Online Dispute Resolution and the End of Adversarial Justice?

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There was a moment in the late 19th and early 20th century when automobiles were being made with steam, electric, and internal combustion engines. As early as the 1840s, inventors had created "[r]echargeable batteries that provided a viable means for storing electricity onboard a vehicle."[1] Porsche's first car was an all-wheel drive electric car that "set several records" in time and distance competitions and by 1897 a fleet of taxis built by the Electric Carriage and Wagon Company of Philadelphia was running in New York City.

The internal combustion engine won out because of a conjunction of factors. Henry Ford figured out how to produce and sell the Model T at a price half that of standard electric vehicles. Charles Kettering made crankshaft starters obsolete. And the discovery of large petroleum reserves in Texas dramatically reduced the price of gasoline. The steam engine, on the other hand, took far too long to warm up – no one wanted to wait 45 minutes before hitting the road. And although electric cars were cleaner, quieter, and initially easier to start than cars with internal combustion engines, they "disappeared by 1935," as did the kind of investment and research that would have improved their performance and affordability. They disappeared even though scientists knew, as early as the 1850s, that pumping CO_2 into the atmosphere would affect the earth's temperature.[2]

Knowing what we now know about the devastating effects of climate change and other negative externalities of crude oil extraction, one can't help but wonder about what the counterfactual world of a century powered by electric vehicles would have looked like. The question is for the most part unanswerable – perhaps we would have had a century of lithium wars rather than oil wars. But it seems clear that almost any outcome would be preferable to the world of irreversible climate change in which we now live.

I raise the forgotten story of electric vehicles because it draws into relief an important feature of transformative innovation that is all too often obscured once path dependence and the leverage of market dominance set in. In the moment, there are often *many* design options, not just one obviously superior alternative, and the *full* cost (including negative externalities) of any one option can be difficult to calculate. But it is gravely irresponsible not to inquire what that cost might be when design options are still open and policy affecting incentives is being determined. Whatever one might have thought about the metes and bounds of this responsibility in a time before our own – eras preceding climate change, nuclear holocaust, and other apocalyptic consequences of technological innovation – we do not have the luxury of failing to ask what kinds of negative externalities might predictably follow a claimed improvement on the status quo.

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[1] https://www.eee.hku.hk/doc/ccchan/CC_Chan_IEEE%20Proceedings%20The%20rise%20&%20fall%20of%20EVs.pdf

[2] https://daily.jstor.org/how-19th-century-scientists-predicted-global-warming/

This is, to say the very least, not a prominent attribute of the tech evangelism that reigns in Silicon Valley.[3] Uber's proponents spoke with religious fervor about the corrupt monopoly of cab companies and how that arbitrarily hindered both the mobility of customers and the autonomy of cab drivers. Very little was said about whether disrupting the industry would, on balance, be socially beneficial. But as it turns out, one of the negative externalities is likely diminished use of public transportation,[4] with attendant effects on climate change and declining resources for innovation in public transportation. Moreover, Uber increasingly behaves toward consumers and drivers like the very monopoly it "disrupted."[5] In some ways, the company's conduct is far more ominous. As one commentator has observed, "if you are one of its regular customers, Uber knows more about you than your own mother does."[6] And there are grounds to worry that the company's use of these data is not entirely benign.[7] Remarkably, despite its market valuation, the company has yet to prove it can turn a profit. It is far more convenient to hail a ride – "access" to a form of transportation has increased. But the cost side of the ledger, as with other forms of "surveillance capitalism,"[8] is daunting.

A third cautionary tale closer to the innovations in legal automation and access to justice I want to focus on in this Chapter is in the area of online legal forms. Turbo Tax arguably revolutionized tax filing with its software. As with taxi drivers and Uber, many accountants have either been displaced by Intuit's software or incorporated it into the services they provide. For consumers, a process fraught with uncertainty has been made more accessible and efficient. On the other hand, Intuit has repeatedly used its market leverage and lobbying power to obstruct states and the federal government from adopting legislation to make free "prefilled" tax forms automatically available to tax payers.[9] The 'innovator' has in this way blocked an even more accessible innovation.

The three examples are common sense reminders that some forms of innovation are transformative in ways we may (predictably) regret, that the rhetoric and fervor surrounding disruptive innovation can obscure sober assessment of the cost side of the ledger, that some transformations saturated with negative externalities become irreversible, and that the power reallocated by innovation – even innovation that increases access to a good or service – can be used to obstruct both regulation to mitigate those externalities and broader access.

Other examples could of course be given, enough to make the Panglossian enthusiasm surrounding artificial intelligence and online dispute resolution rather difficult to swallow.[10] ODR's moment, we are told, has arrived, "offer[ing] the promise of robust yet radically less expensive dispute resolution."[11] Dispute resolution, we are assured, is no different from other sectors in which digital, online systems optimize communications and information processing: "All forms of

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[3] Cf. https://hbr.org/2015/12/what-is-disruptive-innovation (questioning whether Uber is a DI)
[4] https://www.nytimes.com/2017/10/16/upshot/is-uber-helping-or-hurting-mass-transit.html
[5] https://www.theguardian.com/commentisfree/2016/jan/31/cheap-cab-ride-uber-true-cost-google-wealth-taxation
[6] https://www.investopedia.com/articles/investing/030916/how-uber-uses-its-data-bank.asp. No matter how confessional a trip in a cab became, neither the driver nor the taxi company learned anything close to this.
[7] https://www.ftc.gov/news-events/press-releases/2017/08/uber-settles-ftc-allegations-it-made-deceptive-privacy-data
[8] *
[9] https://www.propublica.org/article/filing-taxes-could-be-free-simple-hr-block-intuit-lobbying-against-it
[10] *Need to define this as focused on the more fully automated versions, not those which support intervention of third party neutrals.*
[11] vi

dispute resolution revolve around communication and information processing. For the Internet to be adapted to serve the needs of dispute resolution is no different conceptually from adapting the Internet to serve the needs of any other information intensive process, such as online banking, online auctions, online education, etc. Indeed, [these industries] often provide links on their home pages to dispute resolution systems."[12] The excessive cost, delay, complexity, and confrontational culture of the adversary system will thus be avoided by apps that resolve formal legal disputes as efficiently as eBay resolves auction disputes. In the most ambitious forms of ODR, there will be no more third party mediators, arbitrators, or judges, and therefore no more courthouses or conference rooms.[13]

Justice will roll down in strings of code. Disputes suitable for ODR will not only be resolved cheaply and quickly, the conjunction of data mining, predictive analytics, and dispute systems design will help prevent disputes from arising in the first place.[14] Academic conferences populated by scholars who are funded by or work in the very industry they write about are conducted with all the sobriety of an Elmer Gentry revival meeting. Skeptics are dismissed as unrepentant sinners – elitists too old to appreciate the miracles of the "internet society," heartlessly indifferent to the crisis in access to justice, captive to self-serving, anachronistic ideas about the administration of justice. The capital offenders are judges and lawyers whose skepticism is dismissed as rationalization covering the status and monopoly rents they derive, respectively, from the status quo. Fundamentally, law is not thought to be different from transportation or any other target of disruptive innovation: if you want to improve access, deregulate, disregard regulation that can't be set aside, and expand competition by letting the information economy and disruptive innovation work their magic.

Anyone familiar with the history of professions knows that power struggles between professionals often involve characterizing an entrenched group of experts as corrupt and the new comers (here, software engineers) as avenging angles whose primary care and concern is the welfare of others.[15] Power is in this way masked by the discourses of progress and reform. At the same time, anyone familiar with the history of the Anglo-American legal tradition knows that legal elites have commonly and, it must be said, deservedly been targeted for many of the perceived flaws of the adversary system. The first movement to reduce law to code in America occurred in the early 19th century when Jacksonian populists launched an all out assault on the complexity of common law pleading and the power of judges and lawyers.[16] Drawing on the Napoleonic code and the famous anti-lawyer tracts of Jeremy Bentham, they sought to replace the common law with a democratically enacted code. They simultaneously sought to expand access to the practice of law by eliminating standards for entry to the bar (in many states any white man capable of exercising "natural reason" was authorized to practice without apprenticeship or other professional training credentials). Finally, they sought to make judges democratically accountable by replacing systems of judicial appointment with popular election and recall – procedures that endure to this day in many states. This was the most pronounced anti-lawyer movement in American history, animated by a desire to make the law simple and more accessible. But it is scarcely the only one. Shayes Rebellion pitted agrarian debtors against lawyers and judges who enforced the claims of elite

[12] ODR Theory and Practice 246.
[13] Cite Suskind [add]
[14] Cite lit on dispute systems design. [add]
[15] Bledstein, The Culture of Professionalism
[16] Spaulding, The Luxury of the Law

creditors. And the New Deal pitted progressive reformers and proponents of administrative agencies against conservative courts and the adversary system.[17]

What the anti-lawyer and anti-adversary system rhetoric of the current movement obscures is that the bar's protectionist arsenal is *weaker* than it has been at any point since elite lawyers transformed legal education and professional regulation in response to the Jacksonian populist threat more than a century ago. Indeed, both practically and doctrinally, the bar's protectionist arsenal has been decimated over the last 50 years. The network of price controls, minimum fee schedules, and restrictions on advertising and other rules that limited internal competition and "external" lay-lawyer combinations were dismantled by a series of landmark Supreme Court cases in the 1970s.[18] Competitors in banking, accounting, and other fields renounced the "treaties" that kept them from offering competing services at the same time. And the legal form business expanded under the protection of First Amendment decisions insulating them from unauthorized practice rules.[19]

Lawyers still have not done anywhere near as much as they could to tailor their services to low and middle income Americans, but the status quo in access to justice is as much if not more the product of neo-liberal defunding and restriction of legal services for the poor and defunding of state courts.[20] For decades, the hardest job to get out of law school has been a paid job representing ordinary Americans with legal problems. That is so not because there is a dearth of altruistic students drawn to the practice of law, but rather because of systematic efforts to curtail federal and state funding of legal services for the poor and a dramatic expansion in the cost of higher education at public universities and professional schools that saddles graduates with student debt at levels that cannot be discharged by hanging out one's shingle as a solo practitioner.[21]

Tellingly, some of the same players who never lifted a finger to help low income Americans obtain meaningful access to the adversary system to challenge the injustices of their condition are now enthusiastically supporting ODR as a substitute.[22] They are joined by liberal ethicists, lawyers, judges, and scholars who never much liked the adversary system to begin with – believing that ADR was the way of the future, that the New Deal vision of centralized, rational technocratic agency adjudication is more efficient and suitable to mass processing of claims, or that, whatever the alternatives, adversary adjudication is morally flawed.[23] These are strange bedfellows, united by a shared desire to displace the adversary system for people who cannot already afford it.

Once we understand the neoliberal aspects of the status quo, and liberals' gradual abandonment of the goal of providing lawyers to poor people, there is reason to question why lawyers are being blamed, and reason to doubt that ODR will serve the people its advocates say they care about. After all, if the interests of poor people were truly motivating these reforms, the law already recognizes the right of non-lawyers to create organizations that fund and coordinate

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[17] Norman W. Spaulding, Due Process Without Judicial Process, Fordham L. Rev.
[18] Add cases
[19] Add cases
[20] Luban, Taking Out the Adversary.
[21] Id.
[22] On market based solutions to access to justice that have been mobilized in support of legal tech, see N. Gorsuch, A Republic if You Can Keep It.
[23] ADR advocates, Rhode, Luban, J. Frank and other new-Dealers, etc.

not-for-profit legal services.[24] The failure to innovate in this space speaks volumes about whose interests are paramount in the current movement.

In the pages that follow I begin to set the debate about AI and ODR on a different plane by granting that access to a form of law will be expanded. AI, data mining, predictive analytics and the widespread use of mobile computing devices are likely superb tools for reducing the cost of large scale bureaucratic and logistical tasks. They may prove genuinely transformative. There remain, however, questions about how the architecture of these information systems fits with basic ideas about the structure of due process and the rule of law in a pluralistic liberal democratic society. Ultimately, these are questions about what fully automated ODR will increase access to, what kind of justice and what kind of legal subject is produced by this approach to the administration of justice. The more of these questions we ask, the more I hope it will become apparent that however intricate the logistics of transportation for hire, or the customer service requirements of a massive online auction firm, they are not the same as those implicated in the administration of justice. In important respects, the differences are differences of kind, not degree. A system in which compliance with algorithmic predictions about transportation needs can perhaps optimize efficient ride sharing (understanding 'efficiency' here on terms that do not fully register negative externalities), but a system in which algorithmic predictions automatically resolve disputes even slightly more sophisticated than a pure financial transaction is more likely to force vulnerable people to comply with opaque interpretations of laws they have a right to challenge. Much hinges on whether this form of administration of justice can be described as fair, especially when people of means will continue to have full access to the adversary system.

Here are the questions: What is the proper subject matter jurisdiction of ODR – how do our assumptions about the class of cases it is suitable to resolve fit what we know about cases of this kind? What is the economic model that ensures high accessibility for the end user, client, or legal party involved in a dispute? Who profits and on the basis of what sources of revenue? What is the standard of care and how will it be enforced? What is the architecture that enables mass processing, resolution, and even prevention of legal disputes? What theory of justice beyond mere 'access' is encoded in ODR's architecture?

1. The Domain of ODR: 'Simple' Cases?

> "They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters; and therefore they think it much better that every man should plead his own cause ... [T]he plainest meaning of which words are capable is always the sense of their laws. And they argue thus."
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> -Thomas More, Utopia,

A foundational premise of ODR systems currently being implemented is that there is a class of 'simple' cases for which adversarial resolution is categorially inappropriate, not least of which because the costs of the process exceed the value of these cases as measured by the size of the claim or judgment. The simplicity hypothesis has deep intuitive appeal. There are many cases

[24] NAACP v. Button, Brotherhood of Trainmen, etc.

in which the costs of adversarial process exceed case value.[25] If these cases can be disposed of through an ODR system that does not require physical appearance in court, or even a judge, costs of adjudication are reduced for the state and perhaps for the parties. Resolution is faster and cheaper, giving the parties peace of mind sooner and the ability to move on with their lives. More complicated disputes might require the formalities of adversary procedure, but due process can be provided without judicial process, so to speak. Finally, the argument that simple cases can be resolved more efficiently by ODR is often directly linked to a stronger normative claim that ODR will promote access to justice because it is precisely these simple cases in which ordinary people do not have access to counsel or avoid litigation altogether, believing that the game isn't worth the candle. Ordinary people will thus be better off as ODR expands as a complement or supplement to the adversary system.[26]

This simplicity/access nexus is pervasive in the ODR literature. One commentator observes that "the use of ODR to settle small claims and therefore free up judges and courtrooms for more complex cases is a given: '[s]mall claims courts, with smaller dollar amounts and less complex issues, are ideally situated to transition their operations online.'"[27] ODR, the author continues, "has proven to significantly reduce the delays and costs normally associated with a court case by eliminating the need for travel and synchronous communications."[28] Until the development of ODR, another advocate writes, state courts were "stuck with an in-person, face-to-face model designed for complex disputes, even though, in practice, an enormous fraction of their cases (and overall workload) have few or none of the traditional hallmarks of complexity. When a court uses this ill-fitting approach, the average experience of a litigant 'going to court' amounts to ... waiting in long lines" and if and when "a hearing actually begins, it is over almost at once. The outcome is generally predictable ... as the decision is determined by standard pieces of information contained in the case file or provided by answers the litigant supplies."[29] This is not only hugely inefficient, "access to justice is subverted by the fact that courts continue to operate on the age-old model."[30] The adversary system

> model makes much more sense for complex litigation in which credibility determinations ... and diverse forms of evidence are standard fare. For disputes of this character, the costs of physically using a courthouse (even day in and day out) are relatively modest, if not negligible, given the stakes of the lawsuit. Moreover, the evidentiary and procedural advantages of an in-person, real-time forum in such lawsuits are clear and significant. But for minor disputes in state court, in which the stakes are at least initially fairly low and decisions can be made on the basis of papers and are usually straightforward, the tradeoff cuts deeply the other way.[31]

Simple, "[m]inor legal disputes," we are instructed, account for the majority of state trial court caseloads in the United States.[32] These include not only small claims cases between private litigants

[25] NCSC 2015 Landscape Study
[26] JJ Prescott 2036
[27] ODRT&P 306,309
[28] ODRTP 301
[29] JJ Prescott 1997-98
[30] Id. 1996
[31] Id.
[32] Id. 2001

and landlord/tenant disputes, but "lesser misdemeanors and civil infractions" where the state is involved as the complainant or prosecutor.[33] In its strongest form, proponents compare ODR systems to the absence of access to any dispute resolution process, pointing to the same evidence that litigants with small money value claims cannot afford counsel and cannot afford to lose time from work to appear in court *pro se*.[34]

Almost anything looks good in comparison to nothing – indeed, the problem takes on real urgency when cast in this light. And the urgency is real. But from a design perspective this is not a proper benchmark for decisions about the administration of justice. Against such a benchmark any solution that even modestly improves on the status quo might be considered worth pursuing even if it too is deeply flawed in other ways. Those flaws might not receive the attention they deserve in the haste of policy makers to triage the status quo and the enthusiasm of innovators to turn a profit. Proper reforms require more sober assessment and deliberation.

The first problem with the simplicity/access nexus is the assumption that low value cases are in fact simple. They can be made to seem simple by comparison to more sophisticated causes of action, but, at least for the parties in 'simple' cases, this is an irrelevant comparator. For parties to a case, the judgment whether their case is simple rests on factors such as

- whether they have dealt with similar disputes before and are familiar with the applicable law and procedure,
- the relative value of the case as compared to their other assets and debts,
- dignitary considerations linked to the harm they have suffered or are accused of causing as compared to other wrongs and emotionally charged problems they have dealt with,
- dignitary considerations linked to the degree of participation and understanding litigants have about the process that results in resolution of a dispute
- the capacity of designers of ODR systems to capture the interests of the parties,
- and the actual merits.

With respect to the first consideration, an experienced landlord likely has dealt with tenant disputes in the past and can therefore navigate legal issues in a new dispute with some degree of comfort even if the matter is not free of frustration. By contrast, a tenant who has never had an abusive landlord will not likely regard even a small money value dispute about a repair, return of a deposit, or penalty for late rent as 'simple.' With respect to relative value, the second consideration, even a seemingly 'minor' fine or civil liability can loom large for a person of modest means, forcing painful choices about whether to put food on the table or pay up to avoid mounting fines and fees and continuing intervention on the part of the state. The stakes won't seem 'minor' to such a party.

[33] Id. 2001-02
[34] Id.

Dignitary considerations are indeterminate and subjective, but an extensive, well established body of social scientific and cognitive research makes clear that these considerations are *central* to the perceived legitimacy of dispute resolution systems. Quick resolution of emotionally charged cases in which people do not feel heard can have enduring negative repercussions not only for the parties, but for the administration of justice. As Alan Lind and Tom Tyler summarize, "people usually feel more fairly treated when they have had an opportunity to express their point of view about their situation."[35] This is just as true, they note, in 'simple' cases as it is for 'complex' ones: "In small claims cases ... all parties to a case would like to have an opportunity to tell their story, taking as much time as they feel they need to articulate the issues that matter to them."[36] Unlimited participation obviously is not possible in any dispute resolution system. Finality matters to fairness. Judges are obliged to impose other limits as well regarding, among other things, legal relevance and consideration for the time that must be spent on other cases. Judges "must be sensitive to the caseload they must handle."[37] Still, Lind and Tyler emphasize that the tension between "objective justice and legal efficiency," on the one hand, and "the experience of subjective justice on the part of the litigant," on the other, doesn't evaporate just because a case is a relatively 'simple' one from the perspective of judges and other dispute systems designers.[38]

> They offer as example the proceedings they studied in a traffic court in Chicago.
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> Judges in that court often take the view that showing up for court and losing a day's pay at work is punishment enough for a traffic offense. As a result, those who arrive in court often have their case dismissed without any hearing. From a defendant's perspective this is a good outcome – the defendant pays no fine, does not go to jail, and has no violation record. However, interviews with traffic court defendants suggest that *despite these favorable outcomes they often leave the court dissatisfied*. For example, one woman showed up for court with photographs that she felt showed that a sign warning her not to make an illegal turn was not clearly visible. After her case was dismissed (a victory!) she was angry and expressed considerable dissatisfaction with the court.... Outcome-based models might find the woman's dissatisfaction difficult to explain, but process-based models would have little trouble in accounting for her reaction ...."[39]

These feelings of not being given the time of day, of not being heard, can ramify in other forms of civic engagement, and in other dealings with the state. If they are tied to other forms of mistreatment at the hands of the state, the consequences can be grave.[40]

With regard to the capacities of legal tech, even a simple case can also prove quite complex to code in an ODR system. Complexity in coding arises not only from the costs of good ODR design but from limits in natural language processing capacities in even the most advanced AI systems and other algorithms. These systems are still capable of fairly comical errors in the

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[35] The Social Psychology of Procedural Justice 4-5.
[36] Id. 5
[37] Id.
[38] Id.
[39] Id. at 2
[40] Monica Bell

interpretation of human language.[41] In other settings these errors present inconveniences – your Uber driver arrives late or drives to the wrong location. In law, the consequences can be catastrophic – including erroneous arrest and separation from one's family, destroyed credit, even the use of deadly force in executing a bad warrant. Natural language processing capacities will improve gradually. However, as with any symbolic system that attempts to reproduce, measure, and operationalize content from another symbolic system (here, human language), there will always be gaps. All symbolic systems err, and all are to one degree or another ineluctably "leaky."[42] This derives from the nature of representation itself – the fact that representation depends upon reduction of signified content to signs. Automated systems that displace human judgment come offer advantages, but they also remove the possibility of real time common sense reconsideration. On this view, the question is whether 'simple' cases are actually simple enough for ODR systems to grasp.[43]

That is a question that cannot be answered by comparing to the cost of adversary resolution or cases assumed to be more complex and therefore more suitable to adversary resolution. It can only be answered by taking stock of the merits.

Much of the adversary system is designed not only to maximize participation and party control (albeit for those who can afford it), but to avoid the problem of pre-judgment – the temptation to decide a case based on reductive first impressions. This temptation is strong, a powerful form of cognitive bias (including confirmation bias, halo effects, etc.). A prominent nineteenth century lawyer and judge famously admonished in defense of the adversary system that "the affairs of mankind are not so nicely adjusted as that one party in a law-suit should be entirely right and the other entirely wrong ... [T]ruth cannot be elicited and justice awarded unless both sides of a case are fairly represented." This is so not only because of the "intricacies" of "commercial relations," the moral complexity of human action subject to legal regulation, or the "nice distinctions to be made in determining the degree of criminality," but because long experience shows that "[m]any cases which at first seemed to be bad have on examination proved to be good."[44] The adversary system thus rests on what one might call procedural skepticism – rules of procedure that reduce the risk of pre-judgment.

The idea that the merits of cases reveal themselves on first impression or on the initial pleadings, and that there is a general category of 'simple' cases is, from this perspective, a seductive fiction. It rests on a tendentious value judgment about small dollar figure claims and the triage imperatives of mass processing. Moreover, evidence from the last decade provides sobering proof that supposedly simple cases (small claims, landlord-tenant, and traffic and other misdemeanors) are not simple in fact and that they have profound ramifications for the administration of justice. Firstly, we know that these cases dominate state trial court dockets, and that in the vast majority the individuals involved do not have counsel. So ODR is staking a claim to displace most state court adjudication, not a small subset. We also know that, regardless of specific subject matter, these are mainly debt collection proceedings where the plaintiff is either the state seeking to recover "legal financial obligations" (fines, fees and other penalties imposed by the court) or a creditor (a lender,

[41] Spaulding, Is Human Judgment Necessary
[42] Spaulding, Is Human Judgment Necessary (quote re leakiness of AI)
[43] There is also open debate among ODR advocates, people who work in communicates theory, and experts in conflict resolution, about the parameters and conditions for establishing trust in dispute resolution. ODRTP passim
[44] Justice Jackson, quoted in The Myth of Civic Republicanism 1436-37

collection agency, or landlord) represented by counsel. This means that these are cases with a powerful repeat player (the state or a private creditor) on one side, and an individual defendant/debtor on the other. This contrasts sharply with the facilitation of cooperative resolution between individuals touted in the ODR literature.

With respect to the first category – public debts – the Department of Justice Ferguson Report and follow-on litigation against municipal courts around the country show that there has been widespread abuse of legal financial obligations as cash-strapped municipalities and courts deprived of general funds by their states have converted courts into fee-for-service entities parasitic on the most financially vulnerable populations within their jurisdictions. In Ferguson, excessive fines and fees were imposed disproportionately on the African American population of the city, and enforcement actions in court, the DOJ found, involved shocking deviations from the principles of procedural due process, including failure to make the constitutionally required inquiry into to litigants' ability to pay before using imprisonment as a penalty or inducement for nonpayment.[45]

At the same time, advocates of ODR have been marketing their platforms to court systems around the country and in the pages of law reviews. In the latter setting, access to justice is the principal theme. ODR advocates insist that in traffic cases faster, cheaper resolution benefits individual defendants because they get closure and avoid the additional fees associated with failure to appear and default.[46] But when one examines the use of the platforms marketed to court systems one finds things like the Fort Collins, Colorado municipal court's ODR system for "camera radar/red light payments." The ODR system provides for resolution of traffic camera tickets. The sophisticated cameras cost $10,000 a month each to operate. Tickets are $75. The city claims the purpose of the cameras is primarily driver safety education and points to data showing reductions in accidents at one of the intersections where the cameras are used. But the program also nets the city about $200,000 a year over operating costs, including payments to the private contractor who services the cameras. Camera citations now well exceed officer written traffic tickets in the city and in other jurisdictions there is evidence that this enforcement tool invites politically corrupt outsourcing to private contractors and generates revenue without improving traffic safety at all.[47]

The Fort Collins ODR system does not appear follow a pure bargaining model where the resolution results from negotiating what will be paid irrespective of the merits. Nor, however, is it designed to fully and faithfully ascertain the merits in each case, including any standard defenses (e.g., the owner of the car was not the driver, the photo does not indicate a violation of traffic laws, legally required signage about the use of a traffic camera was posted at the intersection, etc.[48]).

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[45] Ferguson Report

[46] JJ Prescott

[47] https://www.coloradoan.com/story/news/2016/06/06/how-fort-collins-police-use-red-light-traffic-cameras/85511892/. In other jurisdictions the companies that run the cameras take the bulk of the funds generated, and the evidence on reduction of accidents is mixed – accidents fall at varying rates at the intersections that have cameras but increase at other intersections in the same jurisdiction, raising questions about the behavioral benefits. https://fox40.com/news/are-red-light-cameras-life-savers-or-revenue-generators/. Other research shows political corruption in the awarding of red light camera contracts to private vendors and even less convincing evidence regarding driver safety, including increases in rear end accidents at intersections with cameras. https://www.illinoispolicy.org/reports/illinois-red-light-cameras-have-collected-more-than-1b-from-drivers-since-2008/

[48] https://library.municode.com/co/fort_collins/codes/traffic_code

Even that ODR enforcement process would still not provide a public forum, as court proceedings do, for airing concerns about whether the cameras are used for revenue generation and whether safety improves. Public and media scrutiny of enforcement is literally short-circuited.

How Fort Collins' ODR system operates in fact appears to be something in between these two alternatives.[49] The defendant is assured there is a prosecutor who will review the case – the website's "about ODR" page indicates that a defendant could "potentially have ... fines and fees reduced or in some cases dismissed altogether."[50] The FAQ page, however, characterizes ODR as a process to *enter a guilty plea*, stating that "You can plead guilty, be sentenced, and pay your fines/fees without going to court in person."[51] If the system is mainly designed on the latter principle to enter guilty pleas and collect the fines and fees – if, that is, the private "review" conducted by prosecutors and the court is perfunctory, designed to "improve compliance" on the same terms as the designer's platforms sold to other jurisdictions[52] -- one could scarcely imagine a more efficient model of enforcement (short of automatic withdrawal from bank accounts the moment a camera detects an infraction).[53] The problem is that the efficiency gains of compliance-oriented design accrue mainly *to the city*, even as their legitimacy rests on the fact of guilt and the legitimacy of regulating traffic infractions this way. If we remove those assumptions, then the benefits of speed and resolution accrue exclusively to the city, but only by saddling defendants with unwarranted costs. [Indeed, a compliance-oriented ODR system – one that primarily increases the speed of collection – linked to an automated traffic infraction system (the red light cameras) raises the specter of fully automated law enforcement in derogation of every procedural value other than reduced cost to the state.]

Remarkably, ODR advocates commonly ignore or suspend the merits question altogether – either not seeking to measure it, excluding it from the design of ODR systems, or both.[54] Traffic cases are indeed minor relative to felony cases, but the lesson of Ferguson and broader litigation about excessive fines and fees is that incursions on civil liberty and civil rights in the design of dispute resolution systems for these offenses can be substantial. Recent scholarship on criminal law and procedure reinforces this conclusion, showing that 21st century misdemeanor enforcement has been used to criminalize poverty, to impose onerous systems of regulation and continuing supervision on marginal populations, to feed mass incarceration, and to subordinate racial minorities through biased forms of 'order maintenance' policing and punishment.[55]

Even when the state is not a party to supposedly 'simple' cases, recent empirical studies show that the simplicity hypothesis is untethered to the realities of the administration of justice. As ODR advocates describe small claims, it would be easy to assume not only that private individuals

[49] You have to have a docket number to enter the system, so it is not like an open court where the public can investigate or observe the process.
[50] https://cii2.courtinnovations.com/COFCMC/about
[51] https://cii2.courtinnovations.com/COFCMC/faq
[52] Prescott describing Materhorn system for traffic ODR in Michigan at 2036. When addressing courts, the company's ODR system is even more frank about the speed of fee collection: "Increase access to justice, decrease time to case closure, hasten fee collection, and decrease defaults with Matterhorn." https://getmatterhorn.com/get-results/
[53] For another example, note CyberSettle's cross marketing of ODR technology and technology to accelerate collection. http://www.cybersettle.com/
[54] Id. 2001. See also CyberSettle.
[55] See Issa Kholer-Hausmann, Misdemeanorland: Criminal Courts and Social Congrol in an Age of Broken Windows Policing (2019); Alexandra Natapoff, Punishment Without Crime (2018).

are on both sides of the litigation, but that in many 'simple' cases people gin up "highly emotional conflicts over matters with relatively low monetary value."[56] This happens, but the data show that far more often an individual unrepresented defendant is sued in small claims court by a powerful creditor or landlord represented by counsel. The greater leverage of these plaintiffs is mobilized not to force costly merits adjudication, but rather to reduce a claim to a final judgment and proceed with enforcement. The National Center for State Courts Landscape of Civil Litigation study in 2015 found that three quarters of all judgments in the state courts were less than $5,200.[57] Even among non-small claims cases that went to trial, "[t]hree quarters of judgments entered in contract cases following a bench trial were less than half of those in small claims cases (%1,785 versus $3,900). This contradicts assertions that most bench trials involve adjudication over complex, high-stakes cases."[58] Whatever the nature of modern trial, most civil cases, the study emphasizes, were "disposed of through an administrative process" and for cases that reached judgment, *the most common resolution was a default judgment.*[59] This means there is no meaningful deliberation on the merits, often no hearing whatsoever preceeding the entry of judgment.

Most revealingly, the Landscape Study found that

> "[t]he vast majority of civil cases that remain in state courts are debt collection, landlord/tenant, foreclosure, and small claims cases. *State courts are the preferred forum for plaintiffs in these cases for the simple reason that in most jurisdictions state courts hold a monopoly on procedures to enforce judgments. Securing a judgment ... is the mandatory first step to being able to initiate garnishment or asset seizure proceedings.* The majority of defendants in these cases, however, are self-represented."[60]

The conjunction of self-representation and default judgments in small value debtor-creditor disputes suggests the state courts are operating as accelerated debt collection forums. In the 44 states where judges, clerk-magistrates, and justices of the peace are allowed to issue capias warrants for failure to appear at post-judgment asset examination hearings, defendants face arrest and incarceration with bond often set to equal the debt owed.[61] As with misdemeanor criminal cases then, civil litigation for people in financially precarious situations can result in restraints on liberty in order to force payment.

On this evidence, as with misdemeanor enforcement and ODR, the simplicity/access nexus looks quite different. The problem is not how to speed things up in small value cases and substitute automated bargaining over settlement value (or private deliberation on facts adduced through strictly circumscribed online submissions) in place of public inquiry into the merits. It is how to slow creditors down and ensure attention to the merits and the systemic disparities in power that shape the applicable substantive law (click-wrap and other contracts of adhesion; payday lending schemes, etc.) and enforcement procedures (default judgment, capias, etc.). ODR systems oriented toward speed and automated online resolution may be quite attractive to plaintiff

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[56] Salter 119
[57] https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf at iv
[58] Landscape iv
[59] iv
[60] Landscape v
[61]

creditors, but for individual defendant debtors, the risk that ODR systems will not include adequate exploration of defenses available under the relevant contract, lease, or state and federal consumer protection and fair debt collection practices laws is great. Notably, these defenses are not generally regarded as 'simple' by experts. A 2010 FTC report found that even basic affirmative defenses such as state statutes of limitations "on filing actions to recover debt are sometimes variable and complex, and generally not understood by consumers."[62] An allegation of identity theft raised by a debtor can "increase the complexity and time required" to resolve a matter.[63] The Truth in Lending Act's enforcement structure – which contemplates use of the statute as a counterclaim in a debt collection proceeding -- is famously "confusing."[64]

Enough has been said I hope to make clear that small values cases are by no means simple or low stakes either for the parties concerned or the integrity of the administration of justice. The simplicity hypothesis is false. If there is a class of truly simple claims, and there surely is, the hard question is how to define standards for accurately identifying them without having to adjudicate the merits along the way. As matters currently stand, using low money value claims as a proxy for simplicity will result in a bifurcated system of justice – one in which low and middle income people already priced out of meaningful participation in the adversary system[65] will have no alternative but to avail themselves of ODR systems. If these systems are designed to "improve compliance," efficiency, and collection, rather protect than protect users rights, this bifurcation in the administration of justice will formalize and multiply things properly understood to be bugs in the adversary system, not features.[66]

In the most ambitious ODR systems – those which remove the third party neutral human decision maker altogether – low and middle income people will receive justice defined by software engineers unregulated by standards of judicial ethics except to the extent that courts supervise outsourcing contracts. We know that supervision will be limited by the fact that the best AI systems to date are opaque in their data processing. So, for instance, a deep learning system used to generate "reasonable" settlement values would not be explainable – even to the engineers who program it. Systems that are more transparent because they really on expert design rather than

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[62] https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf at 2

[63] Id. at 47.

[64] https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6257&context=ylj. See Coxson v. Commonwealth Mortgage Co. of America, 43 F.3d 189, 194 (5th Cir. 1995) (TILA counterclaim allowed despite the fact that the loan origination was originated 15 years prior to the proof of claim being filed); In re Wentz, 393 B.R. 545 (Bankr. S.D. Ohio 2008) (TILA counterclaim allowed approximately 3 years after origination).

[65] On the price of adjudication as compared to the value of judgments and the effects on access to justice, see.

[66] Although it is true that the cost of the adversary system for litigants (attorneys fees, filing fees, etc.) exceeds the value of small judgments, this is not an inherent feature of adversary adjudication. The current landscape has been shaped by decades of underfunding courts (forcing them into fee for service models), the systematic defunding of public legal services (sharply limiting the supply of lawyers for low income people), and procedural rules that impose barriers on cost-effective aggregate litigation in court and ADR systems such as arbitration. The crisis in access to justice and the cost curve litigants face is as much a product of misguided policy as procedural formality. This counsels caution in turning the urgency of the status quo into an excuse for triage standards of judging the alternatives ODR advocates promote. Genuinely human-centered innovation would describe as innovation only those alternatives that incorporate the participant perspective and provide low income people with litigation tools to vindicate their rights and defenses in fact.

deep learning, on the other hand, remain highly reductive.[67] Absent regulation, in the not too distant future the bifurcated system may not only flourish, but on terms that would render assessment of how the administration of justice operates for supposedly simple cases difficult, further entrenching a class-based division of labor in the administration of justice.

2. Who Pays for ODR

    - Dependence on third party data brokers
    - Fee for service & private contracting
    - Govt. payment – compare cost curve to other alternatives

3. Standard of Care

    - By what standard should effectiveness be judged and what remedies for defects? In literature assumption seems to be that because it replaces zero access, any reduction in cost, delay, complexity, or combativeness justifies the innovation or Turing test (that if consumers can't tell the difference between an AI system and a human actor, it is adequate). Little attention given to the disclaimers of ODR/AI firms re accountability for error or comparison to liability and enforcement systems for lawyers and courts. Cf. absolute immunity of judges for money damages; liability of municipalities at law and equity

4. Architecture of AI and Theories of Justice

This chapter has so far focused on pragmatic concerns about current ODR systems. In closing I want to raise a more fundamental challenge. My claim is that the architecture of algorithmic governance on which ODR systems rely, especially but not exclusively those that displace third party neutrals, complement a theory of justice at odds with liberal democratic understandings of the rule of law. In a free society, the default rule for the administration of justice is that the law intervenes (a) after specific wrongdoing, not before, and (b) in response to specific instances of wrongdoing, not the broader collective conditions giving rise to them. Ex ante intervention is possible, as is structural relief addressed to conditions that cause legal injury, but they are both procedurally and substantively exceptional. Higher procedural standards have to be met to justify ex ante intervention or sweeping structural reform, and different standards of substantive liability generally apply to inchoate offenses.

These structural default rules operate as doctrines of restraint. They exist to protect the sphere of social action from state domination and from domination by others who have the means to seek legal enforcement of their interests. They exist, that is, to enhance autonomy. Default rules that favor ex post intervention focused directly on assigning responsibility for specific incidents of unlawful conduct allow people to act in the first instance (and err). A basic example is the First Amendment doctrine establishing a presumption against prior restraints. Under this rule courts generally decline to prohibit speech ex ante, leaving victims of libel, slander, and defamation

[67] ODRTP Ch 4 61

to ex post remedies in the law of dignitary torts. So too with the doctrine providing that equitable relief, including provisional injunctive relief, will not be granted unless the remedy at law is inadequate. These doctrines can be and are sometimes criticized on the ground that they permit wrongdoers to cause harm as long as they are willing to pay money damages after the fact.[68] But there are nonetheless important epistemological and political consequences to this structure for the administration of justice. At an epistemological level, the default rules reflect the uncertainty that often exists in the ex ante scene about (a) what will occur, and (b) whether and how the law might apply to any planned course of action. Politically, delaying intervention preserves autonomy ex ante. In a pluralistic liberal democratic society, one in which disagreement extends to matters of substantive justice, the autonomy to act first is the very essence of civil liberty, especially for marginal groups the state and other powerful figures may unfairly regard as deviant or dangerous. Assumptions in the ex ante scene about what will occur and whether the law should apply are prone to be incorrect.[69] Waiting ensures that if litigation occurs there is a discrete event to examine, not only in relation to other similar cases, but on its own terms as a (potentially) unique event.

The adversary system broadly speaking fits these default rules. Procedurally, it embodies them, grounding the administration of justice not in a substantive concept of justice but in decentralized, participatory, public, ex post adjudication.[70] ODR appears at first blush to be complementary – asynchronous court appearance and online systems of fact gathering and pleading claim merely to provide a convenient means of accessing the adversary system. But the structure of access can alter the form of justice. ODR is not public,[71] and yet at the same time, guarantees of confidentiality associated with private settlements and the attorney-client privilege do not appear to apply with respect to information gathered by ODR platform providers.[72] The main selling point of ODR is the efficient standardization of participation – gathering legally relevant information for purposes of adjudication without the cumbersome requirements of appearing in court. However, the standardization ODR provides transforms democratically enacted and public rules of procedure and evidence into proprietary technology. Along the way it may alter these rules on terms only those with relevant expertise in expert systems design and machine learning can understand, assess, and modify. Taking courts "online" in this way thus replaces lawyers who work in principal-agent relationships for clients, and who have expertise in the rules of procedure and evidence, with engineers whose highest fidelity is to investors and, secondarily, to the courts who retain them to help reduce costs. Users of ODR platforms become mere tertiary beneficiaries in this framework, whereas they are in principle the core right holders in the adversary system. ODR also replaces the public appearance and reason-giving function of the judge either entirely (in systems that displace these decision makers with AI) or partially by moving the scene of adjudication from court to a private forum such as chambers where the judge or court staff

[68] The critique is particularly salient when state officers and entities are allowed to take a transactional approach to rights designed to limit their abuse of power.

[69] The line between authoritarian systems of government and liberal democratic systems is often drawn at the point of demarcation between elections that are truly contested (in the sense that either side can win in an election administered in a free and fair manner) and those that are not (in the sense that the result is foreordained, manipulated, or guaranteed by force). But there is another basic feature of the line. Authoritarian societies need compliance, their stability hinges on population control and the suppression of dissent. For this reason, autonomy in the ex ante scene must generally be eliminated.

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[71] Cite on due process cases re closed courts.

[72] Cf. ODRTP 56.

member decides alone. We know that reasons for appearing publicly in adversarial space to adjudicate are not exclusively performative.[73] They prevent corruption, bias, and arbitrary decision. Justice, the saying goes, must not only be done, but "seen to be done."[74]

No one should therefore be surprised by what we observed in section I above -- ODR systems that serve principally to improve compliance with judgments on behalf of the state and powerful creditors while failing even to ascertain accuracy, decision on the merits, the rights and defenses of unrepresented parties, and systemic distortions in the laws being enforced.

The problem is not just the structure of current ORD and the incentives of designers. It is that, at root, ODR systems are oriented toward a different theory of justice. Its proponents are quite frank about this. The real promise of the technology is not streamlining access to court, it is developing a sufficiently robust predictive model of adjudication and the underlying social and economic conflicts that lead to adjudication to prevent conflicts from arising in the first place – to instantiate, in other words, an even more robust form of compliance. As one commentator puts it "the seeds of an effort to prevent disputes may lie in the technology employed to resolve disputes." How? "[T]he use of technology provides ODR with more opportunities to identify systemic contribution to conflict and systemic opportunities to reduce conflict."[75] These opportunities arise from the capacity of ODR systems to exploit the information they gather about pending disputes to assist in "automatic detection of problems, obviating the need to passively wait for complaints to arrive and allowing proactive remedying of the problem even before a potential complainant has been made aware of its existence."[76]

If this sounds futuristic, it is not. Private ODR systems are already deployed in this way to prevent customer, user, and employee disputes.[77] It's one thing of course when the lens is directed inward, to identify policies and practices of a corporation that are producing conflict – even for a court this form of internal accountability could be beneficial.[78] But it is quite another to direct the lens outward, using the information saturation of digital interaction and predictive analytics to attempt to manipulate the preferences, choices, and norms of users. Private ODR appears to involve both.[79]

In public ODR systems, "the lines are already being blurred," as these systems displace adjudication in court.[80] Preventive justice dovetails with longstanding work in organizational behavior, alternative dispute resolution, international conflict resolution, risk management, public health, administrative law, and the field of "dispute systems design."[81] Ury, Brett and Goldberg famously argued from the study of wildcat strikes that ex post dispute resolution could be avoided by studying the patterns in those disputes and altering institutional structures to reduce conflict.

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[73] Spaulding, Enclosure of Justice.
[74] Stuart Hampshire, Justice is Conflict 9.
[75] ODRTP 57; id. at 45 ("Where patterns can be identified, the dispute resolution system can move beyond the resolution of individual disputes and enhance prevention on a system-wide basis.").
[76] Id. at 56.
[77] Id. Citing Wikipedia example. Id. at 42 (citing Ebay and its use of its ODR system); 142; 245.
[78] On the broader role of internal assessment and behavioral change, see Simon and Sabel, Minimalism and Experimentalism in the Administrative State, Geo. L.J. (2010).
[79] Id.
[80] ODRTP 54-55.
[81] ODRTP ch. 3

For dispute system designers conflicts are, in the main, unfortunate and avoidable events, rights and adjudication are costly and unhelpful. They believe that with the correct information, well calibrated interest-balancing, and appropriate ex ante interventions, both social conflict (wildcat strikes) and conflict in court can be prevented.[82] The information technology underlying ODR provides means previously unavailable to extend this theory of preventive justice beyond the boundaries of individual organizations in which dispute systems designers have traditionally served as experts.

What could be wrong with generalizing dispute prevention? Why not celebrate both the displacement of lawyers and adjudication in the adversary sense? Partly how one reacts to these questions depends on one's priors regarding the administration of justice. If you start with the priors of dispute systems design conflict is a sign of social illness, noncompliance with law a sign of delinquency and danger; in the other, justice, as Stuart Hampshire insisted, *is* conflict – a fortiori in pluralistic societies.[83] The adversary system reconciles the tension between these viewpoints not by banishing preventive justice but by subordinating ex ante intervention to ex post adjudication. The important point for present purposes is that, ODR systems have the capacity not only to invert this relationship but to subvert it altogether. What has traditionally been understood as an exceptional form of the administration of justice in the liberal democratic state stands to become the rule.

This is not inevitable. Genuinely human-centered design can improve ODR systems (by insisting that they be opt-in not mandatory, imposing strict notice and consent requirements, protecting the privacy of user information while promoting transparency on ODR rules and system design, developing more precise heuristics for separating simple cases from complex ones, elevating procedural values beyond compliance and efficiency, etc.), but only if judges, court administrators, and other regulators recognize that we have arrived at the legal equivalent of the combustion engine-electric car design decision.

[82] ODRTP 44-46.
[83] Hampshire, Justice is Conflict.