

# THE NEW NEW COURTS<sup>†</sup>

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*In this Article we describe the phenomenon of online courts, which is fast gaining momentum, and analyze these “new new courts” from an access to justice perspective. We distinguish between two turning points in terms of access to justice and courts: the rise of alternative dispute resolution (ADR) (producing what we refer to as the “new courts”) and the spread of online dispute resolution (ODR) (giving rise to what we refer to as the “new new courts”). While both developments seem to be motivated by similar rationales and a desire to increase access to justice, the implications of adopting ADR and ODR are different. The benefits associated with institutionalizing ADR in terms of access to justice were perceived primarily in efficiency-related terms due to the assumption that an inherent trade-off exists between efficiency and fairness. This assumption is now being challenged through ODR in the context of the new new courts. Because of the qualities of the digital medium and internet communication, ODR could potentially increase both the efficiency and fairness of dispute resolution processes, formal and informal. At the same time, the new new courts, precisely because of their reliance on algorithms and data, present novel challenges to fairness and open the door to new sources of danger for disputants and the judicial system.*

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<sup>†</sup> The title of this Article references the title of a well-known book about Jim Clark and Silicon Valley, MICHAEL LEWIS, *THE NEW NEW THING: A SILICON VALLEY STORY* (1999).

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*“[I]f, as is overwhelmingly the case, our existing regulatory scheme has resulted in a system in which lawyers’ help lies beyond the reach of the ordinary citizen, then it is within the power—and the duty—of courts to expand access to other sources and types of legal help. The innovators for law are just waiting for the call.”*

—Gillian K. Hadfield<sup>1</sup>

#### INTRODUCTION

In a recent column, Thomas Friedman noted that we have reached a “tipping point” with respect to the internet, one in which “a critical mass of our lives and work” take place online, “[t]hat is to say, a critical mass of our interactions have moved to a realm *where [we are] all connected but no one is in charge*. After all, there are no stoplights in cyberspace, no police officers walking the beat, *no courts*, no judges . . . .”<sup>2</sup>

In actuality, there *are* courts that currently operate online. In July 2016, the United Kingdom court system announced a radical reform: £730 million would be allocated to revolutionize the technology of the British court system, a major component of which would be the institution of a new online court charged with addressing small claims of up to £25,000.<sup>3</sup> Several months earlier, another online court was introduced in British Columbia in the form of a tribunal, established through legislation, mandating an online avenue for small claims of

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1. Gillian K. Hadfield, *Innovating to Improve Access: Changing the Ways Courts Regulate Legal Markets*, DAEDALUS, Summer 2014, at 83, 93.

2. Thomas L. Friedman, Opinion, *Online and Scared*, NY TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/opinion/online-and-scared.html> (second emphasis added).

3. See *infra* Section II.B.3.

up to Can\$5000 and “strata,” certain neighbor-related, claims.<sup>4</sup> In the Netherlands, a platform called *Rechtwijzer* until recently allowed divorcing couples and disputing neighbors to resolve their cases online.<sup>5</sup> In addition, a few dozen U.S. state courts have successfully implemented Matterhorn software for the online processing of outstanding warrant cases and traffic violations.<sup>6</sup> Also, a pilot of online proceedings for debt collection cases is being devised for the New York court system.<sup>7</sup>

What these and other courts have done is remarkable. Instead of refining existing court procedures through technology, they have developed novel processes that draw on the unique qualities of digital technology; such novel processes rely on new tools, involve new actors, and fulfill new goals. They are the “new new courts.”

There are various prisms through which one can evaluate this new phenomenon, such as examining its impact on the litigation process, the role of judges, or the legitimacy of the courts. The focus here is to determine what the new new courts mean in terms of “access to justice,” a long-time goal of justice and one of its greatest deficits. In recent decades, there have been two major developments in terms of access to justice and courts: the rise of alternative dispute resolution (ADR) and the spread of online dispute resolution (ODR).<sup>8</sup> While both movements seem to be motivated by similar rationales, specifically the understanding that different types of disputes often require different procedural avenues for addressing them, the implications of adopting ADR and ODR in courts are different.<sup>9</sup>

With ADR, many legal claims were siphoned from courts to alternative avenues such as mediation, but to a large extent, these ADR processes remained adversarial, with legal actors playing a frequent

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4. CIVIL RESOLUTION TRIBUNAL, <https://www.civilresolutionbc.ca> (last visited Oct. 23, 2017).

5. Maurits Barendrecht, *Rechtwijzer: Why Online Supported Dispute Resolution Is Hard to Implement*, HiiL (June 21, 2017), <http://www.hiil.org/insight/rechtwijzer-why-online-supporte-dispute-resolution-is-hard-to-implement>.

6. Anna Stolley Persky, *Michigan Program Allows People to Resolve Legal Issues Online*, ABA JOURNAL (Dec. 1, 2016, 3:10 AM), [http://www.abajournal.com/magazine/article/home\\_court\\_advantage](http://www.abajournal.com/magazine/article/home_court_advantage).

7. *New York Online Dispute Resolution*, ABA CENTER FOR INNOVATION, <http://abacenterforinnovation.org/programs-and-projects/collaboration/new-york-online-dispute-resolution> (last visited on Oct. 23, 2017).

8. See *infra* Section I.A. (ADR); Section II.B. (ODR).

9. In the case of both ADR and ODR, the courts institutionalized processes characteristic of a traditional court setting in an attempt to increase access to justice. Ethan Katsh & Orna Rabinovich-Einy, *Access to Digital Justice: Fair and Efficient Processes for the Modern Age*, 18 CARDOZO J. OF CONFLICT RES. 637, 638–40 (2017).

role and outcomes echoing substantive legal endowments.<sup>10</sup> The benefits associated with institutionalizing ADR in terms of access to justice were perceived primarily in efficiency-related terms.<sup>11</sup> Still, these were the “new courts.”

The new courts came with a novel understanding of access to justice: one that was realized in “many rooms” (beyond litigation) and required that “process pluralism” become widespread, with new practices and goals permeating the litigation process and re-shaping conceptions about the role of judges and courts, albeit, mostly in efficiency-related terms.<sup>12</sup> Indeed, underlying these developments was the assumption that an inherent trade-off existed between efficiency and fairness.<sup>13</sup> This assumption posed a real challenge to efforts to enhance access to justice through ADR and gave rise to serious

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10. See CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 406–09 (2d ed. 2011) [hereinafter MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION*] (addressing the various implications of mediation on court proceedings); Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 407–08 (2004) (discussing the institutionalization of ADR in Minnesota after legislation allowed courts to mandate non-binding ADR, even when the parties objected); Jacqueline Nolan-Haley, *Mediation: The “New Arbitration,”* 17 HARV. NEGOT. L. REV. 61, 73–89 (2012) (analyzing the ways in which the mediation process has come to resemble arbitration); Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873, 874 (2012) (noting that while ADR may achieve communication and outcomes that would be unlikely in court, over time it “has strayed from its core mission . . . and . . . has become entangled in the contentious game playing and covert manipulation that can occur in litigation”).

11. See Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 62 (1996) (comparing the perception that courts have adopted mediation as a way to more peacefully resolve disputes with the reality that courts seek efficiency and lighter dockets).

12. See Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 13 J. LEGAL PLURALISM 1, 3–4 (1981) (“Is the utopia of access to justice a condition in which *all* disputes are fully adjudicated? Surely not . . . . We know enough about the work of courts to suspect that such a condition would be monstrous in its own way.”); Carrie Menkel-Meadow, Lecture, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 561–63 (2006) [hereinafter Carrie Menkel-Meadow, *Peace and Justice*] (discussing Professor Lon Fuller’s ten conceptions of legal processes, or “process pluralism,” including arbitration and mediation); see also Orna Rabinovich-Einy & Yair Sagy, *Courts as Organizations: The Drive for Efficiency and the Regulation of Class Action Settlements*, 4 STAN. J. COMPLEX LITIG. 1, 6–12 (2016) (exploring how the shift toward ADR was driven by efficiency concerns and backlogs of cases for courts).

13. See *infra* note 81 and accompanying text.

critiques of the new courts.<sup>14</sup> This same assumption is now being challenged through ODR in the new new courts.<sup>15</sup>

Because of the distinct qualities of the digital medium and internet communication, ODR holds the potential to increase the efficiency *and* fairness of dispute resolution processes, both formal and informal. The ability of disputants to conveniently and inexpensively access the court system, and receive tailored legal information creates fertile ground for simplifying court processes, reducing the cost and length of the proceedings, and enhancing courts' abilities to perform in a consistent, context-specific, and equitable manner.<sup>16</sup> These improvements are possible because legal information is delivered in simple language using algorithms that tailor such information to the particular context. In addition, use of algorithms in dispute resolution allows for convenient communication from afar at all hours, as well as the monitoring of the quality of such processes through the collection of data exchanged during ODR proceedings and, ultimately, the improvement of ODR processes' design.<sup>17</sup> At the same time, the new new courts, precisely because of their reliance on algorithms and data, present new challenges to fairness and open the door to new sources of danger for disputants and the judicial system.<sup>18</sup>

Part I analyzes the evolution of the new courts from an access to justice perspective by explaining the efficiency-fairness trade-off and the resulting tension between the expansion of access to justice through ADR and the critiques of private justice. Part II then describes the roots of the phenomenon of the new new courts and provides several examples of such courts that are already, or will soon be, in operation. These examples illuminate the ways in which the new new courts differ from their predecessors from an access to justice perspective. The Article concludes by offering some thoughts on the future direction courts will take considering the developments described

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14. *See infra* notes 74–80 and accompanying text (describing the common criticisms of ADR, including the argument that the judicial process is inherently public and ADR privatizes justice).

15. *See infra* Section II.C.

16. For a more thorough description of the existing new new courts, *see infra* Section II.B.

17. *See infra* Section II.B.

18. *See infra* notes 241–42, 268–81 and accompanying text (discussing how ODR may challenge the traditional roles of the actors in the judicial system and how algorithms may institutionalize certain biases).

in this Article, in particular the potential impact of the spread of the new new courts on access to justice and the fairness of courts' operation.

## I. ACCESS TO JUSTICE, ADR, AND THE NEW COURT

In this section, we describe the rise of the new courts. We uncover the transformation of courts from litigation-centered institutions to ones that incorporate ADR processes and often substitute judicial decision-making with consensual resolutions. As we show, to a large extent, the driving force behind these developments was the desire to enhance access to justice and reduce the many barriers associated with access to courts and the law. The hope that the new courts would be more accessible than their predecessors was not realized in full. Specifically, the focus on enhancing the efficiency of court proceedings through ADR often came at the expense of fairness and the quest for a non-adversarial vision of justice. This reality generated new concerns over private justice and novel challenges for litigants, in particular those belonging to disempowered groups.

### A. *The Rise of ADR*

In the last quarter of the twentieth century, the American court system changed dramatically. Up until then, the court system offered formal adversarial litigation proceedings as the sole avenue for addressing court cases.<sup>19</sup> Yet, towards the end of the twentieth century, court proceedings gradually came to incorporate ADR processes—mostly mediation but also arbitration—in which other actors operated as third-party neutrals assisting in the resolution of claims on the court docket.<sup>20</sup>

The sources of the ADR revolution in courts were diverse, but the shift from traditional adversarial litigation is most strongly associated with the Pound Conference.<sup>21</sup> The 1976 conference was a gathering of over one hundred participants from the legal milieu—judges, attorneys, academics—all of whom discussed the ills of the court

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19. See Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 174 (2003).

20. See *id.* at 178 (discussing the rise of ADR as a way to decide cases outside of the courtroom).

21. 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, 420 (Felix Steffek et al. eds., 2013) [hereinafter Menkel-Meadow, *Semi-Formal*].

system, the sources of the court system's problems, and the possible solutions to those problems.<sup>22</sup>

The principal problems discussed in the conference were the high costs associated with a slow, complex, and overburdened system.<sup>23</sup> The adoption of ADR processes came to be seen as an important avenue for addressing these issues. In what is now regarded as a seminal speech, Professor Frank Sander called for the institution of a "multi-door courthouse," thereby advocating the need to diversify court proceedings through the adoption of a variety of procedural options that could address the deficits of court proceedings.<sup>24</sup> Indeed, Sander, in his subsequent formulation of "fitting the forum to the fuss,"<sup>25</sup> recognized that different types of disputes, parties, and circumstances merited different procedural options; other scholars writing on ADR procedures reached a similar conclusion, as evidenced in Professor Menkel-Meadow's notion of "process pluralism."<sup>26</sup>

In what ways could ADR address the difficulties associated with the courts? The rationales for adopting ADR processes relate to the benefits that run along three inter-connected axes: efficiency-quality, procedure-substance, and individual-group.

As for the first axis, the benefits associated with ADR over courts had to do with both efficiency-related considerations, such as the desire to reduce the caseload of the courts, and qualitative reasons, mainly the appeal of interest-based, non-adversarial dispute resolution avenues, as explained below.

In terms of efficiency, the expectation was that the institutionalization of ADR processes would take pressure off the courts for two reasons. First, some of the court cases would be channeled to other fora, reducing the number of cases that courts would have to resolve through litigation and, perhaps more importantly, contributing, in the long-run, to the understanding of the courthouse as a site in which diverse processes are being offered, moving beyond

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22. *Id.*

23. See JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 95 (1983) (describing the legal system of the time as "a horse-and-buggy [system] near collapse in an urban industrial society").

24. Frank E. A. Sander, *Varieties of Dispute Processing in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 65, 83–84 (A. Leo Levin & Russell R. Wheeler eds., 1979).

25. Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 *NEGOT. J.* 49, 66 (1994).

26. See Carrie Menkel-Meadow, *Peace and Justice*, *supra* note 12, at 561–63 (laying out the foundation of "process pluralism").

a litigation-centric worldview. Such changes would allow courts to process a more limited caseload with greater efficiency and reduce related costs.<sup>27</sup> Second, the adoption of ADR was expected to lower costs since these alternatives were perceived as inherently more efficient than litigation because they were, at least in the context of mediation, much quicker and simpler than litigation and therefore less costly.<sup>28</sup>

Some ADR proponents did not focus on the high costs or lengthy waits associated with litigation, but instead emphasized the appeal of interest-based dispute resolution over adversarial proceedings. In their view, the key reason for adopting ADR had to do with quality-related rationales associated with the other two axes mentioned above: (1) the advantages that run along the procedural-substantive divide and (2) the benefits conferred by ADR processes from both an individual and group perspective.<sup>29</sup>

The implementation of ADR with the above goals in mind, involved a number of potential advantages. In terms of the process, it was claimed that ADR could generate more satisfaction, engender a higher degree of perceived fairness, and provide a more amicable process that would allow the preservation or restoration of ongoing relationships for individual disputants and within communities.<sup>30</sup>

As for the substantive level, the shift from rights to interests produce different, more creative outcomes than those reached by courts could. The ADR process did not need to comport with legal norms and could reflect individual preferences or local norms. Also, because of the parties' active role in producing such agreements, they are thought to be more stable outcomes than those dictated by a judge.<sup>31</sup>

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27. See Menkel-Meadow, *Semi-Formal*, *supra* note 21, at 447–48 (listing such parameters as objective measures for the assessment of dispute resolution processes).

28. *Id.* at 447.

29. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 3 (1991) [hereinafter Menkel-Meadow, *Pursuing Settlement*] (describing the benefits of ADR, but noting its potential shortcomings in practice such as reduced fairness and justice); see also MENKEL-MEADOW ET AL., DISPUTE RESOLUTION, *supra* note 10, at 228 (explaining how mediation may help individuals better understand the opposing party's perspective); Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 211 (2004) (reporting on three experiments that analyzed the reasons for ADR preference including procedural and decisional control).

30. See *infra* notes 35–41 and accompanying text.

31. See *infra* notes 42–46 and accompanying text.

Both the procedural and substantive advantages offered through mediation—the principal ADR process institutionalized in the courts—are tied to mediation’s vision of justice: “justice from below” instead of “justice from above.”<sup>32</sup> Under such an alternative vision, parties’ interests rather than their rights occupy center stage, and the parties’ goal is to reach “win-win” resolutions that address both parties’ interests rather than win-lose decisions.<sup>33</sup> Moreover, such an approach allows parties a central role in voicing their desires and needs and in the decision making phase, which gives rise to a new understanding of the role of legal professionals as problem solvers.<sup>34</sup>

Mediation’s shift from “rights” to “interests,” and from an adversarial process to a relational one, has been particularly important in resolving conflict between parties with pre-existing relationships.<sup>35</sup> Adversarial litigation is infamous for driving parties towards extreme positions, escalating the degree of conflict, and over-simplifying the facts.<sup>36</sup> Through mediation, the parties could enhance their understanding of one another, allowing them to address the source of their problem and develop tools for communicating and problem-solving in the future.<sup>37</sup>

In addition, mediation proceedings have the potential to enhance parties’ perception of the fairness of the process and the legitimacy of

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32. Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 160 n.3 (2002).

33. See ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40–55 (1981) (directing that one should negotiate based on each party’s underlying interests, rather than positions, in order to reach an optimal outcome for both parties).

34. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 757–58 (1983) (noting how the problem-solving model can reach more optimal outcomes because advocates focus on actual objectives rather than assumed objectives).

35. See FISHER & URY, *supra* note 33, at 19–21 (explaining that negotiators must keep in mind that the opposing party is a human being with their own expectations and values); Hensler, *supra* note 19, at 190 (describing how mediation should be transformative, not outcome-based, giving the parties a greater understanding of themselves and the other party); see also Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 303–04 (2002) (stating that there is “great value to using non-adjudicative approaches in many situations”).

36. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post Modern, Multicultural World*, 38 WM. & MARY L. REV. 5, 17–18 (1996) [hereinafter Menkel-Meadow, *The Trouble with the Adversary System*] (describing the “dilemma of oppositional, binary thinking at trial” and how it potentially undermines the legitimacy of proceedings).

37. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION, *supra* note 10, at 228.

the bodies offering mediation. Research in the field of “procedural justice”<sup>38</sup> has shown that, in determining the fairness of dispute resolution processes, litigants attach a great deal of significance to the following factors: (1) whether they were given an opportunity to “tell their stories”; (2) whether the third party considered their views; (3) whether the third party “treated them in an even-handed and dignified manner”; and (4) whether the third party was impartial.<sup>39</sup> The significance of these factors on parties’ perception of fairness has proven to hold, regardless of whether a given party has prevailed with respect to the ultimate outcome, and has been found to color parties’ perception of the legitimacy of the body conducting the process.<sup>40</sup> While procedural justice can be realized in litigation, the reality of overburdened court proceedings can render informal mediation sessions a more likely process for exercising one’s voice and realizing one’s “day in court.”<sup>41</sup>

Beyond reducing friction between the parties and generating perceptions of fairness and legitimacy, the shift from rights to interests can also allow parties to devise resolutions that are more beneficial and

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38. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 93 (1988) (emphasizing the important role of procedural fairness judgments in determining individuals’ preference for specific dispute resolution procedures); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 67–68 (1975) (examining factors used to assess what procedures are utilized when resolving disputes, the effects both on those currently in dispute, as well as on those in the future); Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. OF LEGAL EDUC. 49, 53–54 (2004) (discussing the theories explaining why parties assign high significance to procedural justice).

39. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 817 (2001). Other studies mention additional, sometimes complementing elements, but the components described by Professor Welsh seem to be widely agreed upon.

40. See John M. Connely & William M. O’Barr, *Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure*, 51 LAW & CONTEMP. PROBS. 181, 184–88 (1998) (describing a prevailing litigant’s dissatisfied experience with a judge, and explaining that “paying attention to what litigants say rather than acting on assumptions about their objectives and concerns” will produce greater “litigant satisfaction”); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of their Experiences of the Civil Justice System*, 24 LAW & SOC’Y REV. 953, 957–60 (1990) (noting that social exchange and interdependence theories posit that outcome satisfaction is based on “personal standards or expectations” as opposed to an objective standard); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 382 (2006) (highlighting fairness as the cornerstone of an individual’s willingness to “defer to the decisions of authorities and to the rules created by institutions”).

41. This depends on the model of mediation employed. For a critique of some forms of mediation from a procedural justice perspective, see Welsh, *supra* note 39, at 838–58.

satisfactory to both sides. This occurs because civil legal remedies are typically monetary, which results either in a win-lose solution or a compromise in which courts award a sum that lies somewhere between what one side demanded and the other was willing to concede.<sup>42</sup> By uncovering the interests that underlie the legal positions parties have adopted, novel opportunities for creative solutions emerge, extending beyond a court's "limited remedial imagination."<sup>43</sup> The process through which parties uncover their interests and needs in mediation and brainstorm about possible solutions that address such interests and needs can generate more creative, tailored, and imaginative solutions.<sup>44</sup> Furthermore, mediated resolution may be more resilient because, as research has indicated, disputants are more likely to abide by the resolution if they have a role in shaping the agreement.<sup>45</sup>

In assessing ADR vis-à-vis the court option, the advantages for individual disputants were typically highlighted—namely the promise of a quicker, less expensive, more pleasant, flexible, and satisfactory process that could yield better and longer-lasting solutions.<sup>46</sup> Alongside these voices, there were also ADR proponents who adopted a broader perspective by emphasizing the opportunity provided by ADR—mainly mediation—for the empowerment of disadvantaged groups. These advocates of ADR focused on the ways in which the formal legal system was often an oppressive force for parties belonging to disempowered groups, and the courts were a site where foreign norms were employed.<sup>47</sup> Mediation, by contrast, offered members of such groups an opportunity to expand their problem-solving skills and to draw on local norms.<sup>48</sup> Interestingly, the broader group perspective

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42. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 10 (1986).

43. Menkel-Meadow, *Pursuing Settlement*, *supra* note 29, at 7. Critiques of court remedies were in fact part of a much broader criticism of litigation as a process that is adversarial and rule-oriented, instead of addressing parties' needs and interests. See Menkel-Meadow, *The Trouble with the Adversary System*, *supra* note 36, at 7, 15.

44. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982) (describing the advantages that mediation has over adversarial proceedings such as being more hospitable to individual circumstances).

45. See Lawrence H. Cooke, *Mediation: A Boon or a Bust?*, 28 N.Y. L. SCH. L. REV. 3, 12 (1983) (asserting that because mediation requires parties to shape the terms of the final agreement, parties tend to become personally bound to the resolution and respect the outcome).

46. *Id.*

47. See Hensler, *supra* note 19, at 170 (describing the "community justice movement," which embodies the belief that "formal legal institutions, including courts, are mechanisms for maintaining the power of elite groups").

48. *Id.* at 171.

was also at the heart of much of the criticism that would later be voiced against the growing privatization of justice, in particular its impact on minorities<sup>49</sup> and women.<sup>50</sup> These concerns remained pertinent in the 1990s with the growing institutionalization of ADR through the Civil Justice Reform Act of 1990<sup>51</sup> and the Dispute Resolution Act of 1998,<sup>52</sup> but were also pacified as ADR became an inherent part of the contemporary justice system.<sup>53</sup>

### B. *ADR and Access to Justice*

Parallel to the ADR movement and for many of the same reasons, an “access to justice” movement emerged, calling for equal access to the legal system, as well as just outcomes, both individually and socially.<sup>54</sup> The movement underscored the gap that exists between the legal system’s promise of equal justice and rule of law on the one hand and a reality in which certain disputants are disadvantaged in their ability to enter the system, employ legal procedures, and reach favorable legal outcomes on the other hand.<sup>55</sup> While its original call for action centered on legal aid reform, as a result of its focus on lowering the costs associated with litigation for litigants from a poor socio-economic background, the access to justice movement’s later agenda expanded to include other procedural avenues for making legal procedures

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49. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360 n.8 (1985) (arguing that delegalizing the legal process through ADR “increases the likelihood of prejudice against ethnic minorities of color”).

50. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1601 (1991) (arguing that mandatory mediation in divorce proceedings disadvantages women by coercing them to conform to societal norms while confronting an ex-spouse).

51. Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471–82 (2012)).

52. Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–58 (2012)).

53. See Menkel-Meadow, *Semi-Formal*, *supra* note 21, at 421 (outlining the legal sources of dispute resolution in the United States); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 609 (2005) (recounting Congress’s efforts to promote ADR by authorizing it or requiring it under certain statutes, including the Dispute Resolution Act); Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055, 1055–57 (1996) (discussing the rise of ADR through its implementation by federal agencies and consideration in the Federal Rules of Civil Procedure and local court rules).

54. See Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 182 (1978).

55. Sagit Mor, *With Justice and Access for All*, 39 CARDOZO L. REV. (forthcoming 2018) (manuscript at 2) (on file with authors).

simpler to initiate and use, such as small claims courts and class action.<sup>56</sup> Over the years, the access to justice movement came to view the institutionalization of ADR as a central component in realizing its goals: making courts easier to access and making court procedures and outcomes more just.<sup>57</sup>

Why would ADR processes be successful in reducing the various barriers to access that are associated with courts and enhancing access to justice? To answer this question, we need a better understanding of the meaning of access to justice and the nature of the barriers preventing such access. In a recent article, Professor Sagit Mor distinguishes between three levels of access, each of which is associated with different, and sometimes overlapping, types of barriers.<sup>58</sup> While Mor discusses these barriers in the context of disability, the terminology is relevant to the discussion of access to justice more generally and can be instrumental in exploring the ways in which the mediation process—the prominent ADR process adopted in courts—was expected to lower access barriers.

The first level of access Mor discusses is “access to the legal system” and the related “entry barriers.”<sup>59</sup> Such barriers include monetary impediments associated with court fees and having to retain a lawyer. Indeed, the costs of the legal process typically occupy center stage when discussing access and barriers, but Mor defines barriers relating to this realm of access more broadly to include additional formal, physical, and procedural barriers, such as rules regarding legal capacity of claimants or court buildings that are inaccessible to the disabled.<sup>60</sup>

Mediation was expected to increase access to the legal system both directly and indirectly. By redirecting some court cases to mediation, ADR could provide much-needed relief from traditional legal proceedings; mediation was informal, efficient, and inexpensive, thereby reducing the direct and indirect costs associated with the court option. While the desire to reduce costs was a concern for the entire system, as evidenced by the Pound Conference, the courts’ high costs present a particularly acute problem for disputants from a low socio-

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56. MAURO CAPPELLETTI & BRYANT GARTH, ACCESS TO JUSTICE: A WORLD SURVEY 21 (1978) (discussing the successive “waves” of approaches to access to justice problems).

57. *Id.* at 55–59; Mor, *supra* note 55 (manuscript at 27–29) (discussing the accessibility issues with legal proceedings, including the “structural, spatial, mental, and other process related barriers affected one’s ability to utilize the law”).

58. CAPPELLETTI & GARTH, *supra* note 56, at 21.

59. Mor, *supra* note 55 (manuscript at 4).

60. *Id.* (manuscript at 21).

economic background, a major concern for the access to justice movement.<sup>61</sup> As for other formal or physical barriers, the flexibility associated with mediation could allow parties to overcome legal limitations or to convene in accessible sites.

The second level of access Mor discusses is “access to law,” which refers to the legal process and to legal consciousness.<sup>62</sup> This level of access draws attention to a myriad of structural, cultural, and psychological barriers that constrain certain parties’ ability to make use of litigation even where no formal barrier exists.<sup>63</sup> Barriers that operate on the access to law realm include the geographic spread of courts between center and periphery and the availability of high quality translation and access to legal information.<sup>64</sup>

In these contexts, ADR seemed to promise reduced hardship. The informal, interest-based and non-adversarial nature of ADR could reduce psychological inhibitions, such as fear of exposure in open court.<sup>65</sup> In addition, the option of referring parties from court to local community-based mediation centers, whose establishment requires fewer resources, could improve the geographic reach of such services. Furthermore, a tailored ADR process in which the parties devise the applicable norms and outcomes reached could overcome both linguistic and cultural differences.<sup>66</sup> Finally, the shift from rights to interests and needs in mediation could make less stark the disparities between parties in terms of legal information and strategy.<sup>67</sup>

The third, and final, level of access that Mor references is “access to justice,” a barrier that stands in the way of “just outcomes” and involves the structure and content of legal rules and decisions.<sup>68</sup> Included in this

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61. See Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1788 (2000) (discussing the challenges low-income civil litigants face and the dearth of resources available to help them).

62. Mor, *supra* note 55 (manuscript at 21).

63. *Id.*

64. *Id.*

65. See Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals*, 44 *UCLA L. REV.* 1871, 1873 (1997) [hereinafter Menkel-Meadow, *Conflicts Among Dispute Professionals*] (stating that “ADR provides a place in which disputes can be settled privately, without embarrassing the parties”).

66. See CATHERINE BELL & DAVID KAHANE, *INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS* 313 (2013) (noting that ADR can be more culturally-sensitive and less hierarchical than litigation).

67. See Menkel-Meadow, *Conflicts Among Dispute Professionals*, *supra* note 65, at 1872 (emphasizing the differences between a rights-based litigation process and an interest-based mediation).

68. Mor, *supra* note 55 (manuscript at 22).

category are those instances in which the grievances suffered by certain individuals and groups have not been recognized as legal wrongs.<sup>69</sup> Also included in these types of biases are the various realms in which “repeat players” have advantages over “one-shotters”<sup>70</sup> in litigation. Repeat players have a deep familiarity with the system and can use the system to create rules that play to their advantage in future cases.<sup>71</sup>

In terms of outcomes and repeat player advantages, mediation, because it relies on interests rather than rights, is not supposed to confer benefits on those who have more power to shape legal endowments, have prior experience, and are expected to have future dealings with the legal system.<sup>72</sup> While some mediated outcomes have objective value, others can be difficult to measure and compare. For example, what value do we assign to an apology or a promise to communicate with one another in a respectful manner?

In all the realms described above, the institutionalization of ADR was viewed as a promising route for enhancing access to justice. The reality of institutionalized ADR, however, proved to be more complex, as evidenced by the heated debate that accompanied the adoption of ADR.<sup>73</sup> One major line of attack against ADR, most prominently associated with Professor Owen Fiss, was premised on the view that courts were a public body, endowed with the authority for resolving legal disputes, and such authority should not be delegated to a private, alternative forum.<sup>74</sup> When courts refer cases to mediation or encourage parties to settle, they are draining the lifeline that allows

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69. *See id.* (explaining that barriers may prevent interested parties from advocating for laws protecting their interests).

70. Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95, 97–98 (1974) (explaining that “one-shotters” are first-time disputants who are disadvantaged by their unfamiliarity with courts’ processes).

71. For an analysis of the structural advantages repeat players have over one-shotters, *see id.* at 124–25.

72. For an exploration of the ways in which ADR processes can nonetheless produce advantages for repeat players, *see generally* Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Justice Systems?: Repeat Players in ADR*, 15 *OHIO ST. J. DISP. RESOL.* 19 (1999).

73. *See supra* notes 51–55 and accompanying text.

74. Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1075 (1984) (arguing that ADR should not be institutionalized because “[c]onsent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done”); *see also* Menkel-Meadow, *Semi-Formal, supra* note 21, at 419 (explaining the access to justice issues associated with privatizing justice).

courts to develop the law: create and revise precedents, declare societal values, and provide a balanced venue for airing disputes between litigants.<sup>75</sup>

Other critics emphasized the dangers that ADR processes could pose for particular groups of disputants, such as women, minorities, and consumers, vis-à-vis their more powerful, wealthy, and experienced counterparts.<sup>76</sup> These groups were precisely the ones that ADR was supposed to increase access to justice for, and the concern that ADR was offering members of these groups second-class justice was a grave one. ADR presented a challenge for members of disadvantaged groups precisely because of the qualities that made such processes more appealing to them than litigation: their confidentiality and flexibility.<sup>77</sup> These qualities gave the impression that rights were irrelevant and parties could forego legal representation when in fact ADR processes were conducted “in the shadow of the law” and therefore knowing one’s rights often proved important, providing those who were already more powerful with an advantage.<sup>78</sup> The veil of secrecy that surrounded ADR made it ever more difficult to ensure quality control, eradicate bias and guarantee fair outcomes.<sup>79</sup> The focus on needs and interests in this closed setting was said to depoliticize potential claims, such as discrimination, by transforming them into private misunderstandings that grew out of “miscommunication.”<sup>80</sup>

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75. Fiss, *supra* note 74, at 1075–76.

76. See Delgado et al., *supra* note 49, at 1360–61 (arguing that ADR may reinforce class-based prejudices); Grillo, *supra* note 50, at 1556–57 (discussing the ways in which mandatory divorce mediation can be particularly harmful to women); Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1002–03 (1979) (highlighting the issues facing the processing of consumer complaints).

77. See Orna Rabinovich-Einy, *Technology’s Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253, 263–65 (2006) [hereinafter Rabinovich-Einy, *Technology’s Impact*] (describing this dynamic as the accountability dilemma in mediation).

78. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968, 997 (1979).

79. See Rabinovich-Einy, *Technology’s Impact*, *supra* note 77, at 263–65 (positing that “two of mediation’s core features—confidentiality and flexibility—have stood in the way of establishing effective formal and informal accountability mechanisms”).

80. See RICHARD ABEL, *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 283 (1982) (describing the effectiveness of informal processes in neutralizing people’s instincts of antagonism and vindication in the adversarial process); CHRISTINE HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* 44–45 (1985); Sara Cobb, *The Domestication of Violence in Mediation*, 31 LAW & SOC’Y REV. 397, 411–12 (1997); Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497, 514 (1993); Hensler, *supra* note 19, at 196; Laura

In essence, what ADR critics were claiming was that enhanced “access” came at a cost to “justice,” as a result of the inherent trade-off that exists between “fairness”—consistency and other values achieved through due process protections—and “efficiency”—realized through flexible and tailored processes of ADR.<sup>81</sup>

Regardless of the critiques, institutionalization of ADR processes proceeded full steam ahead in a wide range of arenas, including courts and other public bodies, as well as communities, educational settings and workplace organizations.<sup>82</sup> Despite the ongoing reference to ADR as informal processes and litigation as the formal avenue for resolving disputes, the sharp dichotomy between these processes, to the extent one ever existed, was blurred and the new court emerged.

### C. *The New Court*

The growth of ADR procedures challenged the traditional understanding of access to justice. As described above, with the spread of mediation in courts there was a different vision of justice, one in which meeting individual interests and needs was prioritized over the protection of rights and the establishment of standards. Consensual resolutions became preferred over judicial decisions.<sup>83</sup> Recognizing the value of ADR, courts referred many cases to mediation, and

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Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 11 (1993).

81. See DEBORAH L. RHODE, ACCESS TO JUSTICE 86 (2004) (examining the shortcomings of certain ADR efforts and expressing the efficiency-fairness trade-off in such questions as “[h]ow can informal tribunals provide adequate procedural protections and prevent the exploitation or coercion of weaker, unrepresented parties?”). Indeed, the trade-off conception is so strong that it continues to color the discussion on ODR. See Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 MICH. J. INT’L L. 485, 487 (2014) (arguing that the trade-off of efficiency at the sake of justice has given countries pause in using ODR). The writing on ODR has also assumed the existence of a trade-off. See JULIA HÖRNLE, CROSS-BORDER INTERNET DISPUTE RESOLUTION 17 (2009) (discussing the conflict between effectiveness and due process in ODR); ARNO R. LODDER & JOHN ZELEZNIKOW, ENHANCED DISPUTE RESOLUTION THROUGH THE USE OF INFORMATION TECHNOLOGY 21 (2010) (stating that mediation may not provide all the same procedural safeguards as litigation but is cheaper and faster).

82. Menkel-Meadow, *Semi-Formal*, *supra* note 21, at 425.

83. See Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL’Y 37, 42–43 (2002) (arguing that the outcomes of consensus decisions are “qualitatively better” than the outcomes dictated by third parties).

litigation became the exception.<sup>84</sup> Nevertheless, court decisions maintained their influence as mediators and arbitrators crafted their decisions and resolutions in accordance with legal endowments.<sup>85</sup>

As described above, ADR processes were not always successful in realizing swifter, cheaper, and less adversarial dispute resolution processes. While ADR sought to reduce access barriers, it could not eliminate them because parties still had to meet, occupy space, and employ a third party whose time and capacity were limited.<sup>86</sup> In addition, as ADR processes were assimilated in courts and ADR techniques were being employed by judges,<sup>87</sup> the courts “co-opted” mediation.<sup>88</sup> The reality of court-annexed mediation was very different than the promise for a context-specific tailored process that maximized party autonomy, participation, and control.<sup>89</sup> Studies have shown that mediators tend to be evaluative while providing assessments of the likely outcome of litigation and the optimal resolution of the dispute, and lawyers tend to play a central role, at the expense of parties who are pushed aside and oftentimes not even present.<sup>90</sup>

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84. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 514–15, 517 (2004) (reasoning that the significant decline in trials is caused by the prevailing use of alternative forums used for dispute resolution because of their ease of access—no court filings required—and lower costs, among other factors).

85. Mnookin & Kornhauser, *supra* note 78, at 966.

86. For a discussion about the barriers to the legal system see Mor, *supra* note 55 (manuscript at 21–23).

87. See Michal Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice*, 16 CARDOZO J. CONFLICT RESOL. 879, 898–905 (2014) (discussing various forms of judicial conflict resolution); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982) (examining the shift of federal judges away from disengagement and impartiality in decision making toward a more managerial role).

88. See Menkel-Meadow, *Semi-Formal*, *supra* note 21, at 419 (explaining that ADR was supposed to challenge “formalistic and legalistic approaches” characteristic of court proceedings, and has instead become institutionalized, imposing similar barriers to access to justice).

89. See Welsh, *supra* note 39, at 788–89 (opining that the reality of ADR does not match the ideals exposed by its proponents).

90. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION, *supra* note 10, at 406–09 (addressing the various implications of mandatory mediation on the nature of the process); see also McAdoo & Welsh, *supra* note 10, at 407–08 (describing the institutionalization of ADR in Minnesota and how it is mostly “lawyer-driven”); Jacqueline Nolan-Haley, *supra* note 10, at 73–89 (examining the increasingly prominent role lawyers have in mediation); Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873, 874 (2012) (describing mediation’s shift to resembling the adversarial nature of litigation).

Similarly, courts were influenced by the flexibility and informality of ADR, echoing concerns about their preference of efficiency over fairness, and access over justice. During the last decades of the twentieth century, the judicial practice began to shift with the rise of what is known as “managerial judging” and the explicit incentives provided to judges to promote settlement by either referring cases to ADR or advancing settlement by the judges themselves.<sup>91</sup> The role of judges was altered dramatically from their perception as passive and distant figures to actors who take an active part in the management of the proceedings.<sup>92</sup> Such procedural activism found expression in the exercise of new authority in the preliminary stages of trial and in judges’ attempts to render the process more efficient, both by promoting settlement and in their interpretation of the various procedural rules.<sup>93</sup>

Critics of managerial judging claim that such activism bars the parties from raising substantive claims and shelters judges from supervision and intervention.<sup>94</sup> Despite critiques, these practices have become widespread and are an inherent part of the contemporary judicial landscape, extending beyond pre-trial to the trial itself.<sup>95</sup>

In recent years, managerial judging techniques have been absorbed into the broader category of “judicial dispute resolution,”<sup>96</sup> or “judicial conflict resolution.”<sup>97</sup> Under this novel understanding of the judicial role, judges are expected to perform a myriad of dispute resolution functions, including judicial negotiation, mediation, arbitration, problem solving, dialogue-facilitation, restorative justice, and dispute system design.<sup>98</sup> While these roles occupy most of what judges do in practice, they have yet to be studied and conceptualized.

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91. Resnik, *supra* note 87, at 378.

92. *See id.* at 381–86 (recounting the historical role of judges but noting that now “judges who passively await parties’ pretrial request are out of step with colleagues who have implemented [ADR] . . . procedures”).

93. *See id.* at 385.

94. E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 314–18 (1986); *see also* Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1270 (2010).

95. Elliott, *supra* note 94, at 314; Thornburg, *supra* note 94, at 1263.

96. TANIA SOURDIN & ARCHIE ZARISKI, *THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION 2* (2013) (defining judicial dispute resolution as the process of judges encouraging and actively engaging in settlement negotiations).

97. Alberstein, *supra* note 87, at 881 (defining judicial conflict resolution as a combination of judicial authority and consensual processes).

98. *Id.*

The changes described in the judicial role have heightened concerns over inconsistent application of rules across cases, judicial neutrality, reasoned decision-making, documentation, and the availability of effective monitoring by appellate courts.<sup>99</sup> These concerns echo some of the worries raised over the adoption of ADR and their impact on access to justice, explored above. Indeed, the adoption of ADR in courts has led to the erosion of the formal-informal distinction, and much of what transpires in courts has become “semi-formal,”<sup>100</sup> with efficiency being the primary driving force for settlement-encouragement and the adoption of expedited flexible procedures, both within and outside the litigation route.<sup>101</sup>

Similarly, the initial impetus for the adoption of technology in both formal and informal dispute resolution was to enhance efficiency, much in the same direction previous procedural reforms have taken.<sup>102</sup> Nevertheless, the impact of digital technology on the efficiency-fairness trade-off has taken a different direction, creating new opportunities for enhancing access to justice through court ODR in what we refer to as the “new new courts.”

## II. ACCESS TO JUSTICE, ODR, AND THE NEW NEW COURT

In this Part we describe the impact digital technology has had on the court system in terms of access to justice. While the institution of ADR in courts gave rise to the new courts, the incorporation of ODR into court proceedings is giving rise to the new new courts. The qualities of digital technology—mainly the use of algorithms and the availability of Big Data—are re-shaping court proceedings in a direction that could mitigate the efficiency-fairness trade-off that has colored the debate over the new courts, and enhance access to justice. At the same time, it is precisely the reliance on algorithms and the use of Big Data that create new challenges to the fairness and integrity of the justice system.

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99. Thornburg, *supra* note 94, *passim*.

100. Menkel-Meadow, *Semi-Formal*, *supra* note 21, at 425 (explaining that “semi-formal” implies a hybrid or mixture of processes).

101. *Id.* at 430.

102. See Orna Rabinovich-Einy, *Beyond Efficiency: The Transformation of Courts Through Technology*, 12 UCLA J.L. & TECH. 1, 4–5 (2008); Yamamoto, *supra* note 53, at 1056–57 (explaining that increased use of ADR was just one reform by which to make courts more efficient).

A. *Sources of the New New Court*

Courts are conservative entities that are resistant to change. In part, such resistance is due to their role as a body whose mandate is to regulate the pace of change in society and, in that respect, have always been slow to change.<sup>103</sup> The introduction of digital technology into the courtroom and the prospects of adopting ODR in courts present an additional layer of challenges to courts' operations. Much of what we have associated with the functioning of courts—legal documents, control over specialized knowledge, and precedent—is a product of the print-era.<sup>104</sup> The qualities of digital communication and the spread of internet communication are undermining some of the most entrenched practices associated with courts, as well as the authority of lawyers and judges.<sup>105</sup>

Despite its commitment to stability, the law has undergone significant change in recent decades, much of which is attributable to the impact of digital technology. While paper is still in use, courts and law firms are now computerized, online filing is widespread, lawyers rely on online databases for legal research, email is a common means of communication between lawyers and clients, and the courtroom allows for the display of digital evidence, videos, and the like.<sup>106</sup> While these changes are significant, it is important to recognize that they were aimed at improving efficiency and dealing with budgetary

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103. M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 5–6 (1989).

104. *See id.* at 17–48 (discussing how technology is reshaping the legal field and challenging long-standing values such as concern with the past).

105. *See id.* at 198–226 (arguing that the increased access to legal information undermines some of the power that lawyer and courts traditionally held); RICHARD SUSSKIND & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS* 68 (2015) (asserting that technology is transforming the legal profession and changing the ways in which lawyers work). Of course, there are additional factors aside from digital technology that are contributing to the erosion of the authority of professionals, as the authors of this book eloquently explain.

106. *See* CHIEF JUSTICE JOHN G. ROBERTS, JR., 2014 YEAR-END REPORT ON THE JUDICIARY 4–5 (2014), <https://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf> (noting that courts implement technologies that “advance their primary goal of fairly and efficiently adjudicating cases through the application of law”); ADMIN. OFFICE OF THE U.S. COURTS, FISCAL YEAR 2017 UPDATE: LONG RANGE PLAN FOR INFORMATION TECHNOLOGY IN THE FEDERAL JUDICIARY 2–4 (2016), [http://www.uscourts.gov/sites/default/files/2017-it-long-range-plan\\_0.pdf](http://www.uscourts.gov/sites/default/files/2017-it-long-range-plan_0.pdf) (reporting the technological advances of the federal courts, including individual court websites and e-filing and planned future upgrades).

constraints, rather than re-imagining the litigation process and the role of courts.<sup>107</sup> Under such a view, technology is only a means that allows courts to process more cases in less time and at lower costs, a rather narrow understanding of the ways in which digital technology could enhance access to justice. As we explain below, this view has evolved over time. The adoption of technology in courts has gone through several phases, reflecting changes in both the level of sophistication of available technology and the societal views and preferences towards the use of digital technology.

Initially, technology came into the courtroom as part of an internal-bureaucratic evolution in work practices, much like the computerization of other workplaces and offices outside the legal realm.<sup>108</sup> Later, as online filing was introduced, court decisions were being published online, and court websites became an important source of information. Ultimately, lawyers and their clients came to see digital technology as an integral part of the legal landscape.<sup>109</sup>

While court websites have existed for some time, the approach towards their configuration has changed. In the past, they were seen primarily as a vehicle for conveying large amounts of general information; for example, court websites could cover court procedures, the law, rights and remedies, defenses, and the availability of legal aid.<sup>110</sup> While the online display of such information increased its accessibility, such improvement proved mild.<sup>111</sup> The distribution of large quantities of unspecific information that was not tailored to the specifics of a particular case was insufficient in easing the difficulties

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107. RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 84–91 (2013) [hereinafter SUSSKIND, *TOMORROW'S LAWYERS*] (discussing the impediments to judicial access in the United Kingdom and how the technological advances are not making access much easier).

108. Also referred to as “e-working.” See *id.* at 94–95; Rabinovich-Einy, *Beyond Efficiency*, *supra* note 102, at 34–35.

109. See Patrick Carlson, *The Must-Have Legal Technology to Start a Law Firm in 2016*, LAW TECH. TODAY (Apr. 7, 2016), <http://www.lawtechnologytoday.org/2016/04/legal-technology-2016> (proclaiming that technology enables law firms to connect more personally with potential clients and take advantage of a more tech-savvy society).

110. See, e.g., *Small Claims Court Procedures*, VA.'S JUD. SYS., [http://www.courts.state.va.us/resources/small\\_claims\\_court\\_procedures.pdf](http://www.courts.state.va.us/resources/small_claims_court_procedures.pdf) (outlining the process for bringing a claim); see also Donald F. Norris & Christopher G. Reddick, *Local E-Government in the United States: Transformation or Incremental Change?*, 73 PUB. ADMIN. REV. 165, 165 (2013) (examining the trajectory of court internet presence and comparing it to early projections of how such presence would unfold).

111. *Id.*

parties faced in their particular cases; it was especially difficult for pro se disputants to navigate their way through the system.<sup>112</sup>

As technology advanced, court websites, legal aid websites, and software shifted from information provision to information processing to allow platforms to provide parties with tailored legal information that could guide them in handling their individual cases.<sup>113</sup> Various courts and legal aid bodies re-designed their sites, incorporating such tools as interactive questionnaires, podcasts, and videos.<sup>114</sup> Legal aid organizations have also used a variety of software tools, such as “remote assistance,” to help self-represented parties.<sup>115</sup> For example, A2J Author, designed by the Chicago-Kent College of Law, and the Interactive Community Assistance Network (I-CAN!), developed by the nonprofit Legal Aid Society of Orange County in partnership with the Superior Court of California in Orange County, are both examples of impressive legal-aid driven tools.<sup>116</sup> Both programs use interactive software that extracts information from the parties to refer them to relevant, individualized, and instructive legal information.<sup>117</sup>

In some instances, we are beginning to see ODR introduced into the remote assistance landscape. ODR mechanisms first surfaced as online substitutes for ADR processes—such as negotiation, mediation, and arbitration—in those cases in which courts and ADR were unavailable, too costly, or ineffective.<sup>118</sup> Over time, more and more dispute types became candidates for ODR and the assumption that parties should address their disputes face-to-face was relaxed.<sup>119</sup>

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112. James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 256 (2012).

113. *Id.* at 248.

114. *Id.* at 247–48.

115. *See id.* at 249 (noting that “remote assistance” services include instant messaging programs or other live chatting services, which connect self-represented individuals with trained specialists).

116. *See* Ronald W. Staudt, *All the Wild Possibilities: Technology that Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117, 1129–30 (2009) (discussing the origins of A2J Author); *Interactive Community Assistance Network (I-CAN!)*, SUPERIOR CT. OF ORANGE COUNTY 1, [http://www.courts.ca.gov/documents/KlepsBrief\\_ICAN.pdf](http://www.courts.ca.gov/documents/KlepsBrief_ICAN.pdf) (last visited Oct. 23, 2017) (explaining that I-CAN! was developed to help self-represented litigants file court documents).

117. *See* Staudt, *supra* note 116, at 1123 (providing an overview of the function of the Legal Service Corporation’s Technology Initiative Grants program).

118. *See* Orna Rabinovich-Einy & Ethan Katsh, *Technology and the Future of Dispute Systems Design*, 17 HARV. NEGOT. L. REV. 151, 169–77 (2012) (providing examples of early adopters of ODR including eBay and SquareTrade).

119. *Id.* at 182.

This change was largely a result of developing internet communications, with the shift from personal computers to cell phones and the growth of social networks.<sup>120</sup> Consequently, online communication could take place between friends, acquaintances, or strangers, regardless of physical distance. With online communications becoming an adequate substitute for offline communications and the incorporation of digital technology in the courts as described above, it is unsurprising that ODR processes are being employed by courts and replacing traditional face-to-face court proceedings in certain contexts.

While the adoption of ODR processes may seem like an extension of existing court operations, merely improving courts' convenience and accessibility, it is our contention that the adoption of full-fledged ODR systems could transform courts as we know them. Courts will shift from institutions that rely on physical presence and geography; employ human decision-making; and resolve individual cases as a channel for enforcing and developing the law, to ones that increasingly rely on digital communication, employ algorithms, and prevent disputes from arising as a means of enforcing existing norms and establishing the need for new law.

These shifts have the potential to overcome the efficiency-fairness trade-off that colored the institutionalization of ADR and the emergence of the new court and, therefore, could enhance access to justice dramatically. The above shifts also present new challenges and dangers that could jeopardize the just resolution and prevention of disputes.

This Section will explore some of the new new courts that are already operating or are in the making as a first step in considering their impact on access to justice as compared to the new courts. Further, this Section surveys early ODR initiatives that have led to the current ODR systems.

#### *B. New New Courts in Action*

Courts introduced early ODR initiatives over a decade ago and focused mainly on the added efficiencies associated with processing a case online.<sup>121</sup> The initiatives targeted simple, low-value disputes or disputes in which geographical distance has made the prospect of

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120. See Charles Arthur, *How the Smartphone Is Killing the PC*, GUARDIAN (June 5, 2011, 3:30 PM), <https://www.theguardian.com/technology/2011/jun/05/smartphones-killing-pc>.

121. See Orna Rabinovich-Einy, *Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age*, 7 VA. J.L. & TECH. 4, 35 (2002).

online interaction appealing. Because ODR processes take place exclusively online, asynchronously, and typically without legal representation, they reduce legal costs and the length of proceedings as compared to in-court proceedings.<sup>122</sup>

There are several examples of what could be viewed as a first-generation court ODR, the adoption of online processes for discrete, simple disputes that rely on online written communications with very little data processing and algorithmic intervention. One example is the Australian eCourtroom launched in February 2001, which allowed for online document and evidence submission, email exchanges, and court orders.<sup>123</sup> Online courts reduced the need for face-to-face hearings, as well as the length of those hearings conducted,<sup>124</sup> allowing the court to deal more effectively with complex, document-heavy cases and with cases in which parties were located at a distance.<sup>125</sup>

Another example is “Money Claim Online,” a process related to monetary claims, which has been an available tool in the United Kingdom for over a decade.<sup>126</sup> Parties can execute their claims entirely online, unless the defendant files a counterclaim in which case the claim is resolved through traditional means.<sup>127</sup> This process is widely used and has been successful.<sup>128</sup>

The online process in both examples merely substitutes for the face-to-face appearances in court without changing the nature of the

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122. The efficiencies associated with ADR, described earlier in this Article, are even more pronounced in ODR proceedings because of this increased flexibility. *See id.* at 30–32 (discussing the advantages of ODR over traditional types of mediation); *see also supra* notes 27–28 and accompanying text.

123. *See Online Services: eCourtroom*, FED. CT. AUSTL., <http://www.fedcourt.gov.au/online-services/ecourtroom> (last visited Oct. 23, 2017).

124. SUSSKIND, TOMORROW’S LAWYERS, *supra* note 107, at 107. The eCourtroom is used to address various types of disputes, including native title claims.

125. Brian Tamberlin, *Online Dispute Resolution and the Courts*, THIRD ANN. UN F. ONLINE DISP. RESOL. 387 (July 2004). Some Singapore courts also offer an email-based online mediation process (“e-Alternative Dispute Resolution”) that is used specifically for e-commerce-related disputes wherein court action has not yet been initiated. Nicolas W. Vermeys & Karim Benyekhlef, *ODR and the Courts*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 295, 304 (Mohamed S. Abdel Wahab et al. eds., 2012).

126. *See Vermeys & Benyekhlef, supra* note 125, at 302–03 (“Money Claim Online allows claimants and defendants to use online forms to settle a money claim rather than incurring the costs associated with a court case.”).

127. *Id.* at 303.

128. *Id.*; *see also* SUSSKIND, TOMORROW’S LAWYERS, *supra* note 107, at 102 (noting that Money Claim Online handles roughly 60,000 claims a year).

process conducted or the values and goals promoted through such a process. In some of the more advanced, recently launched ODR programs, the role of technology is understood more richly by embracing the unique qualities of digital technology, the use of algorithms and data to re-design court processes, thereby offering a novel vision of the justice system.

### 1. *The Civil Resolution Tribunal*

British Columbia is the first jurisdiction to have an operational online tribunal. The tribunal, called the Civil Resolution Tribunal (CRT), was established under law and has been in operation since July 2016.<sup>129</sup> The CRT currently handles civil monetary claims of up to Can\$5,000 and certain “strata,” or neighbor-related, claims.<sup>130</sup> Strata disputes have been processed by the CRT since its launch, and the small claims, up to Can\$5,000, since June 2017.<sup>131</sup>

The CRT went through extensive planning, development, and testing stages before being launched last year, requiring not only technical know-how and software adjustments, but also provoking political challenges because of the CRT’s mandate. The CRT was adopted as a mandatory, lawyer-free (with some exceptions) system for all claims falling under the tribunal’s jurisdiction.<sup>132</sup> It is available 24/7, accessible via computer or smartphone for a low fee, and is premised on a collaborative, non-adversarial approach.<sup>133</sup> Furthermore, the entire process is quick, on average lasting sixty to ninety days.<sup>134</sup> Lawyers and professional associations perceived this new scheme as a significant challenge, so additional consultations with relevant constituencies were necessary prior to CRT’s launch.<sup>135</sup>

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129. CIVIL RESOLUTION TRIBUNAL, *supra* note 4.

130. *Id.*

131. *Id.*; *Small Claims Under \$5000 Coming to the CRT on June 1, 2017*, CIV. RESOL. TRIBUNAL (Apr. 18, 2017), <https://civilresolutionbc.ca/small-claims-5000-coming-crt-june-1-2017>.

132. Interview with Darin Thompson, B.C. Ministry of Justice, & Shannon Salter, Chair of the Civil Resolution Tribunal (Sept. 10, 2015) (on file with authors).

133. Civil Resolution Tribunal Act, B.C. GOV’T <http://www.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/civil-resolution-tribunal-act> (last visited on Oct. 23, 2017).

134. See Lasia Kretzel, *CRT Reveals New Tool to Resolve Strata and Small Claims Disputes*, NEWS 1130 (July 15, 2016, 3:19 PM), <http://www.news1130.com/2016/07/15/tool-to-resolve-strata-small-distputes> (describing the CRT as new tool to make dispute resolution easier).

135. See Jean Sorensen, *B.C. Lawyers Worried About Exclusion from New Civil Resolution Tribunal*, CANADIAN LAW. (Sept. 3, 2013), <http://www.canadianlawyermag.com/>

The system itself is comprised of four main stages. The first involves “information, problem diagnosis, and self-help.”<sup>136</sup> This stage allows the parties to anonymously explore their options and have a better understanding of their legal case—its merit, its strengths and weaknesses, and available courses of action. To that end, the parties use the “Solution Explorer,” a user-friendly stage that provides tailored legal information, based on the user’s answers to interactive questions, on whether they have a valid claim and what legal route they can pursue in addition to tools, template letters, and other resources.<sup>137</sup>

If parties decide to pursue their claim, then the claim is seamlessly transferred to the CRT and the parties can proceed to the second stage of “party-to-party negotiation,” which is an automated negotiation through ODR process.<sup>138</sup> In this stage, the software presents the parties with pre-structured language describing their problem and highlighting possible solutions.<sup>139</sup>

The negotiation phase is a relatively brief one and if it does not result in an agreement, the parties are directed to a third “case management” stage, which involves third party online facilitation, and opens several options.<sup>140</sup> Parties can have a synchronous facilitation in which the third party’s assistance is rendered in real time or they can communicate asynchronously.<sup>141</sup> The facilitator is not limited to a purely facilitative role and may provide parties with an evaluation of their legal case in an attempt to bring the parties closer together through online interaction or help them prepare for a hearing.<sup>142</sup> Most claims will be resolved at this stage, but those that are not will continue to the fourth and final stage, referred to as adjudication.<sup>143</sup>

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legalfeeds/author/mallory-hendry/bc-lawyers-worried-about-exclusion-from-new-civil-resolution-tribunal-5311 (noting the concern amongst lawyers about whether an individual’s rights will be adequately represented by the CRT).

136. Ashton Butler, *BC’s Civil Resolution Tribunal: A Case for Expanding Online Dispute Resolution in Canada*, SASKATCHEWAN L. REV. (May 31, 2017), <http://sasklawreview.ca/comment/bcs-civil-resolution-tribunal-a-case-for-expanding-online-dispute-resolution-in-canada.php>.

137. *Id.*; Interview with Darin Thompson & Shannon Salter, *supra* note 132.

138. Butler, *supra* note 136.

139. Interview with Darin Thompson & Shannon Salter, *supra* note 132.

140. *See* Butler, *supra* note 136 (highlighting the flexibility of the case management stage).

141. *Id.*

142. *Id.*

143. *Id.*

During adjudication, the hearing may take place via written submissions, telephone, or video conferencing.<sup>144</sup> The CRT platform provides the parties with a reasoned written decision, which is enforceable as a court order and is subject to a bifurcated appeal process: small claims orders are subject to an appeal *de novo*, and strata claims can be appealed only on limited grounds.<sup>145</sup>

Since its launch, the CRT has handled over 7500 strata claims.<sup>146</sup> They are committed to ongoing learning and improvement. The CRT team constantly seeks feedback from both satisfied and unsatisfied users to improve the process, identify problems, and replicate successful elements.<sup>147</sup> They collect data in a myriad of ways available only because of the CRT's online nature: active user input given through rating and ranking, open text boxes, ex-post feedback, and analysis of dispute resolution data.<sup>148</sup> Indeed, CRT developers have devoted significant efforts and resources to the development and refinement of categorizations of claims and defenses in order to allow for meaningful use of the data. Such data helps to improve the CRT and the diagnosis phase, and, perhaps more importantly, helps prevent future claims.<sup>149</sup>

As the CRT team has recognized, learning from data and prevention of problems need not be limited to the improvement of the system itself, but could be viewed as a broader goal of the legal system.<sup>150</sup> As use of online systems expands and data is stored and studied more extensively by courts, they will be able to detect, through such indicators as spikes in particular claims, that there is a regulatory gap or a need for better enforcement of existing laws in certain areas.<sup>151</sup> In this way, dispute resolution data collected in courts can be used to prevent future disputes from occurring.

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144. *Id.*

145. Interview with Darin Thompson & Shannon Salter, *supra* note 132.

146. Tanja Rostek, *Happy First Birthday, Strata Solution Explorer!*, CIV. RESOL. TRIBUNAL (June 30, 2017), <https://civilresolutionbc.ca/happy-first-birthday-strata-solution-explorer>.

147. *See id.* (“Every organization says ‘We Value Your Feedback.’ But at the CRT, we not only value your feedback, we encourage it.”).

148. *Id.*; Interview with Darin Thompson & Shannon Salter, *supra* note 132.

149. Interview with Darin Thompson & Shannon Salter, *supra* note 132.

150. *Id.*

151. *See* ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES 167 (2017) [hereinafter KATSH & RABINOVICH-EINY, DIGITAL JUSTICE] (explaining how the identification of such patterns can generate better rules and/or more effective enforcement and thereby prevent future claims from arising).

## 2. *Rechtwijzer*

The Hague Institute for the Internalization of Law (“Hiil”) and Modria (the leading designer of ODR services) developed *Rechtwijzer* as an ODR platform to specifically address divorce and neighbor disputes.<sup>152</sup> It was launched in 2014, but its operation was recently discontinued due to a lack of financial viability, low usage, and difficulties in collaborating with the justice system.<sup>153</sup>

This discontinuance was a major disappointment for supporters of ODR, as the *Rechtwijzer* platform won high acclaim in wide circles and its demise came as a great surprise to many at a time when court ODR seemed to be on the rise.<sup>154</sup> A new venture called Justice42, however, which draws on the *Rechtwijzer* platform and its lessons, is expected to launch in collaboration with a Dutch IT firm, and will hopefully benefit from referrals by Dutch legal aid—although Dutch legal aid will not be involved as a partner.<sup>155</sup>

The *Rechtwijzer* system was offered as a voluntary service to divorcing couples who were seeking a collaborative and amicable avenue for the dissolution of their marriage.<sup>156</sup> Like some of the other ODR processes it was also based on an initial diagnosis phase and intake for each of the parties.<sup>157</sup>

Following these preliminary stages, the parties conducted a direct online negotiation process on the relevant topics that arose in their separation, such as custody and visitation, housing arrangement, property division, alimony, and future communication.<sup>158</sup>

Negotiation on the platform is interest-based, but also ensures parties’ rights are protected by providing relevant legal information, such as providing alimony calculation tools that are compliant with

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152. *Rechtwijzer: Divorce and Separation*, Hiil, <http://www.hiil.org/project/rechtwijzer-divorce-separation-netherlands> (last visited Oct. 23, 2017).

153. See Maurits Barendrecht, *Rechtwijzer: Why Online Supported Dispute Resolution Is Hard to Implement*, Hiil (June 21, 2017), <http://www.hiil.org/insight/rechtwijzer-why-online-supporte-dispute-resolution-is-hard-to-implement>; Roger Smith, *Goodbye Rechtwijzer: Hello, Justice42*, LAW, TECH. & ACCESS TO JUST. (Mar. 31, 2017), <https://law-tech-a2j.org/advice/goodbye-rechtwijzer-hello-justice42> (noting that these endeavors are too expensive for governments to fund and that developing a “mutually reinforcing partnership” with traditional justice systems to expand the digital platform is difficult).

154. Barendrecht, *supra* note 153.

155. Smith, *supra* note 153.

156. *Id.*

157. Barendrecht, *supra* note 153.

158. *Id.*

legal rules and a neutral lawyer to evaluate any agreement reached by the parties during the negotiation process.<sup>159</sup> Interestingly, Rechtwijzer is able to realize what has been a rather elusive goal in traditional dispute resolution: devising non-adversarial interest-based agreements while balancing power between the parties.

HiiL and Modria charged the Dutch legal aid board a setup fee and a fee-per-user, and users were charged a fixed modest fee, subsidized for those eligible for legal aid.<sup>160</sup> Rechtwijzer presented significant savings in comparison with legal costs in a court proceeding, received high ratings from users, and was associated with low stress levels during divorce proceedings.<sup>161</sup>

Unfortunately, as stated above, Rechtwijzer's activity was recently halted, despite positive feedback and high satisfaction rates by users. It remains to be seen whether the new product, Justice42, will be able to offer a viable alternative to the adversarial and costly court divorce proceedings.

### 3. *The Online Solutions Court*

In July 2016, Lord Justice Briggs, then of the Court of Appeal of England and Wales, now of the Supreme Court of the United Kingdom, published the Civil Courts Structure Review, proposing the institution of an "Online Solutions Court" for monetary claims of up to £25,000, rolling out in phases with an initial cap of £10,000.<sup>162</sup> The Briggs Report was preceded by another important report authored by Professor Richard Susskind and the Civil Justice Council in which the contours of such an online court, then called "Her Majesty's Online Court," were drawn and the seeds for its adoption were planted.<sup>163</sup> The establishment of the court is part of a more sweeping £730 million reform of the entire court system and is scheduled to be launched in full by April 2020.<sup>164</sup>

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159. *Id.*

160. *Id.*

161. *See id.* (hypothesizing that the low stress levels may have been due to a user's ability to spread out utilization hours thereby allowing a user to work at their own pace).

162. LORD JUSTICE BRIGGS, JUDICIARY OF ENG. & WALES, CIVIL COURTS STRUCTURE REVIEW: FINAL REPORT 118–20 (2016) [hereinafter BRIGGS, ANNUAL REPORT], <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>.

163. CIV. JUST. COUNCIL, ONLINE DISPUTE RESOLUTION FOR LOW VALUE CIVIL CLAIMS: ONLINE DISPUTE RESOLUTION ADVISORY GROUP 3 (2015), <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>.

164. BRIGGS, ANNUAL REPORT, *supra* note 162, at 46, 115–16; *Final Report in Lord Justice Brigg's Civil Courts Structure Review*, HERBERT SMITH FREEHILLS: LITIG. NOTES (Aug.

The Online Solutions Court is meant to enhance access to justice by providing a less adversarial and more investigative court process that is more easily “navigable” for parties.<sup>165</sup> The Online Solutions Court departs from the traditional court model in three important respects: (1) it will be conducted online; (2) it will incorporate ADR; and (3) it will be used by the parties themselves.<sup>166</sup>

The process envisaged will be comprised of three stages. First, there will be an exploratory stage in which parties will seek algorithmic tailored assistance, informing them whether they have a valid legal claim and, if so, what routes are available to them, as well as allowing them to submit a claim form.<sup>167</sup> Tailored answers are given based on responses provided by parties to the questions presented to them in plain language. The system will also provide information on alternative avenues and options outside of court, such as an ombudsman scheme.<sup>168</sup> This stage was described both as being the most important, because it will allow parties to solve their problem at an early stage, and also as the stage that often presents the hardest design challenge.<sup>169</sup> Sophisticated or represented parties will be able to bypass this stage.<sup>170</sup>

The second stage involves case management and conciliation by case officers, a new position created in the court system.<sup>171</sup> Conciliation efforts could include such means as ODR, telephone communications, face-to-face mediation, or early neutral evaluation.<sup>172</sup>

The last, and third, stage involves legal determination, which could be conducted in a conventional hearing or, alternatively, on paper, via

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4, 2016, 12:06 PM), <http://hsfnotes.com/litigation/2016/08/04/final-report-in-lord-justice-briggss-civil-courts-structure-review>; see Pablo Cortés & Rafał Mańko, *Developments in European Civil Procedures*, in *THE NEW REGULATORY FRAMEWORK FOR CONSUMER DISPUTE RESOLUTION* 41, 59 (Pablo Cortés ed., 2016).

165. See BRIGGS, ANNUAL REPORT, *supra* note 162, at 45 (noting that the online court aims to make the dispute resolution process more navigable and reduce the assistance from lawyers).

166. SIR TERENCE ETHELTON, JUDICIARY OF ENG. & WHALES, *THE CIVIL COURT OF THE FUTURE* 6 (2017), <https://www.judiciary.gov.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf>.

167. See BRIGGS, ANNUAL REPORT, *supra* note 162, at 58–59.

168. See ETHELTON, *supra* note 166, at 8–9 (explaining that the system will help individuals pursue legal and non-legal claims).

169. See BRIGGS, ANNUAL REPORT, *supra* note 162, at 50 (noting that the first stage is, in part, difficult to design because it cannot replace lawyers’ advice on the merits).

170. *Id.* at 59.

171. *Id.*

172. *Id.*

video, or through the telephone.<sup>173</sup> These decisions are subject to an appeal.<sup>174</sup>

Lord Justice Briggs recommends that at some point the Online Solutions Court become mandatory, and assistance to those who find digital media inaccessible should be aided in an effective way, rather than preventing the system as a whole from moving online.<sup>175</sup>

The focus of much of the Briggs Report is making the English court system more accessible for low value claims. Therefore, the online court envisaged in the report is meant to be used mainly by non-lawyers. As a result, the design of the process needs to be sufficiently simple, making it necessary to devise novel procedural rules for the online court and bringing about a deeper cultural change.<sup>176</sup> The redesign means that rather than merely fitting the existing civil procedure rules to the online context, new simple procedures should be designed for the online court.

At the same time, the Online Solutions Court is not meant to exclude lawyers because they are perceived as having an important role in assisting in the resolution of legal disputes.<sup>177</sup> Therefore, a delicate balance needs to be maintained in the recoverability of legal costs to allow for the hiring of lawyers on the one hand, but also not to deter pro se litigants from bringing claims themselves because they fear incurring high costs.<sup>178</sup>

While the Briggs Report faced significant critiques, such as preventing access from those “challenged by computers,”<sup>179</sup> providing “second class justice,”<sup>180</sup> and “excluding lawyers,”<sup>181</sup> the pilot is moving full steam ahead with a team working away on the new procedural rules as well as the development of the pilot.

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173. *Id.* at 38.

174. *Id.*

175. *See id.* at 39–40 (encouraging the system to be available on tablets and smartphones, not just laptops and desktops, to increase accessibility).

176. *See id.*

177. *See id.* at 41 (“It is not a design objective of the Online Court to exclude lawyers. The underlying rationale is that whereas the traditional courts are only truly accessible by, and intelligible to, lawyers, the new court should as far as possible be equally accessible to lawyers and [litigants].”).

178. *Id.* at 41.

179. *Id.* at 38–41.

180. *Id.* at 37–38.

181. *Id.* at 41–44.

#### 4. *Matterhorn*

Matterhorn was developed in 2013 by Michigan Law Professor J.J. Prescott and his former student.<sup>182</sup> Since then, Matterhorn has been used to launch online court processes into a few dozen U.S. state courts in Michigan, Ohio, and Arkansas.<sup>183</sup> The system handles mostly outstanding warrants and traffic violations, and it has been expanded to cover such areas as small claims and family disputes.<sup>184</sup>

Matterhorn allows individuals involved in court proceedings to communicate online with judges, prosecutors, city attorneys, and other officials involved in the process.<sup>185</sup> The specifics of the process may vary depending on the type of case (outstanding warrant, traffic violations, etc.) and the characteristics of the party involved (e.g., being a minor).<sup>186</sup> If the cases meet certain eligibility criteria—such as the nature of case and the litigant’s history—and choose to use Matterhorn, the online platform allows those who are sued or receive a ticket or notice of violation to submit a request for relief or a request to negotiate with a city attorney, prosecutor, or other decision maker.<sup>187</sup> Once they open a communication channel through Matterhorn, the individuals must answer questions and submit a statement.<sup>188</sup> In the case of civil infractions, if a recommendation is made by the city attorney or prosecutor, it is then reviewed by a judge.<sup>189</sup> If a settlement offer is made, it is communicated to the litigant through the platform.<sup>190</sup> If the case regards an outstanding warrant, then the litigant petitions the judge, again answering questions and a statement as well as a request either to appear before the court or to devise a payment plan.<sup>191</sup> If a litigant fails to comply

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182. See Persky, *supra* note 6 (explaining that the system was born out of a desire to help reduce the backlog of outstanding warrants in court systems).

183. Email from J.J. Prescott, Professor of Law, Univ. of Mich., to Orna Rabinovich-Einy, Author (July 18, 2017, 6:37 PM) (on file with authors).

184. J.J. Prescott, *Assessing Access to Justice Outreach Strategies* (manuscript at 6) (draft on file with authors).

185. *How It Works*, MATTERHORN, <https://getmatterhorn.com/how-matterhorn-works> (last visited Oct. 23, 2017).

186. *Id.*

187. J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology* (manuscript at 21 n.157) (draft on file with authors) [hereinafter Prescott, *Improving Access*].

188. *Id.* (manuscript at 21).

189. *Id.*

190. *Id.*

191. See *Online Dispute Resolution for Courts*, MATTERHORN, <https://getmatterhorn.com/online-dispute-resolution-for-courts> (last visited Oct. 23,

with a court decision or declines an offer, the original charge is reinstated and the litigant is notified.<sup>192</sup>

In these cases, the ability to process the case from afar reduces not only the difficulties associated with having to travel to a court and to devote time to the proceedings, but it also lessens the fear of appearing in court, especially for those disputants who are worried about the consequences of an outstanding warrant or debt.<sup>193</sup>

Courts that have implemented Matterhorn collect and analyze data with great tenacity, evaluating such measures as cost savings, time frames, and impact on access to justice.<sup>194</sup> In addition, studies have measured litigant perceptions of fairness and emotions towards online platforms.<sup>195</sup>

The data gathered and analyzed indicate that the availability of online proceedings where Matterhorn was used has been an important factor in improving access to justice, both by encouraging more parties to bring their case and by reducing the average processing time of all cases in courts employing Matterhorn. In these courts, Matterhorn cases and traditional cases were resolved in substantially less time.<sup>196</sup> Research on litigant perceptions regarding the fairness of online proceedings in courts using Matterhorn has underscored the significance of procedural justice in this context and has generated important insights for the design of online courts. Such issues include the need for interpersonal cues from court officials or more interactive communication avenues to enhance perceptions of fairness in these proceedings.<sup>197</sup>

Matterhorn's commitment to enhancing access to justice and its rigorous evaluation of efficiency and fairness in court proceedings have made it a highly successful venture. It has experienced significant growth, spreading to a large number of courts in several states, as well as expanding to cover a wider variety of legal claims.

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2017) (noting that the system has a configurable payment assessment feature that helps courts decide between payment plans and alternative penalties).

192. Prescott, *Improving Access*, *supra* note 187 (manuscript at 21).

193. *Online Dispute Resolution for Courts*, *supra* note 191.

194. Lorelei Laird, *J.J. Prescott: Go to Court Without Leaving Home*, ABAJ. (Sept. 7, 2016, 8:30 AM), [http://www.abajournal.com/legalrebels/article/jj\\_prescott\\_profile](http://www.abajournal.com/legalrebels/article/jj_prescott_profile).

195. See Youyang Hou et al., *Factors in Fairness and Emotion in Online Case Resolution Systems*, in PROCEEDINGS OF THE 2017 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 2511, 2511 (2017) (examining survey responses regarding attitudes toward ODR).

196. See *id.*; Laird, *supra* note 194 (noting that the software has cut case closure rates for courts employing Matterhorn from thirty to sixty days on average to 7.67 days).

197. See Youyang Hou et al., *supra* note 195, at 2511.

5. *The New York ODR debt collection pilot*

The permanent Commission on Access to Justice operating under the New York State Unified Court System revealed a stunningly high default rate in debt collection cases (between eighty to ninety percent). Reacting to this rate, the Commission sought to urgently address the access to justice deficit in this context.<sup>198</sup> Consequently, together with the ABA Judicial Division, New York State is developing a proposed pilot of court-annexed ODR for debt collection cases.<sup>199</sup>

Given the low rate of debtor participation and the power imbalance between debtors and creditors, the entire ODR process was designed with consumer protection in mind.<sup>200</sup> Options and text are carefully chosen so as to ensure that consumers do not waive their rights.<sup>201</sup> Also, once parties choose to use the system, communication between the alleged debtor and creditor must be conducted solely through the platform.<sup>202</sup> Despite the fact that the current system works to the benefit of creditors, the online system is expected to appeal to creditors because it is more likely to produce agreements that will be respected and executed by consumers—as opposed to default court judgments.<sup>203</sup> Indeed, several creditors have already indicated interest in participating in the pilot once it is launched.<sup>204</sup>

The proposed ODR scheme is designed as a voluntary tiered system.<sup>205</sup> In this system, the first stage would be a solutions explorer, which was designed as part of the CRT in British Columbia.<sup>206</sup> An important consumer protection feature of the proposed system is that it is designed to identify whether the debtor has an absolute defense.<sup>207</sup> If such a defense exists, then the system will not allow the debtor to continue to the direct negotiation stage.<sup>208</sup> The system therefore sets out to balance the power between the consumer and creditor and to ensure that consumers' rights are respected.

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198. Telephone Interview with David Larson, Professor of Law, Mitchell Hamline Sch. of Law (July 25, 2017).

199. *Id.*; *New York Online Dispute Resolution*, *supra* note 7.

200. *See* Telephone Interview with David Larson, *supra* note 198.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

In the second stage, if the debtor does not have an absolute defense, then the parties can conduct an online negotiation.<sup>209</sup> Concern over power imbalances have influenced the proposed design, limiting parties' choice of language and offering them pre-structured communication options through drop down menus which feature prescribed language and options.<sup>210</sup>

If direct efforts through negotiation fail, or if the consumers so desire at any earlier stage, they may connect to legal services or request a third-party mediator.<sup>211</sup> At this point it is undecided whether this proposed third stage will be conducted via text or video.<sup>212</sup>

The conceptual design of the ODR system was completed and submitted to the court in late June 2017.<sup>213</sup> It is anticipated that the request for proposals will be published soon.<sup>214</sup> Then providers will be able to submit bids for the execution of the pilot. The system may undergo some modifications depending upon the selected vendor's proposal, but the general commitment to the design of a balanced system that incorporates consumer protection will be preserved.<sup>215</sup>

Even in these early phases, the project is already facing significant hurdles. For one, the New York court system is not fully digitized, thus creating challenges for successful implementation of ODR.<sup>216</sup> Indeed, as we can see from the description of the Tyler-Modria merger below,<sup>217</sup> ODR and court-digitization projects go hand in hand and can complement one another.

Another challenge, perhaps more difficult, involves the objection by legal service providers that are concerned that the ODR system would benefit creditors at the expense of debtors.<sup>218</sup> While these concerns are valid, the alternative of providing legal support for the vast majority of debtors is unrealistic.<sup>219</sup> For that reason, the team in charge of the design of the project believes that by devising an accessible, easy-to-use online system, which empowers consumers and protects their rights, the system will provide consumers, who currently are not engaging with the

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209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *See infra* Section II.B.6.

218. Telephone Interview with David Larson, *supra* note 198.

219. *Id.*

justice system, with much needed support and assistance.<sup>220</sup> The proposed system is not intended to replace legal services but instead will provide an additional route by which consumers can gain access to justice.<sup>221</sup>

#### 6. *Tyler Technologies-Modria acquisition*

One of the most interesting developments in court ODR is the acquisition of Modria by Tyler Technologies in May 2017.<sup>222</sup> Modria is the leading software platform for the design and operation of online dispute resolution services. It was established by Colin Rule and Chittu Nagarajan in 2011, after the two left their positions at eBay and Paypal.<sup>223</sup> Rule and Nagarajan developed the eBay-Paypal ODR system, which handled over 60 million disputes a year, the vast majority of which were resolved through automated dispute resolution services.<sup>224</sup>

While Modria has had substantial experience in the e-commerce sector designing ODR systems for platforms such as Upwork and Rover, it has also been a central player in the public sector in designing ODR systems for family divorce cases via the Rechtwijzer platform,<sup>225</sup> property tax appeals in the United States and Canada, and no-fault arbitration cases (the AAA New York No Fault Insurance ADR Center).<sup>226</sup>

Tyler Technologies is the largest software company operating in the United States in the local government sector.<sup>227</sup> It was founded in 1966 and since 1997 has focused on providing software-based solutions for local government.<sup>228</sup> Tyler Technologies services over 15,000 local

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220. *Id.*

221. *Id.*

222. See Scott Carr & Colin Rule, *Modria Joins Forces with Tyler Technologies*, MODRIA BLOG (May 30, 2017) <http://www.b2i.us/profiles/investor/ResLibraryView.asp?BzID=499&ResLibraryID=83554&Category=16> (noting that Tyler Technologies is the largest company in the world that focuses exclusively on local government technologies).

223. Telephone Interview with Colin Rule, Co-Founder, Modria (July 25, 2017) (on file with authors).

224. Amy J. Schmitz, *Consumer Redress in the United States*, in THE NEW REGULATORY FRAMEWORK FOR CONSUMER DISPUTE RESOLUTION 324, 338 (Cortés ed., 2016); see KATSH & RABINOVICH-EINY, DIGITAL JUSTICE, *supra* note 151, at 4, 34–35 (describing the shift towards automated resolution based on the sheer volume of disputes).

225. See *supra* Section II.B.2.

226. Robert Ambrogi, *Is There a Future for Online Dispute Resolution for Lawyers?*, LAW SITES BLOG (Apr. 11, 2016), <https://www.lawsitesblog.com/2016/04/future-online-dispute-resolution.html>; Telephone Interview with Colin Rule, *supra* note 223.

227. See *History of Tyler Technologies*, TYLER TECHNOLOGIES (last visited on Oct. 23, 2017), <https://www.tylertech.com/about-us/corporate-history>.

228. *Id.*

government offices, including courts and school districts.<sup>229</sup> Nine hundred counties across the United States have incorporated Tyler Technologies's court management and online filing system.<sup>230</sup>

The acquisition of Modria by Tyler Technologies allows Tyler to incorporate Modria into its software and offer its clients an additional layer of options to manage court cases and increase the odds of efficient resolution.<sup>231</sup> Tyler Technologies has an impressive court diagnosis tool,<sup>232</sup> which plugs into its e-filing tool.<sup>233</sup> By integrating ODR into these tools, the court creates a one-stop shop for intake and diagnosis, enhancing case resolution and closure.<sup>234</sup>

The platform will be implemented across a range of case types, including family, workplace, and debt, each of which will require its own specific process design.<sup>235</sup> The large number of courts and scale of cases handled by Tyler Technologies will accelerate the platform's machine learning in this setting.<sup>236</sup>

Tyler Technologies's Vice President of Online Dispute Resolution, Colin Rule, projects that within ten years, seventy-five percent of civil cases will be resolved through this type of online process, with only the very complex and high value cases requiring more traditional face-to-face resolution.<sup>237</sup> Modria's acquisition indicates that Tyler is a firm believer in the potential of ODR, specifically in the court setting and in the public sector more generally.

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229. Carr & Rule, *supra* note 222.

230. See Kurt Watkins, *Tyler Technologies Signs \$36 Million Agreement with Cook County, Illinois, for Odyssey Solution*, TYLER TECHNOLOGIES (Apr. 25, 2017), <http://investors.tylertech.com/profiles/investor/ResLibraryView.asp?ResLibraryID=83338&GoTopage=1&Category=16&BzID=499&G=320> (noting that 100 million people across twenty-four states use the case management software).

231. Telephone Interview with Colin Rule, *supra* note 223.

232. See *Odyssey Guide & File*, TYLER TECHNOLOGIES, <https://www.tylertech.com/solutions-products/odyssey-product-suite/guide-file> (last visited on Oct. 23, 2017) ("Odyssey Guide & File allows courts to develop their own interview process and electronic forms in order to simplify the filing process for self-represented litigants while adhering to the court's filing rules.").

233. See *Odyssey File & Serve Empowers Paperless Productivity via e-Filing*, TYLER TECHNOLOGIES, <https://www.tylertech.com/solutions-products/odyssey-product-suite/file-serve> (last visited Oct. 23, 2017) (highlighting the seamless integration of the tool with the rest of the product suite and noting that the e-filing tool enables electronic delivery, service, and filing of court documents).

234. Email from Colin Rule, Co-Founder, Modria, to Orna Rabinovich-Einy & Ethan Katsh, Authors (Aug. 5, 2017) (on file with authors).

235. Telephone Interview with Colin Rule, *supra* note 223.

236. Email from Colin Rule, *supra* note 234.

237. Telephone Interview with Colin Rule, *supra* note 223.

As we can see, the new new courts described in this section are not merely more efficient, less expensive, and more accessible versions of traditional courts, but present a novel institution that could also transform the characteristics and goals of courts, making them more flexible, less adversarial, and context-sensitive dispute resolution avenues.

In the following section we explore what makes the new new courts different from new courts from an access to justice perspective.

### *C. New New Courts and Access to Justice*

How do the characteristics of the new new courts impact traditional barriers to access as we have known them? Are the new new courts more effective in addressing such barriers than the new courts, which relied on ADR for access enhancement?

The introduction of new technologies in the new new courts creates opportunities for overcoming barriers for both access and justice in ways that were not possible in the past. There are three technological changes taking place that can help courts provide enhanced access to justice: (1) new efficiencies; (2) increased conveniences and court capacity for handling cases; and (3) new justice possibilities via (i) consistency, (ii) a leveled playing field with pre-fixed options, (iii) language choice, (iv) data collection and subsequent proactive learning, and (v) improved procedural design.

The first disruptive change involves moving dispute resolution from a physical setting to a virtual one. The platforms described earlier and others now under development may provide an all-online forum or rely on processes that combine online models with physical, face-to-face approaches. Both will disrupt the physical boundaries and special spaces that have symbolized and shaped the view that citizens have had of court proceedings. In the new new courts, tools will be provided to individuals to facilitate access to courts, evaluate their legal stance, communicate with the other party, and have a third-party decide their dispute, all without having to physically appear in court during court operating hours. Simply stated, having one's day in court will no longer require one to actually spend a day physically in a court.

ODR emerged as a response to relatively simple disputes in which parties were often at a distance. With more sophisticated software, the range of ODR applications and the very nature of ODR use are changing. For example, ODR is being employed in local settings, such

as neighbor disputes.<sup>238</sup> Evolving software also provides tools for use in more complex disputes, including divorce proceedings.<sup>239</sup> As this trend continues, conceptual distinctions between conflicts arising online and those arising offline, and between ADR and ODR, are evaporating. The historical distinction between formal and informal avenues for dispute resolution will also likely fade as ADR and other processes are not physically moved out of court, but rather are managed by online processes built into a court's platform.

The second disruptive change involves relying less on human intervention and more on data-driven decision making. This is a shift that requires careful attention. The use of automated processes can certainly reduce costs and increase capacity for handling cases; however, the use of ODR in courts also inserts algorithms into the judicial process. Algorithms can limit human discretion, increase consistency, and reduce biases. Designed well, algorithms can enhance both "justice" as well as "access,"<sup>240</sup> attenuating the efficiency-fairness trade-off. At the same time, algorithms may also operate in a biased fashion and their opaqueness can frustrate aspirations of justice, as we further discuss below.<sup>241</sup> Whether these possibilities occur will be traceable to whether we can rigorously monitor the manner in which such algorithms operate and the values that guide their design.<sup>242</sup>

The legal profession is increasingly experiencing the disruptive force of the new technologies as more and more automated systems provide self-help options to negotiate or mediate a resolution. Entrepreneurs are discovering that new relationships and new processes encourage the development of new roles and occupations.<sup>243</sup>

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238. See *supra* Section II.B.1 (discussing British Columbia's implementation of the CRT platform).

239. See *supra* Section II.B.2 (discussing The Hague's Rechtwijzer platform).

240. See SUSSKIND, TOMORROW'S LAWYERS, *supra* note 107, at 89 (stating that with software, the "rules are embedded in the system. Failure to comply is not an option"); see also Anupam Chander, *The Racist Algorithm?*, 115 MICH. L. REV. 1023, 1031–33 (2017) (discussing attempts to use algorithms to achieve more just results in law and social network access).

241. See Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1253–55 (2008) (describing the unforeseen problems associated with automation, such as a lack of record keeping, secrecy, inadequate notice, inaccurate outcomes, and impairment of rulemaking procedures).

242. See *id.* at 1308 (noting that transparency and accountability will allow us to adequately monitor the effectiveness and fairness of algorithms).

243. Compare SUSSKIND & SUSSKIND, *supra* note 105, at 2 (reflecting a view that automation will have a very deep and broad impact on the work of lawyers and the need for them), with Dana Remus & Frank S. Levy, *Can Robots Be Lawyers?*

These roles are beginning to appear in such applications as Rechtwijzer, where lawyers are used to monitor the fairness and legality of agreements negotiated by the parties, and case officers in the United Kingdom's Online Solutions Court.<sup>244</sup> In addition, moving from human decision making to automated processes opens up new opportunities for programmers and web designers whose work will reshape ADR and the litigation process. In the design of the CRT system in British Columbia, for example, emphasis was placed on "user experiences" when designing the software.<sup>245</sup> This is something that is obviously important in the access to justice context, but not something that received attention when processes were in a court building and dominated by the legal profession. Today, albeit gradually, new methodologies are being employed to evaluate "user experiences."<sup>246</sup> Input is then incorporated into the design and modification of the software. While for some, the consumerist language in the court context can be offsetting, the focus on "users" has allowed groups, such as non-profits representing pro-se litigants to voice their views on the design of court processes.

The third change involves a new understanding of the value of data, commonly referred to as "Big Data," produced during dispute resolution proceedings. Courts have traditionally collected limited data on legal claims, but over the last few decades, they have limited the use of data even more due to confidentiality concerns as ADR was increasingly being employed in court settings.<sup>247</sup> With more reliance on technology, we are seeing more data being collected and can expect a shift from courts that focus on "small data"—for example, judicial opinions and statistical information about numbers and kinds of cases—to legal environments that are focused on collecting, using, and reusing Big Data from all cases to improve the performance of courts:

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Computers, Lawyers, and the Practice of Law 3–4 (Nov. 30, 2016) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2701092](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701092) (conveying a much more reserved view of the impact of automation on lawyering and lawyers). For a similar skeptical view of the extent of impact of automation, see also Frank Pasquale, *Automating the Professions: Utopian Pipe Dream or Dystopian Nightmare?*, L.A. REV. BOOKS (Mar. 15, 2016), <https://lareviewofbooks.org/article/automating-the-professions-utopian-pipe-dream-or-dystopian-nightmare>.

244. See *supra* Section II.B.2 (discussing the emergence of new self-help options, including the Online Solutions Court and Modria).

245. See *supra* Section II.B.1.

246. Interview with Darin Thompson & Shannon Salter, *supra* note 132.

247. Rabinovich-Einy, *Technology's Impact*, *supra* note 77, at 263–65.

better resolve claims and enforce existing rules, develop the law and potentially prevent disputes from arising to begin with.

The goal of prevention of disputes surfaced in the late 1980s as large organizations and corporations recognized that the kinds of disputes they experienced, often labor-related disputes, could be anticipated.<sup>248</sup> This insight was not derived from technology-supported data analysis but depended on the memory of dispute resolvers themselves. As already noted, ADR practice frowns upon preserving data due to confidentiality concerns.<sup>249</sup> In courts, unlike ADR, we have available decisions of judges and statistical data about categories of cases, but no opportunity and no pressure to broaden the analysis of data.<sup>250</sup> There is almost nothing that can be easily accessed about small claims courts and state courts.<sup>251</sup> With ODR, we will be able to study this data and learn a great deal about the resolution of these disputes, in and out of court. The automatic collection and analysis of dispute data will affect concepts, traditions and values as well as processes. Buried in the data collected about the large numbers of users will be trends and patterns that were not identifiable before. Such patterns include important lessons about the disputants, their habits, conditions that generate success and failure in dispute resolution, and how to prevent problems in the future.

How do the three shifts associated with the transition from the new courts to the new new courts affect access to justice? Earlier in this Article we drew on the typology of access barriers developed by Mor, consisting of (1) “entry barriers” that exist when accessing the *legal system* (e.g., costs, capacity, architecture); (2) a myriad of structural, cultural and psychological barriers that constrain access to *law* and parties’ ability to make use of the formal legal system, even where no formal barrier exists (e.g., proximity to courts and legal services, legal knowledge,

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248. CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* 4, 7 (1st ed. 1995); see Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, DAEDALUS, Summer 2014, at 129, 131–32 (discussing how increased tort litigation contributed to the rise of dispute prevention).

249. See Orna Rabinovich-Einy, *Deconstructing Dispute Classifications: Avoiding the Shadow of the Law in Dispute System Design in Healthcare*, 12 CARDOZO J. CONFLICT RESOL. 55, 78–80 (2010) (exploring the benefits of opening up dispute-related data channels to realize patterns across subject areas such as medical malpractice claims).

250. See Rabinovich-Einy, *Technology’s Impact*, *supra* note 77, at 292 (highlighting the pitfalls and lack of accountability of formal dispute resolution mechanisms such as courts).

251. See Yeazell, *supra* note 248, at 130 (“[W]e simply know almost nothing about state judiciaries prior to the 1980s.”).

and language proficiencies); and (3) the barriers that stand in the way of “just outcomes” and have to do with the structure and content of legal rules and decisions, all of which shape access to *justice* (e.g., grievances that are not recognized as legal wrongs, repeat player effect).<sup>252</sup>

As explained in the previous section, the new courts were expected to improve access on all three realms as a consequence of the extensive adoption of mediation in courts.<sup>253</sup> The flexible, interest-based process was expected to reduce costs and physical barriers, as well as procedural complexity and to allow for non-legal wrongs to be addressed.<sup>254</sup> These characteristics of the mediation process also seemed to make it less susceptible to repeat-player effects.<sup>255</sup> Unfortunately, as we have shown, in reality, court mediation and the new courts more generally, have at times provided more access at the expense of justice, or, in Mor’s terms, greater access to the legal system, albeit at a cost to access to law and justice.<sup>256</sup>

The new new courts offer the prospect of a fresh equilibrium, one in which all realms of justice could be enhanced because of the qualities of digital technology and, in particular, the use of algorithms and data. In terms of Mor’s first realm, access to the legal system is greatly enhanced in ODR because processes are conducted from anywhere one has access to the internet—a home, an office, or a park for that matter, and at any hour of the day, any day of the week. This not only eliminates physical barriers, but also significantly reduces direct and indirect costs of participation.

In addition, use of online automated processes frees courts from the constraints of limited space and human capacity, allowing for huge numbers of claims to be processed. The freedom from these constraints was previously unfathomable for human decision makers operating from a physical space where parties had to convene.

For some parties, access to online systems (or lack of access) is itself a barrier; however, when access is available through phones instead of personal computers, these concerns are significantly mitigated.<sup>257</sup> Also, the provision of assistance in designated kiosks at the courts and

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252. See *supra* notes 58–72 and accompanying text.

253. See Mor, *supra* note 55 (manuscript at 21).

254. See Menkel-Meadow, *Semi-Formal*, *supra* note 21, at 432.

255. See *supra* note 71 and accompanying text.

256. See *supra* Section I.A.

257. Prescott, *Improving Access*, *supra* note 187 (manuscript at 16) (noting that phones increase access to ODR systems for low-income individuals because eighty-four percent of low-income individuals have access to smart phones).

in legal aid centers can overcome many of the concerns associated with the digital divide, the split between those with and without internet access. Over time, this divide has become more of a generational divide than a socio-economic one, as evidenced by the high penetration of internet access via mobile technology in third world countries.<sup>258</sup>

In terms of access to the law, Mor's second realm of access, algorithms and data offer a remarkable contribution, as evidenced in the various types of "triage" systems developed by online courts and pilot projects. These tools allow parties whose knowledge of the law and legalese is quite limited to navigate their way through legal rules and procedures by answering simple questions and receiving clear, individualized answers and advice.<sup>259</sup> Parties are offered pre-fixed options for answers, further leveling the playing field for those who have difficulty in wording accurate and relevant responses to the questions posed.<sup>260</sup> There are also open text boxes in which parties can add to the templates provided.<sup>261</sup>

The advice provided through such tools as the Solutions Explorer of the CRT is reachable from afar at no cost, bridging geographic distances and the center-periphery divide. Data collected from party responses is analyzed and allows the court system to refine and improve such tools to further reduce barriers and enhance access.

In addition, access to justice, Mor's third realm of access, can be improved in several ways. For one, the triage systems refer parties to both legal and non-legal avenues for addressing their problems, helping the parties obtain remedies for those grievances that do not amount to legal wrongs.<sup>262</sup>

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258. See, e.g., *Cell Phones in Africa: Communication Lifeline*, PEW RES. CTR. (Apr. 15, 2015), <http://www.pewglobal.org/2015/04/15/cell-phones-in-africa-communication-lifeline> (reporting that out of seven African countries surveyed between five and thirty-four percent of residents owned a smartphone); Roland Banks, *Mobile Technology Is Improving Life for Those in Developing Nations*, MOBILE INDUSTRY REV. (May 22, 2015), <https://www.mobileindustryreview.com/2015/05/mobile-technology-developing-nations.html> (claiming that ninety-seven percent of surveyed individuals in developing countries "say that the mobile [i]nternet has transformed their lives").

259. See Cabral et al., *supra* note 112, at 249–51 (discussing the benefits of web-based legal services).

260. *Id.* at 251.

261. *Id.* at 249.

262. *Id.* at 297.

Second, the introduction of algorithms can help level the playing field between sophisticated repeat players and one-shotters. Fixed procedural options incorporated into the software can mitigate repeat players' procedural advantages and algorithmic interventions can reduce human bias;<sup>263</sup> this combination could result in improved legal outcomes for traditionally disempowered parties. Analyzing collected data could also help ensure that these goals are met by studying the impact of particular design choices in the procedural realm on the substantive outcomes of particular legal disputes, including those involving claimants belonging to suspect groups (e.g., women, minorities, consumers).<sup>264</sup>

Third, by having new voices, groups, and professions involved in the design of ODR processes, the process has the potential to incorporate values and norms that address the needs and rights of those groups whose voices are unheard in the design of traditional court processes. This is significant because procedural avenues and choices inevitably impact and shape legal outcomes.

Moreover, where individuals pursue a claim that could be relevant to a larger group of potential claimants, the other claimants need not wait for such claims to arise to receive a remedy. The ODR system can instead require defendants to compensate those harmed who have not yet sued (and may not even be aware of the harm). One could even imagine that an ODR system could require defendants to prevent such harm from recurring in the future, thereby performing a preventative function. Such actions by ODR providers would address the problem of legal consciousness and could bring about a real change in the equilibrium of legal outcomes for different social groups.

Last, by studying the types of problems that are consistently referred out of the system, one could recognize which grievances impact the lives of individuals but are not yet recognized as legal wrongs. Thus, presenting an opportunity to discuss whether they merit recognition.

As we can see, adopting technology in the courtroom could change the very nature of court processes, with software being employed to evaluate degrees of success in preventing claims.

The three shifts described above present a promise for transforming our very understanding of the meaning of justice: from courts being associated with buildings and halls shifting to ones that operate online; from courts relying on human intervention to ones that employ

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263. See *supra* note 240.

264. See KATSH & RABINOVICH-EINY, DIGITAL JUSTICE, *supra* note 151, at 49.

automation; and from courts as institutions that collect very little data and focus on individual cases to ones that collect and study Big Data. In this new reality, the focus moves from dispute resolution and the development of law through individual claims, to the rigorosity of proactive dispute prevention efforts and the study of Big Data to make law more responsive to diverse populations, improve the rule of law, and encourage greater effectiveness of regulatory regimes.

Private platforms, such as those in the e-commerce space, have had a head start in both ODR and online dispute prevention.<sup>265</sup> The public sector—not only courts but also state and local agencies—has begun to recognize the value of online processes and the dispute-related data that is being collected in the course of interacting with users.<sup>266</sup> The potential of online systems for both enhancing efficiency and justice is gradually being recognized, buoying efforts to implement such systems in U.S. courts, as evidenced by the Tyler Technologies-Modria merger and the impressive growth of Matterhorn.<sup>267</sup>

Despite this potential, digital technology in general, and the use of ODR in courts in particular, is far from a panacea. Its workings depend on the design of court ODR systems, the operation of algorithms, and how institutions make use of the gathered data.

Various researchers have shown that algorithms can operate in a discriminatory and inconsistent fashion. These findings raise serious due process and equality challenges.<sup>268</sup> Algorithms can rely on skewed

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265. See, e.g., Kashmir Hill, *How Nextdoor Reduced Racist Posts by 75%*, SPLINTER (Aug. 25, 2016, 11:55 AM), <https://splinternews.com/how-nextdoor-reduced-racist-posts-by-75-1793861389> (discussing dispute prevention efforts on Nextdoor, a social networking site for neighborhoods, which publicized that it has reduced racial posts by seventy-five percent through changes to its interface by posing additional questions to users who post messages to the site's Crime and Safety forum).

266. Colin Rule & Mark Wilson, *Online Resolution and Citizenship Empowerment: Property Tax Appeals in North America*, in REVOLUTIONIZING THE INTERACTION BETWEEN STATE AND CITIZENS THROUGH DIGITAL COMMUNICATIONS 185, 188 (Sam B. Edwards III ed. 2014) (stating that the “conventional wisdom” that citizens prefer to engage with government agencies in person is giving way to a recognition that “user preferences have shifted to online channels”).

267. See *supra* notes 182–97, 237–52 and accompanying text.

268. See Citron, *supra* note 241, at 1253–54; Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STANFORD TECH. L. REV. 473 (2017); Tal Zarsky, *The Trouble with Algorithmic Decisions: An Analytic Road Map to Examine Efficiency and Fairness in Automated and Opaque Decision Making*, 41 SCI., TECH. & HUM. VALUES 118, 122–23 (2015).

databases,<sup>269</sup> reflect the programmer's own biases in their design,<sup>270</sup> and, perhaps most disturbingly, operate in unpredictable ways, in particular when we are dealing with learning algorithms.<sup>271</sup>

Other causes for concern have to do with the collection and study of data. The preservation of broad categories of data, and the ability to cross-check such data and study it, generate important insights on groups of individuals, on cases, and on processes and outcomes; however, the collection of data may also prove intrusive and harmful in terms of individual privacy. It has been shown that anonymization has its limits in Big Data settings and the risk of de-anonymization is real.<sup>272</sup> Another related fear has to do with the security and authenticity of information, the existence of effective means for ensuring the accuracy of data, and the integrity and safety from leaks and hacking attempts.<sup>273</sup> Also, given the value of dispute data, the concern arises about such information being shared—whether for commercial purposes or not—with private or public entities, and used in a discriminatory fashion.<sup>274</sup> These issues are being addressed in those new new courts that are being established, but will require ongoing attention and refinement of rules and practices.

Finally, a related concern has to do with the use of Big Data for dispute prevention-related activity. This is uncharted territory in courts and requires rigorous thinking about the ethical and regulatory

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269. See Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93, 120 (2014) (noting that bias present in datasets can affect algorithms used to query Big Data thus spurring privacy concerns).

270. *Id.* at 105.

271. *Id.* at 99.

272. See, e.g., Arvind Narayanan & Vitaly Shmatikov, *Robust De-anonymization of Large Sparse Datasets*, in PROCEEDINGS OF THE 2008 IEEE SYMPOSIUM ON SECURITY & PRIVACY 111, 111 (2008) (exploring the limits of Big Data by analyzing the applicability of de-anonymization to Netflix user data). For a more general analysis, see Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1717–22 (2010), which highlights three high-profile examples of deanonymization of data kept by sophisticated private and governmental entities.

273. Regarding accuracy of data, see KATSH & RABINOVICH-EINY, *DIGITAL JUSTICE*, *supra* note 151, at 94–95, for a description of the scope of errors in healthcare data and the lack of effective means for amending such errors.

274. See, e.g., *Online Pharmacy Fined for Selling Customer Data*, BBC NEWS (Oct. 21, 2015), <http://www.bbc.com/news/technology-34570720> (reporting on the unauthorized sale of private customer data by an online pharmacy to marketing companies); see also Crawford & Schultz, *supra* note 269, at 99–103 (examining the use of Big Data to implement discriminatory practices by companies secretly targeting a specific demographic at the exclusion of others).

guidelines for such activities.<sup>275</sup> The opacity that surrounds these activities in the private sector need not and should not characterize them in the court setting. Indeed, in our view, transparency regarding such activities and the rules governing them could be an important step in the development of a public online dispute resolution and prevention model that could help shape more equitable practices in the private sector as well.

While algorithms and data present serious challenges and open the door to abuse, they also present extraordinary opportunities for enhancing access to justice through a careful and measured approach. When we evaluate this new direction, we must remember that our traditional, brick-and-mortar courts have presented insurmountable barriers for large sections of our population. The challenges that lie ahead should guide us in designing our future justice system, but should not deter us from embracing the new new courts.

#### CONCLUSION

Each of the shifts associated with the new new courts holds enormous potential for increasing access to justice. Each also creates opportunities for frustrating access and giving rise to barriers and 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 unrepresented parties to better understand their rights and options and figure out their interests and needs.

In addition, the enhanced capacity associated with automated processes that are not dependent on human capacity or on physical space allows for huge numbers of claims to be processed, providing access to some avenue of dispute resolution for problems that in the past were in the “lump it” category.<sup>276</sup>

The involvement of new voices in the design phase—representatives of disempowered groups, new professions—can broaden the types of problems that are addressed by the system, as well as enrich procedural

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275. See KATSH & RABINOVICH-EINY, *DIGITAL JUSTICE*, *supra* note 151, at 53 (stating that “[t]he same qualities of prevention-related activities that make quality control efforts possible also raise serious concerns about data protection and the privacy of users”).

276. ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 97* (1st ed. 2001) (addressing the potential impact of online filing of complaints on the airing of such problems).

choices, linguistic avenues, and visual representation of legal information and avenues of redress.

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 allows monitoring of the quality of processes and outcomes, uncovers biases and problems in the operation of dispute resolution algorithms, and even provides for dispute prevention. Instead of waiting for human third parties to analyze their experiences post-dispute resolution, the data can uncover disputes before parties are aware of them, in some cases, even before they occur. It can also indicate more broadly whose problems are not being addressed within the legal system and signal the need for the law to generate appropriate legal categories and provide redress for such grievances.

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 the change in preferences regarding online use, there is still a group for whom such communication remains out of reach.<sup>277</sup>

More significantly, perhaps, are the potential biases and lack of transparency associated with algorithms, in particular learning algorithms.<sup>278</sup> 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.<sup>279</sup>

The adoption of ODR in courts is operating somewhat like a Trojan horse. The assumption was that it would improve courts' efficiency

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277. See *The Digital Divide, ICT, and Broadband Internet*, INTERNET WORLD STATS, <http://www.internetworldstats.com/links10.htm> (last visited on Oct. 23, 2017) (noting that barriers to internet usage in developing countries include limited access to Information and Communications Technologies and low literacy rates among significant segments of the population).

278. See Michael L. Rich, *Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment*, 164 U. PA. L. REV. 871, 886 (2016) (noting that certain learning algorithms are so complex that the programmers do not even understand why certain results are reached); Kevin Roose, *Facebook's Frankenstein Moment*, N.Y. TIMES (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/technology/facebook-frankenstein-sandberg-ads.html> (discussing issues surrounding the unpredictability of Facebook's algorithms, including accusations that the algorithms aided Russia's influence in the 2016 U.S. election, censored Rohingya Muslims in Myanmar, and assisted human traffickers in Africa).

279. For a discussion of the limitations of the transparency of algorithms as a solution to bias, see Chander, *supra* note 240, at 1040.

and further enhance access to justice without changing courts' course—much like the impact of the institutionalization of ADR in the past. This might have been possible with the first generation of court ODR processes, but will be difficult to sustain in the new new courts that are now emerging and are adopting state of the art ODR systems which rely heavily on algorithms, offer new types of processes, involve new types of actors in the design of the systems, and remain closely attuned to data.<sup>280</sup>

Despite the change in courts' modus operandi and their enhanced capacity to process claims, the bulk of societal disputes will continue to be addressed outside the court system. As a growing portion of our lives takes place online, our disputes will also require online mechanisms for addressing them, the majority of which will not be court-connected.<sup>281</sup> The emergence of a public ODR model that is grounded in the court system will be crucial to ensure that individual problems are resolved in a fair and just manner. This holds true not only in the courts, but also in the private sector where mega-platforms are already addressing hundreds of millions of disputes annually through largely automated systems lacking in transparency.

Contemporaneously with the growth of online systems in the private sector we are seeing the realization that such systems are also needed in the public sector. While online court systems are still seen as the exception and have generated heated debates, we can expect the consensus over such systems to grow over time. At the moment, algorithms are not a substitute for judicial resolution, which continues to be human-based. It remains to be seen whether the distinction between software occupying a facilitative role as opposed to a determinative role will persist, or whether it will be diluted much in the same way that the online-offline or formal-informal divides have been attenuated.

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280. See *supra* Section II.B.

281. Even if access to courts is increased dramatically, the majority of disputes would still be addressed through alternative fora, as encapsulated in the following statement by Lawrence Friedman:

[H]ow much access to justice do we really want? Let us try to 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.

Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 *FORDHAM URB. L.J.* 3, 7 (2010).

We are in the midst of a deep change in our courts. Novel court processes are emerging, ones that are less adversarial, more flexible, dynamic, accessible, transparent and efficient, and hopefully, more balanced. Courts employing technology in this way should strive to enhance both access and justice, as well as both efficiency and fairness. Figuring out what exactly constitutes a fair process in this day and age—what “a day in court” means, which elements provide disputants with “voice,” what generates trust, and what constitutes neutrality, and the like—is the step we must take now, even as our understanding of such concepts and values changes.