum.<sup>106</sup>

Such broad-based survey and focus group work is important and would be helpful over time to investigate how policy changes affect individual and collective experiences in civil justice.<sup>107</sup> This Article is not tackling the entire universe of data needs, but it fits within this larger fabric of research by asking how the addition of ODR to court offerings may expand A2J and enhance social justice. As noted above, it is a pivotal time for court ODR projects as new pilots are being introduced throughout the world with the goal of expanding A2J. Therefore, we must seize this moment to diligently study whether and how ODR impacts A2J. Moreover, this must occur in a transparent manner with an aim of improving the justice system overall.<sup>108</sup>

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102. See Jacqueline Nolan-Haley, *Does ADR's "Access to Justice" Come at the Expense of Meaningful Consent?*, 33 OHIO ST. J. ON DISP. RESOL. 373, 373–79 (2018).

103. See generally Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 S.C. L. REV. 295 (2016).

104. *Id.* at 296.

105. *Id.* at 299.

106. See *id.* at 300–01.

107. See *id.* at 302–09. Sandefur suggests that we use existing survey systems to collect this information. For example, she says we could use the Current Population Survey, which targets labor and employment, to collect information on employment-related justice problems. *Id.* at 308–09.

The Current Population Survey is a large (approx. 50,000–60,000 households) “monthly survey of households conducted by the Bureau of Census for the Bureau of Labor Statistics. It provides a comprehensive body of data on the labor force, employment, unemployment, persons not in the labor force, hours of work, earnings, and other demographic and labor force characteristics.”

*Id.* at 306 (quoting BUREAU OF LAB. STAT., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2017)). At the same time, the “American Community Surveys (ACS), a project of the U.S. Census Bureau, each year queries Americans about a range of facts about their lives, including employment, the languages they speak at home, family structure, citizenship status, and housing characteristics.” *Id.* at 308. In the context of housing, starting in 2017, the American Community Survey began asking questions about experiences of eviction and housing insecurity. *Id.*

108. See Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 606–15 (2018).

For example, it is through research that we can learn whether and how repeat-player advantages skew ODR systems. Repeat players, including governments, businesses, and lawyers who are regularly in court, enjoy a heightened understanding of and comfort with the courts.<sup>109</sup> In contrast, “little-guy” consumers and SRLs are usually one-time litigants who may feel overwhelmed and disempowered in the courts. We may find that ODR helps address repeat-player advantages by providing online wizards and self-empowerment portals that help level the playing field. However, we also may find that companies retain an advantage in ODR due to better access and ability with respect to technology.

In fact, the Pew Charitable Trusts is currently researching ODR as part of its Civil Legal System Modernization project.<sup>110</sup> Pew states that the project aims to do the following:

- Increase the availability and quality of free online legal tools that help everyone navigate complex problems and connect to resources.
- Develop, promote, and evaluate technologies that improve how people interact with state and local courts.
- Conduct research to identify policies that can improve outcomes for people involved in the civil legal system.
- Build partnerships with the private sector, policymakers, and other stakeholders to advance comprehensive improvement to the civil legal system.<sup>111</sup>

This research includes plans to work with selected groups and the NCSC with respect to its request for proposal (RFP) on “Outcome Evaluation for Online Dispute Resolution in State Courts.”<sup>112</sup> The RFP lists many research questions with a central focus on whether and how ODR makes a difference.<sup>113</sup> Specifically, Pew is selecting up to five pilot court sites, in consultation with NCSC, and will conduct its own research in conjunction with selected grant recipients.<sup>114</sup> NCSC will also conduct process evaluations on a sample of pilot courts, which will include an analysis of whether new technological tools in court adequately address the problem(s)

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109. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 98–103 (1974); see also Richard Lempert, *A Classic at 25: Reflections of Galanter’s “Haves” Article and Work It Has Inspired*, 33 LAW & SOC’Y REV. 1099, 1108 (1999).

110. *Project: Civil Legal System Modernization*, PEW CHARITABLE TR., <https://www.pewtrusts.org/en/projects/civil-legal-system-modernization> [https://perma.cc/58WH-RBH6] (last visited Apr. 12, 2020).

111. *Id.*

112. *Request for Proposals: Outcome Evaluation for Online Dispute Resolution in State Courts*, PEW CHARITABLE TR., (Apr. 19, 2019), <https://www.pewtrusts.org/-/media/assets/2019/04/2019-clsm-rfp-01-amended.pdf> [https://perma.cc/5KZJ-MN3C].

113. *See id.*

114. *Id.* Again, as noted above, this Article is not associated with the Pew project and I am not one of the selected researchers. However, this Article may be helpful for those who are conducting the research.



they are intended to.<sup>115</sup> Finally, NCSC will evaluate and assist with stakeholder engagement, changes to business processes, and other aspects of court ODR platforms.<sup>116</sup>

Pew's interest in ODR provides a starting place to begin a much deeper empirical analysis. However, it should not be the sole study. Varied research regarding A2J more generally, particularly with respect to ODR, is essential for promoting change. We have a justice crisis in the United States and the world, which leads to disengagement and distrust. This is problematic not only for those that lack access to remedies but also for society as a whole. Negative consequences emerge when individuals no longer trust the rule of law or communal institutions charged with protecting justice.

### III. HOW SHOULD WE APPROACH A2J RESEARCH WITH RESPECT TO ODR?

It is difficult to narrow one's research, or limit what should be considered, in a functional analysis of ODR, which asks whether ODR is fulfilling its aspirational function of expanding A2J. For example, it is important to consider and examine how ODR affects costs for the courts and their users because cost is a factor in assessing access. It is perhaps more important, however, to learn whether ODR goes beyond saving time and money to expanding who can access courts, how they access these courts, and what resolutions they obtain.<sup>117</sup> This includes asking whether ODR is furthering the courts' justice and due process functions. Of course, further research with a broader scope will be necessary, but this Article aims to focus on specific ways to home in on whether, and how, ODR advances process satisfaction, access to just remedies, and feelings of trust in the solutions provided.

#### *A. Methodology—Borrowing and Learning from Experience*

Current research regarding ODR is fairly basic and sometimes supported by software developers who wish to use it for their own research and development. The research may also highlight the courts using the programs and serve as marketing material for the courts' successes. Data privacy standards often limit the extent or scope of information gathered about ODR users and the settlements they reach. Nonetheless, current research provides valuable insights.

#### 1. Researching Ohio

In 2016, the Franklin County Municipal Court Dispute Resolution Department started an ODR program using the Matterhorn platform for small

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115. *Id.*

116. *Id.*

117. Again, cost is a factor. Individuals will have greater access to court procedures when they are less costly. However, it is not always true that individuals feel satisfied with whatever is least expensive. Moreover, it seems that the A2J crisis is related to overall distrust of and disengagement with the government and related institutions. Even our political discourse has degenerated as a result. Accordingly, it is vital to address ways to provide greater satisfaction and comfort with the government and A2J through government institutions, such as the courts.

claims cases focused mainly on city tax disputes.<sup>118</sup> The program has expanded since its inception and is available free of charge to its users.<sup>119</sup> It provides a stepped process in that it first provides parties with their own online “negotiation space” to communicate, but if an agreement cannot be reached, either party may request a third-party, court-connected mediator to facilitate negotiations.<sup>120</sup> The program also allows parties to upload files and view, accept, or decline settlement offers.<sup>121</sup>

Franklin County has collected data on its program, which provides a glimpse into completed research regarding ODR. First, Franklin County’s experience indicates that it is especially important to gather data regarding the cases at issue in order to compare outcomes and process facts from before and after ODR pilots begin. This pre- versus post-ODR information can be very informative. For example, with respect to the relevant tax disputes studied in Ohio, in the nine months before the ODR pilot began, 39 percent of cases were dismissed; the parties in 12 percent of cases agreed to a judgment; and 49 percent of cases ended in default judgments.<sup>122</sup> After the pilot began, 58 percent of cases were dismissed; the parties in 17 percent of cases agreed to a judgment; and 25 percent of cases ended in default judgments.<sup>123</sup> This seems to indicate that ODR expanded access to negotiated remedies, leading to a 19 percent increase in dismissals and 24 percent decrease in default judgments.<sup>124</sup>

Second, Franklin County’s experience seems to suggest that researchers will have to offer a small incentive and embed the survey in the studied processes to capture greater survey response rates. It is also important to administer surveys to those who opt out of the ODR process to learn why individuals are choosing to avoid ODR where it is offered. For example, in the Ohio study, the department surveyed only ODR users and captured only ninety-two responses as of the data project’s posting online.<sup>125</sup> With this small survey sample, the department reported that nearly all of these respondents (97 percent) said that they would prefer to use ODR rather than go to court, and 67 percent thought the agreement reached using ODR was

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118. *See generally* ONLINE DISP. RESOL. FRANKLIN COUNTY MUN. CT., <https://www.courtinnovations.com/ohfcmc> [<https://perma.cc/47F9-YJRF>] (last visited Apr. 12, 2020).

119. *Id.*

120. *Id.*

121. *Id.*

122. Memorandum from the Franklin Cty. Mun. Court Dispute Resolution Dep’t to Mun. Court Judges 2 (June 19, 2018) [hereinafter Memorandum] (on file with author).

123. *Id.*

124. *Id.*; *see also* Email from Alex Sanchez, Manager, Small Claims & Dispute Resolution, Franklin Cty. Mun. Court, to Amy J. Schmitz, Elwood L. Thomas Mo. Endowed Professor of Law (June 14, 2018) (on file with author); *Data*, FCMC DATA PROJECT, <https://sites.google.com/view/fcmcdataproject/data?authuser=0> [<https://perma.cc/NM4C-K7LQ>] (last visited Apr. 12, 2020).

125. *ODR and Mediation Data Project*, FCMC DATA PROJECT, [https://sites.google.com/view/fcmcdataproject/about#h.p\\_ICY712yMURSn](https://sites.google.com/view/fcmcdataproject/about#h.p_ICY712yMURSn) [<https://perma.cc/6LB3-JRWL>] (last visited Apr. 12, 2020). *See generally* Memorandum, *supra* note 122.

fair.<sup>126</sup> Furthermore, 93 percent said that they would recommend ODR to others.<sup>127</sup> Nonetheless, the low response rate leaves researchers asking how this would compare with non-ODR users' responses regarding satisfaction. Moreover, it is unclear whether self-selection played a role in outcomes, given the limited number of responses.<sup>128</sup>

Third, data regarding user demographics in F2F versus ODR processes is important and should be gathered in a careful manner that respects privacy and anonymity. Ohio's demographic information was mainly limited to broad categories of income.<sup>129</sup> However, researchers would benefit from gathering and studying deeper demographic data regarding those using the ODR programs versus those who opted out. Previous court experience, gender, race, education level, and more would be helpful in exploring whether ODR is assisting vulnerable populations and those who have not been served by F2F processes. However, privacy parameters remain important and very careful protocols must be in place for proper data collection.

Furthermore, the Ohio research is helpful for showing the value of comparing a sample of non-ODR cases with ODR pilot cases. In Ohio, the department looked at a random sample of non-ODR tax cases during the same 2016 to 2017 period.<sup>130</sup> The results seemed to indicate that the ODR cases took less time, and the comparisons were helpful in showing how 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.<sup>131</sup>

Indeed, the Franklin County clerk reported that ODR led to more dismissals and agreed judgments but fewer defaults.<sup>132</sup> This seems to indicate that ODR expands access to more positive outcomes for taxpayers, as court judgments and defaults can follow taxpayers for years.<sup>133</sup> It also assists with tax collection because defaults are very likely to go unpaid, especially when the payment sought is disproportionate to the likely amount collected.

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126. Memorandum, *supra* note 122, at 3. Admittedly, it would have been beneficial to have comparison data but none was available.

127. *Id.* The majority of survey respondents were white (about 38 percent); about 16 percent were black; and about 4 percent were Hispanic. *Id.* Most were between the ages of thirty-five and fifty-four (51 percent); 26 percent were between the ages of fifty-five and seventy-four; 18 percent were between the ages of eighteen and thirty-four; 3 percent were age seventy-five and over; and 2 percent declined to provide this information. *Id.*

128. For the survey questions and answer options, see *ODR and Mediation Data Project*, *supra* note 125.

129. The income demographics were broken up into: low, moderate, middle, and upper. *See id.*

130. *See Data*, *supra* note 124.

131. For a breakdown on the data and terms, see *ODR and Mediation Data Project*, *supra* note 125.

132. *See id.*

133. *Id.*

## 2. Observing the Civil Resolution Tribunal

The British Columbia Ministry of Justice has created a robust ODR court called the Civil Resolution Tribunal (CRT).<sup>134</sup> The CRT ODR program covering small claims and condominium, or “strata,” disputes was one of the first judicial ODR projects in the world and has served as an example for others to follow.<sup>135</sup> The CRT follows a stepped ODR process, beginning with a problem-solving wizard that helps complainants assess their problem and decide the best option to proceed in solving the issue.<sup>136</sup> If the user cannot resolve the issue through the wizard, the process moves to an ODR portal, which begins with party-to-party negotiations and moves to mediation if that fails.<sup>137</sup> If the parties are still unable to reach a mutually agreeable solution, an online arbitrator will make the ultimate decision after online or telephonic hearings.<sup>138</sup> If hearings are not needed, the arbitrator may render a decision based solely on party submissions.<sup>139</sup>

This ODR program expands access to remedies because it is available at any time of the day or night. Parties can access the portal on computers or mobile phones, and the CRT also provides telephone services for oral presentations when requested.<sup>140</sup> Users pay nominal fees of C\$0 to C\$200 and obtain judgments that are enforced by the court.<sup>141</sup> Moreover, the process typically takes much less time than in-person processes and saves parties time and money.<sup>142</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>143</sup>

The CRT has been gathering data to use what it learns to implement changes and improve the process.<sup>144</sup> For example, its May 2019 survey provided the statistical insights:

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134. Shannon Salter, *Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal*, 34 WINDSOR Y.B. ACCESS TO JUST. 112, 118 (2017).

135. See *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> [https://perma.cc/YD3L-B378] (last visited Apr. 12, 2020).

136. See *Explore and Apply*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/how-the-crt-works/getting-started/> [https://perma.cc/V9JY-FXET] (last visited Apr. 12, 2020).

137. See *Arbitration and Strata Disputes*, GOV'T B.C., <https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/arbitration> [https://perma.cc/8HQM-S3T7] (last visited Apr. 12, 2020).

138. *Id.*; see also *The CRT Process*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/how-the-crt-works/> [https://perma.cc/89XC-CWAT] (last visited Apr. 12, 2020).

139. *The CRT Process*, *supra* note 138.

140. *Special Accommodation*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/tribunal-process/starting-a-dispute/special-accommodation/> [https://perma.cc/G28S-XX8S] (last visited Apr. 12, 2020).

141. See *Fees*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/resources/crt-fees/> [https://perma.cc/6RUB-ZCTK] (last visited Apr. 12, 2020).

142. See Salter, *supra* note 134, at 120–25.

143. See *Fees*, *supra* note 141.

144. See, e.g., *Participant Satisfaction Survey—May 2019*, CIV. RESOL. TRIBUNAL (June 6, 2019), <https://civilresolutionbc.ca/participant-satisfaction-survey-may-2019/> [https://perma.cc/99JB-RP4C] (last visited Apr. 12, 2020); Tanja Rosteck, *Continuous Improvement*

Professional: 96% agreed that CRT staff were professional in each interaction.

Easy to use: 55% felt the CRT's online services were easy to use.

Informed: 74% agreed the CRT provided information that prepared them for dispute resolution.

Timely resolution: 62% felt their CRT dispute was handled in a timely manner.

Accessible: 60% found the CRT process easy to understand.

Fair treatment: 88% felt the CRT treated them fairly throughout the process.

72% are likely to recommend the CRT to others.<sup>145</sup>

The CRT notes that these are anonymous surveys, with fifty-nine people providing responses in May 2019.<sup>146</sup>

As in Ohio, these response rates are fairly low, likely because surveys are voluntary and unattached to incentives. For example, the CRT received only these 59 responses even though there were 11,089 total disputes for that period.<sup>147</sup> Furthermore, there were 458 new disputes submitted in May, 9418 disputes were completed, and 2305 disputes were resolved by adjudication.<sup>148</sup>

This survey data seems to indicate user satisfaction, but, as noted earlier, the quality of the data is suspect due to the low response rate. Furthermore, deeper survey and focus group research, coupled with comparative analysis, could help researchers see whether ODR is in fact opening doors to the courthouse for the disenfranchised. There are important questions left unanswered. Is the CRT bringing in those who would not otherwise access the courts? How do ODR programs serve older adults? What about accessibility in rural areas with less connectivity?

### *B. Focus of Inquiry*

As noted above, there are many questions to ask when researching whether ODR is in fact expanding A2J, including questions regarding cost for both the courts and litigants. That data should and will be captured in most courts as they assess whether to expand use of ODR. Nonetheless, this Article emphasizes the need for research that focuses on whether ODR is expanding A2J by opening new doors for those without representation or those who face language or physical barriers to the courts (borrowing from the Justice Index

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*Update—June 2019*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/continuous-improvement-update-june-2019/> [<https://perma.cc/Z5M4-4X4A>] (last visited Apr. 12, 2020).

145. *Participant Satisfaction Survey—May 2019*, *supra* note 144.

146. *Id.* The CRT notes that this was not a particularly high response rate, as the surveys are voluntary. This raised questions about self-selection bias.

147. *CRT Statistics Snapshot—May 2019*, CIV. RESOL. TRIBUNAL (June 6, 2019), <https://civilresolutionbc.ca/crt-statistics-snapshot-may-2019/> [<https://perma.cc/5FHB-ZGK3>].

148. *Id.*

project noted above). Additionally, do ODR users perceive the process as fair and feel that it worked well? Specifically, this Article aims to organize research queries in terms of the appropriateness and effectiveness of ODR processes from the standpoint of who, how, and what.

### 1. Who

It is necessary to gather data on age, income, gender, education, race, representation, and other ascertainable factors regarding the users of ODR systems as compared to those who opt out or otherwise choose F2F processes. The more data on users, the more useful the research will be for assessing whether ODR opens new doors to the courthouse. This data should be assessed from an ODR versus F2F perspective and used in an overall comparative analysis of the users pre- and post-ODR. Is the program reaching SRLs and those who were not otherwise using the courts? How do demographic factors come into play with access and use of ODR versus F2F processes? Are more people accessing the courts, and do they include those who would not access remedies without the ODR option?

As noted above, it is also useful to cast a broader net in determining how people of different backgrounds and education levels access remedies or seek solutions to their problems. For example, if an ODR pilot involves small claims, researchers should think creatively to seek ways to learn whether and why individuals do not access the courts, even with an online option. How can an ODR program be improved to open avenues for remedies for these individuals? Focus groups and interviews with legal aid services, as well as local better business bureaus, attorney general consumer divisions, and other such representatives, may assist in gathering this information. Researchers should use their imaginations to learn more about those who never engage with the courts, often for reasons beyond court costs.<sup>149</sup>

### 2. How

It is especially important to gather and study quantitative, as well as qualitative, data about how consumers access and engage with ODR processes versus F2F processes. For example, it would be important to conduct pre- versus post-ODR and F2F versus ODR comparisons along variables such as time to disposition and the number and types of engagements (be they text-based engagements, video hearings, or document deposits) with the process. Comparisons of dropout rates and timing of engagement with the process are also important. Are F2F or online litigants more likely to drop out? At what time of day do individuals engage with ODR? Tracking user clicks and time spent using the process would help uncover information related to these questions.

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149. My own empirical research regarding consumers' likelihood of bringing issues to court has highlighted how merely the "tip of the iceberg" of consumer complaints ever reach the courts due to the time, effort, and costs of pursuing court claims. *See generally* Schmitz, *supra* note 4.

Research should also focus on whether users can find, understand, and act on information provided through the ODR process. For example, most ODR processes provide guided questionnaires or “wizards” that help users find answers and remedies for their problems.<sup>150</sup> Some have also called these “solution explorers.”<sup>151</sup> Similarly, I have called them “TurboTax for dispute resolution” because ODR programs have the capacity to help individuals help themselves reach resolutions and find solutions without lawyers in the same way that TurboTax aims to assist individuals without the help of a certified public accountant.<sup>152</sup> However, we should not just assume that these processes are effective but should survey ODR users and conduct focus groups to explore whether parties find them to be effective and user-friendly.

Researchers should also examine whether users receive pertinent information regarding opportunities to present evidence and other procedural levers, along with whether they in fact use these opportunities and procedures. In this regard, it is especially important to compare the experiences of those with and without legal representation and those using ODR versus F2F processes. Furthermore, researchers should ask whether ODR users experience fewer procedural errors and dismissals (for example, due to the failure to prosecute or documentary errors) than F2F users.

Moreover, research must focus on whether ODR increases court users’ sense of procedural fairness and, if so, whether that varies among different users. In particular, it is important to survey both new and repeat users to ask whether these users have different experiences with ODR. Researchers should also be creative in finding ways to assess how users perceive, and feel using, a process. As noted above, this is a fundamental issue for many in dealing with the courts. Those who already feel disenfranchised have an inherent lack of trust in court systems and thus, ODR system designers must learn from research how best to craft systems that make users feel comfortable and welcome. ODR fails when individuals feel pressured to use it and then frustrated with its operation. For claimants who already distrust the courts, an ineffective ODR process is like adding insult to injury.

With this type of research, surveys are an important first step, but surveys should be coupled with focus groups for deeper qualitative analysis. This is important to determine how users of the system felt about their ODR experiences, whether the process improved the parties’ use of court procedures, and whether their sense of procedural fairness changed. This research can also ascertain whether and how individuals feel heard online. Governments depend on citizen trust for legitimacy, so it is essential that court users trust the process and feel heard through government channels.

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150. 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/> [https://perma.cc/NBK6-QFSD].

151. *Id.*

152. See Amy J. Schmitz, *Introducing the “New Handshake” to Expand Remedies and Revive Responsibility in ECommerce*, 26 ST. THOMAS L. REV. 522, 548 (2014).

There is concern that eliminating F2F contact with courts will diminish trust-building attributes of court processes. While ODR creates that danger, online communications have become more emotive.<sup>153</sup> Emotion plays a role in conflicts, and dispute resolution systems should take those emotions into account.<sup>154</sup> For example, ODR may hamper a disputant's ability to observe contextual clues and body language, which may reduce the level of understanding between the disputants.<sup>155</sup> However, individuals are learning to better express themselves online, and ODR may actually promote honest communication because it provides space for individuals to calm down and rationally approach a problem—especially in high-conflict disputes such as divorce.<sup>156</sup>

Nonetheless, this should be tested with real-time surveys. For example, it may be advisable to insert emotional feedback collection points into an ODR process, which would stop a disputant at a certain point in the ODR process and ask about their emotional state.<sup>157</sup> This could be less onerous if made available through a research application embedded in the process, which would also help track at which point in the process the user feels a certain way. Even if a court is not willing to inject such emotional feedback applications into a court ODR program, real-time testers of an ODR process could be equipped with such tools to assist their research. Furthermore, the research should be enhanced with randomized control trials, which could also include emotional test points to better inform our understanding of whether ODR is enhancing users' experiences with the courts.

Likewise, it is essential to ask whether a new ODR process closes other F2F doors to the courthouse. Is it opt in or opt out? Is there pressure to settle through an ODR process, as has been complained of court-annexed mediation? As Jacqueline Nolan-Haley astutely noted:

[W]e need to engage our imagination and begin to reflect on what it means to cultivate an "access to justice consciousness" from an ADR perspective. In my view, a preliminary sketch begins with fidelity to informed consent principles. Although this in itself does not assure access to justice, its absence signals vulnerability in the search for access to justice.<sup>158</sup>

Indeed, A2J should demand that any use of alternative processes remains consensual and protects self-determination.

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153. Darin Thompson, *Interacting with Disputants' Emotions in Online Dispute Resolution*, CANLII, <http://www.canlii.org/t/2fc3> [<https://perma.cc/ZHT3-YUZC>] (last visited Apr. 12, 2020).

154. *Id.*

155. *See id.*

156. *Id.* The author then begins a discussion about human-computer interaction by citing a study where the participants began a bargaining game. *Id.* Half were told they were up against a computer, and the other half were told they were up against a person. *Id.* Essentially, the study found that the participants acted very similarly and elicited emotional responses even when they were up against a computer. *Id.* The author essentially concluded that people react with emotion even when they know they are interacting with an emotionless machine. *Id.*

157. *Id.*

158. Nolan-Haley, *supra* note 102, at 395.



### 3. What

Does ODR affect case outcomes? It seems there should be data points within case files that can be aggregated and assessed to get an understanding of procedurally fair outcomes or some sort of baseline comparison to assess ODR outcomes as they compare to similar F2F cases. For example, it would be interesting to compare ODR to F2F in high power imbalance cases, such as those involving debt collection, in which most case dispositions involve, by default, the debtor being ordered to pay the full sum. Does ODR use in such cases result in fewer defaults and more resolutions for lesser sums than what the lender first demanded?

It is also important to study whether there is a difference in outcomes for those with and without representation. Additionally, researchers should ask whether a judge or other court representative reviews the ODR decisions for enforceability and validity. Again, it is essential to look at case types more generally to examine overall trends from a pre- versus post-ODR program perspective.

However, comparing case outcomes can be complicated. It is simple to gather the ODR dispositions and to learn whether a judge (or other officer) reviews outcomes within the ODR program, but it is more difficult to delineate proper comparison cases from outside of the ODR program. Nonetheless, researchers should be able to find an effective means to get this data by consulting with courts using ODR. For example, Ohio was able to capture comparison data by creating a “sample” of non-ODR cases to use in the research.<sup>159</sup> Similarly, using some form of randomized control trials would assist with this research.

In sum, the precise methodologies would depend on the case type, the particular ODR process, and the implementing court. However, mixed methods can go a long way where there is dedication to the research and a broad net. Indeed, ODR outcomes should be transparent to foster fairness and trust. Who will trust the use of ODR if its processes are hidden behind a proverbial *Wizard of Oz* curtain? There is already fear that artificial intelligence will infiltrate the courts and ODR will simply become another way of letting the robots take over.<sup>160</sup>

Accordingly, transparency must be encouraged. As Nancy A. Welsh stated about advancing transparency:

ODR creates the opportunity for collecting and analyzing substantial amounts of data, which can then be used to detect problematic patterns. At the same time, the public is increasingly aware of the dangers presented by involvement with the online world, including the potential for security breaches, victimization as a result of inaccurate information, and unfairness as a result of biased algorithms. Consequently, many ODR advocates are

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159. See *ODR and Mediation Data Project*, *supra* note 125.

160. Gene Marks, *Are Robots Coming for Your Lawyer?*, *GUARDIAN* (Sept. 13, 2018, 10:00 AM), <https://www.theguardian.com/business/2018/sep/13/ai-firm-atrrium-legal-law-attorneys> [<https://perma.cc/PMM3-KC9Y>].

calling for ODR procedures to be made transparent and accountable, with required reporting regarding the number of people using them, their substantive results, users' perceptions of the ODR process's fairness, demographic patterns, and the results of algorithmic audits.<sup>161</sup>

Indeed, ODR is ripe for study, which will benefit the users, courts, A2J, and even the providers, who hope to gain the public's trust and secure lucrative contracts.

### C. Privacy and Attention to Ethics

Any research must comply with the strict quality and safety controls of any major research university or research consortium. This goes without saying; in fact, research is usually conducted in accordance with standards and protocols set by an internal review board.<sup>162</sup> Such standards include responsible practices for acquiring and maintaining research data, methods for record keeping and electronic data collection, and storage for scientific research. They also encompass data privacy and confidentiality, data selection, retention, sharing, ownership, and analysis, as well as treatment of data as legal documents and intellectual property protected by copyright laws.<sup>163</sup>

Moreover, researchers must be creative in crafting randomized control trials to help uncover what works and what doesn't work in ODR. Control trials, along with proper quality and safety protocols, would allow researchers to compare experiences in a way that has proven very effective in medicine, education, and elsewhere.<sup>164</sup> Furthermore, this research must focus on advancing the use of new technologies to better the legal system and society as a whole.<sup>165</sup> It is time to enhance A2J, and research will help us find the way.

### CONCLUSION

"Disruptive technology" is essentially technology that changes or challenges the way an industry works.<sup>166</sup> ODR is clearly challenging how

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161. Nancy A. Welsh, *Dispute Resolution Neutrals' Ethical Obligation to Support Measured Transparency*, 71 OKLA. L. REV. 823, 862–63 (2019).

162. See, e.g., *Institutional Review Board: IRB Home*, OFF. RES. & ECON. DEV., <https://research.missouri.edu/irb/> [<https://perma.cc/35TF-2SYL>] (last visited Apr. 12, 2020). Researchers also must work with research compliance, including by participating in trainings, external review, and other processes. See *Compliance: Research Compliance*, OFF. RES. & ECON. DEV., <https://research.missouri.edu/compliance/> [<https://perma.cc/T6QM-4ANA>] (last visited Apr. 12, 2020).

163. See, e.g., *Compliance: Research Integrity*, OFF. RES. & ECON. DEV., <https://research.missouri.edu/compliance/integrity> [<https://perma.cc/UD2S-EJD7>] (last visited Apr. 12, 2020).

164. See generally Dalie Jimenez et al., *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY L. & POL'Y 449 (2013).

165. See generally Agnieszka McPeak, *Disruptive Technology and the Ethical Lawyer*, 50 U. TOL. L. REV. 457 (2019).

166. *Id.* at 458–59.

ADR and even the courts work to advance A2J. Therefore, it is essential that empirical studies of ODR go beyond the current Pew/NCSC project and include varied researchers and projects. ODR holds great promise for advancing A2J but only if properly deployed, improved, and monitored. This depends on research, along with transparency, to help inform best practices and means for monitoring. Hopefully, this research will also expand to provide better and more informed ideas for advancing A2J broadly and enhancing social and legal justice in the United States and beyond.