

**BUILDING THE VIRTUAL COURTHOUSE:
ETHICAL CONSIDERATIONS FOR DESIGN,
IMPLEMENTATION, AND REGULATION
IN THE WORLD OF ODR**

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For some time now, there has been a well-documented movement toward alternative dispute resolution (ADR) and away from traditional litigation through courts in the United States and around the world. The benefits of the ADR movement are manifold, ranging from greater control over the process of dispute resolution to alleviating overburdened courts. But the costs of ADR are also becoming increasingly apparent, including a relative lack of due process protections. A more recent phenomenon is the marriage of technology to ADR, creating the field of online dispute resolution (ODR). Increasingly, both public- and private-sector actors are moving towards ODR to resolve low-value disputes. Some companies, such as Modria, are seeking to increase efficiency still further through automating the dispute resolution process through the use of algorithms, effectively removing humans from the justice delivery system. The limited literature analyzing the ODR movement has so far neglected the ethics of these emerging systems. Where should policy makers, business leaders, and societies draw the line between disputes that may be resolved online—potentially using an automated system—and those requiring in-person hearings? This Article seeks to begin the conversation about these questions by reviewing the current technological state of ODR and its use by companies—including eBay, Modria, and Cybersettle, among others—before moving on to consider ethical ODR issues including balancing such values as transparency, efficiency, and conflict dynamics. Finally, this Article makes suggestions for regulating this burgeoning industry, drawing from the interdisciplinary literature on polycentric governance.

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INTRODUCTION

Alternative dispute resolution (ADR) is an attractive and increasingly popular option relative to traditional litigation, especially in the area of commercial law.¹ This growth has led many commentators to argue that ADR is providing access to justice for disputes that are often not heard in the courts due to the low value of recovery or the extraordinary effort that would be required to win a claim.² A similar trend now may be happening in a fast-emerging area of consumer spending: e-commerce. The inability of individuals and businesses to protect their rights in an online environment, in particular, is a concern for many policy makers and businesses as it erodes individuals’ trust in the online marketplace and thereby stands as a barrier to continued e-commerce growth.³

As people become more comfortable with online purchasing, the likely extension of ADR into cyberspace is predictable—as may be shown by the rise in popularity of shopping days like Cyber Monday.⁴ To resolve inevitable e-commerce disputes, virtual courthouses are being built. These courthouses allow individuals to pursue causes of action—such as failure to deliver items ordered—using an online dispute

1. 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. (forthcoming 2014) (manuscript at 1).

2. See, e.g., *Resolving Small Claims Cases*, CAL. COURTS, <http://www.courts.ca.gov/20129.htm> (last visited Jan. 2, 2014).

3. See Raymond & Shackelford, *supra* note 1 (manuscript at 34).

4. Sean Patterson, *Amazon Sold 36.8 Million Items on Cyber Monday*, WEBPRONEWS (Dec. 30, 2013), <http://www.webpronews.com/amazon-sold-36-8-million-items-on-cyber-monday-2013-12>.

resolution (ODR) platform. Unfortunately, many of these virtual courthouses have failed in the past, at least partially because of the high costs associated with design, upkeep, and staffing the platforms.⁵ Business communities, commentators, and policy makers recognize the value of ODR platforms but are struggling to locate appropriate funding and demarcate the bounds of ODR use vis-à-vis brick-and-mortar courts. Not waiting for policy makers, the private sector has stepped into the void and begun to provide ODR services. However, managers—and all of us as “netizens”⁶—must, and should ask: How can and should we regulate ODR services to ensure both justice and efficiency?

Ethical issues are already arising in the ODR context. For example, in the early stages of the ODR revolution, “a leading global provider of Web-enabled and in-person dispute-resolution services,” NAM Corp., “announced . . . that Insurance Services Office, Inc. (ISO) . . . acquired 16 percent of” its outstanding equity.⁷ “As part of the transaction, ISO [was] issued 642,570 shares of common stock” and the president and chief operating officer of ISO joined NAM’s board of directors.⁸ In practical terms, one of the major clients of an ODR provider now owned a portion of—and benefited from the use of—its dispute resolution provider. One can imagine the conflict of interest issues that emerge from such a relationship. And while one may argue that no undue influence occurred in this situation, the lack of transparency, regulation, and protections afforded the insurance claimants in this situation should create serious concerns over the unregulated nature of private dispute resolution businesses.

Though the reasoning behind the NAM Corp. investment is business prima facie, the implications to the justice system are at best murky and demonstrate the need to develop regulation to shape the legal and ethical environment of ODR providers as they make a business out of accessing justice. The limited literature analyzing the ODR movement has so far largely neglected the ethics of these emerging systems—especially as

5. See generally Ethan Katsh & Leah Wing, *Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future*, 38 U. TOL. L. REV. 19, 21–31 (2006) (discussing the progression of ODR and the various platforms that have succeeded and failed). For a further discussion, see Raymond & Shackelford, *supra* note 1.

6. MICHAEL HAUBEN & RONDA HAUBEN, NETIZENS: ON THE HISTORY AND IMPACT OF USENET AND THE INTERNET 3 (1997).

7. Press Release, Insurance Servs. Office, Inc., NAM Corporation, Parent Company of Clicknsettle.com, Announces That Insurance Services Office, Inc., Acquires 16 Percent Stake in NAM, (May 11, 2000), <http://www.iso.com/Press-Releases/2000/NAM-CORPORATION-PARENT-COMPANY-OF-CLICKNSETTLE.COM-ANNOUNCES-THATINSURANCE-SERVICES-OFFICE-INC.html>.

8. *Id.*

they relate to low-value disputes in an era of rapid technological advancement enabling the growth of automation and with new public and private ODR providers regularly coming online.⁹ Where should policy makers, business leaders, and societies draw the line between disputes

9. There are, however, several excellent books that touch on aspects of this topic, the most recent and well-regarded being: ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION (Mohamed S. Abdel Wahab et al. eds., 2012) [hereinafter ONLINE DISPUTE RESOLUTION]. The book goes into several relevant topics in individual chapters, such as (not otherwise included): Arno R. Lodder & John Zeleznikow, *Artificial Intelligence and Online Dispute Resolution*, in ONLINE DISPUTE RESOLUTION, *supra* at 61, 65; Ernest Thiessen, Paul Miniato & Bruce Hiebert, *ODR and eNegotiation*, in ONLINE DISPUTE RESOLUTION, *supra* at 329. There are also an array of articles touching on aspects of this topic (not otherwise included): Robert M. Bastress & Joseph D. Harbaugh, *Taking the Lawyer's Craft into Virtual Space: Computer-Mediated Interviewing, Counseling, and Negotiating*, 10 CLINICAL L. REV. 115, 144–50 (2003) (discussing some ethical issues arising in the field of online dispute resolution); Ronald A. Brand, *Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project*, 10 LOY. U. CHI. INT'L L. REV. 11, 11–12 (2012); Pablo Cortés, *Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers*, 19 INT'L J.L. & INFO. TECH. 1, 1 (2011) (describing the potential use of trustmarks in the E.U.); Susan Nauss Exon, *Maximizing Technology to Establish Trust in an Online, Non-Visual Mediation Setting*, 33 U. LA. VERNE L. REV. 27, 60–62 (2011); Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 POL. BEHAV. 119, 121 (2003); Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2 DUKE L. & TECH. REV. 1 (2003), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr>; Katsh & Wing, *supra* note 5, at 21–31 (discussing the progression of ODR and the various platforms that have succeeded and failed); Lucille M. Ponte, *Throwing Bad Money after Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 TUL. J. TECH. & INTELL. PROP. 55, 67–70 (2001) (discussing the issues associated with such a conflict of interest); Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253, 253 (2006); Thomas Schultz, *Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust*, 6 N.C. J.L. & TECH. 71, 74 (2004); Stephanie Smith & Jan Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 156 (2009); Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution*, 70 FORDHAM L. REV. 985, 985–90 (2001) (discussing the practical and ethical implications of online dispute resolution, particularly in the realm of e-commerce); Jennifer Zawid, *Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators*, 40 U. MIAMI INTER-AM. L. REV. 1, 32–34 (2008); Jo DeMars et al., *Virtual Virtues: Ethical Considerations for an Online Dispute Resolution Practice*, DISP. RESOL. MAG., Fall 2010, at 6, 7 (“[A]s soon as the mediator aids the perceived weaker of the parties to ensure a balanced, fair outcome, the mediator has infringed on his or her ability to remain neutral.”); Julia Hörnle, *Encouraging Online Dispute Resolution in the EU and Beyond - Keeping Costs Low or Standards High?* (Queen Mary Sch. of Law, Legal Studies Research Paper No. 122/2012, 2012), available at <http://dx.doi.org/10.2139/ssrn.2154214>.

that may be resolved online—potentially using an automated system—and those requiring in-person, offline hearings?

This Article seeks to begin the conversation about the ethics of ODR by reviewing the current technological state of ODR and its use by companies—including eBay, Modria, and Cybersettle, among others—before moving to consider the ethical issues ODR triggers, including balancing such factors as transparency, efficiency, and conflict dynamics. Finally, this Article makes suggestions for regulating this burgeoning industry, drawing from the interdisciplinary literature on polycentric governance.¹⁰ Ultimately, our argument turns on the concepts of trust—in both ODR platforms and justice systems—and applying civic virtue to enshrine ethical codes of conduct in resolving e-commerce disputes from the ground up. While ODR can serve a productive purpose and increase efficiency for the resolution of low-value disputes, questions need to be asked now about how robust these systems should become and how policy makers can best harmonize the interests of governments in promoting justice and business in the bottom line.

I. RESOLVING BUSINESS DISPUTES ONLINE

The growth of e-commerce continues to accelerate around the world as more consumers gain confidence to transact business online, traditional in-person business shifts to e-commerce platforms, and Internet access levels in both developed and underdeveloped countries begin to converge.¹¹ Business models across the world are increasingly under pressure due to the continuing evolution of e-commerce. For example, China has the world's largest online population with nearly 600 million Internet users as of October 2013 and is the world's second-largest online retail market.¹² In the United States,

10. See Michael D. McGinnis, *An Introduction to IAD and the Language of the Ostrom Workshop: A Simple Guide to a Complex Framework*, 39 POL'Y STUD. J. 169, 171–72 (2011), (defining polycentricity as “a system of governance in which authorities from overlapping jurisdictions (or centers of authority) interact to determine the conditions under which these authorities, as well as the citizens subject to these jurisdictional units, are authorized to act as well as the constraints put upon their activities for public purposes”).

11. *Country Comparison: Internet Users*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2153rank.html> (last visited Jan. 13, 2014); *World Telecommunication/ICT Indicators Database 2013 (17th Edition)*, INT'L TELECOMM. UNION (Dec. 6, 2013), <http://www.itu.int/en/ITU-D/Statistics/Pages/publications/wtid.aspx>.

12. See Kristie Lu Stout, *The Mad, Mad World of China E-Commerce*, CNN.COM (Oct. 1, 2013, 1:19 AM), <http://www.cnn.com/2013/10/01/world/asia/lu-stout-china-e-commerce/>.

Black Friday 2013 (November 29) saw \$1.198 billion in desktop online sales, making it the season's first billion dollar day and heaviest online spending day to date, . . . a 15-percent increase versus Black Friday 2012. Thanksgiving Day (November 28) . . . achieved a strong 21-percent increase over Thanksgiving Day [2012] to \$766 million.¹³

E-commerce now accounts for some 8 percent of total retail sales in the United States, and Forrester Research predicts U.S. online retail sales will soar to \$370 billion by 2017.¹⁴

Some commentators argue that recent growth in e-commerce is tied to the improving trust that consumers and businesses have in online commercial systems.¹⁵ This increased trust in e-commerce arises in several key areas, such as corporate image, reputation, and media exposure.¹⁶ These factors can be eroded, however, when a business lacks appropriate systems to handle customer complaints—especially in the age of social media—highlighting the need for effective dispute resolution mechanisms. And of course, the judicial system in which the business is located can further erode the trust of the customers when the judicial system lacks effective means of providing redress for harm or loss. Moreover, inadequate cybersecurity investments can similarly dampen consumer enthusiasm for e-commerce. According to one study, cyber criminals targeting e-commerce have become so successful that they are, in some cases, shaking consumer confidence, which could be degraded to such an extent that users sacrifice convenience for security.¹⁷

13. *Black Friday Billions: \$1.2 Billion in Desktop E-Commerce Spending Marks First Billion-Dollar Online Shopping Day of the 2013 Holiday Season*, COMSCORE (Dec. 1, 2013), http://www.comscore.com/Insights/Press_Releases/2013/12/Black_Friday_Billions_12_Billion_in_Desktop_ECommerce_Spending_Marks_First_BillionDollar_Online_Shopping_Day_of_the_2013_Holiday_Season.

14. Sucharita Mulpuru et al., *US Online Retail Forecast, 2012 to 2017*, FORRESTER (Mar. 13, 2013), <http://www.forrester.com/US+Online+Retail+Forecast+2012+To+2017/fulltext/-/E-RES93281?docid=93281>; *US Online Retail Sales to Reach \$370 Billion by 2017*, FORRESTER (Mar. 13, 2013), <http://www.forrester.com/US+Online+Retail+Sales+To+Reach+370+Billion+By+2017/-/E-PRE4764>.

15. See, e.g., Abdollah Aghaie, *Measuring and Predicting Customer Lifetime Value in Customer Loyalty Analysis: A Knowledge Management Perspective (A Case Study on an e-Retailer)*, 20 INT'L J. INDUS. ENGINEERING & PRODUCTION RES. 21, 21 (2009); Brian J. Corbitt, Theerasak Thanasankit & Han Yi, *Trust and E-Commerce: A Study of Consumer Perceptions*, 2 ELECTRONIC COMM. RES. & APPLICATIONS 203, 203 (2003).

16. See Aghaie, *supra* note 15, at 25.

17. See, e.g., PETER SOMMER & IAN BROWN, *REDUCING SYSTEMIC CYBERSECURITY RISK* 5–8, 30 (2011), available at <http://www.oecd.org/gov/risk/46889922.pdf>.

Commentators have begun to recognize that the absence of redress systems directly impact the overall trust in the e-commerce marketplace, which in turn inhibits continued growth.¹⁸ As a result, some judicial systems are beginning to address this gap in providing online access to justice.¹⁹ Yet, some businesses believe that legislative and judicial systems are moving too slowly (or not at all) and are instead creating their own dispute resolution systems.²⁰ Ready or not, several private sector entities have decided that the time has come to build ODR platforms. The question is whether these will be trustworthy systems, designed with an eye toward creating an ethical as well as a cost-effective private justice system for resolving online business disputes.²¹

18. See *EU Consumers Could Save €22.5 Billion a Year from New Dispute Resolution Mechanisms*, ARCHIVE EU2013 (May 23, 2013) [hereinafter *EU Consumers*], <http://www.eu2013.ie/news/news-items/20130523ecc-netconference/> (recognizing that effective ADR encourages consumers to spend because they know that redress is easily accessible).

19. See *infra* notes 34–46 and accompanying text.

20. For example, eBay has long allowed for the resolution of disputes. See, e.g., *Resolving Buying Problems*, EBAY, <http://pages.ebay.com/help/buy/protecting.html> (last visited Apr. 9, 2014). Of course, others also offer complaint services. For example, Amazon.com allows customers of third-party sellers to file an A-to-Z Guarantee claim if they purchased physical goods or eligible services on the Amazon.com website. See *A-to-Z Claim Conditions*, AMAZON.COM, <http://www.amazon.com/gp/help/customer/display.html?nodeId=541260> (last visited Apr. 9, 2014). A similar service is offered by Etsy. See *How Do I Report a Problem with My Order?*, ETSY.COM, <http://www.etsy.com/help/article/35> (last visited June 5, 2013). For further discussion on this point, see Colin Rule & Harpreet Singh, *ODR and Online Reputation Systems: Maintaining Trust and Accuracy through Effective Redress*, in *ONLINE DISPUTE RESOLUTION*, *supra* note 9, at 163, 163–64.

21. For example, the World Justice Project works to strengthen the rule of law by working with different sectors and disciplines around the world to create equitable and just communities. See MARK DAVID AGRAST ET AL., *WORLD JUSTICE PROJECT RULE OF LAW INDEX 2012–2013*, at 11 (2012) [hereinafter *WORLD JUSTICE PROJECT*], available at <http://worldjusticeproject.org/publication/rule-law-index-reports/rule-law-index-2012-2013-report> (noting that “[t]he rule of law is a system in which the following four universal principles are upheld: [1] The government and its officials and agents as well as individuals and private entities are accountable under the law. [2] The laws are clear, publicized, stable, and just, are applied evenly, and protect fundamental rights, including the security of persons and property. [3] The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient. [4] Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve”). Because ODR seeks to replace a portion of the justice system, we argue that an ethical, private justice system must live up to these standards—especially factor four.

A. The Emergence and Importance of Online Dispute Resolution

According to noted ADR author Professor Jacqueline Nolan-Haley, “[a]rbitration’s fading popularity over the last two decades has energized mediation’s growth and has helped it to displace arbitration as the ADR process of choice.”²² Indeed, Professor Nolan-Haley asserts: “mediation is the new arbitration.”²³ In many ways, the growth of mediation has spurred renewed attention to ODR, as mediation is a cooperative process fostered through communication—something that can be facilitated within cyberspace.

The definition of ODR is a flexible one; however, there are basic tenets that help frame the concept. At the heart of ODR is the use of technology to resolve disputes between parties.²⁴ In this case, as this Article addresses e-commerce, ODR may be defined as the use of technology to resolve a dispute between parties engaging in the online purchase of goods or services. It is important to note that although technology can be used to communicate and file a complaint with an online business, these types of mechanisms should not be considered anything other than a business’s internal, customer-handling system. ODR involves the use of technology to facilitate more than mere communications.²⁵ Instead, it should be viewed as a place to resolve a dispute between parties that cannot—or will not—resolve the dispute without intervention. The existence of a dispute is the distinguishing factor between internal systems for managing customer complaints and external systems that seek to provide a means of redress. Because the system seeks to replace the traditional justice system, the ODR platform should be subject to some minimal regulation, such as basic due process and procedural protections as are explored in Part III.²⁶

The extension of mediation into cyberspace holds the potential to improve individuals’ confidence in e-commerce and the corresponding e-commerce redress mechanism. The absence of an effective redress system is often heralded as one of the major obstacles to growth of cross-border e-commerce.²⁷ As highlighted by European regulators,

22. Jacqueline Nolan-Haley, *Mediation: The “New Arbitration,”* 17 HARV. NEGOT. L. REV. 61, 66 (2012).

23. *See id.* at 61.

24. *See* Raymond & Shackelford, *supra* note 1 (manuscript at 22).

25. For a further discussion, see *id.* (manuscript at 22–23).

26. *See infra* Part III.

27. *See* EXEC. AGENCY FOR HEALTH & CONSUMERS, CONSUMER MARKET STUDY ON THE FUNCTIONING OF E-COMMERCE AND INTERNET MARKETING AND SELLING TECHNIQUES IN THE RETAIL OF GOODS, FINAL REPORT 179 (2011) (reporting and evaluating a wide breadth of information concerning online behavior and attitudes of consumers within Europe); *see also* EUR. COMM’N, THE EU JUSTICE SCOREBOARD (2013),

“fragmentation of the internal market impedes efforts to boost competitiveness and growth.”²⁸ The report goes on to note an important point:

Furthermore, the uneven availability, quality and awareness of simple, efficient, fast and low-cost means of resolving disputes arising from the sale of goods or provision of services . . . constitutes a barrier . . . which undermines consumers’ and traders’ confidence in shopping and selling across borders.²⁹

The absence of redress mechanisms often costs businesses and individuals money and time, which further erodes consumer confidence. As highlighted by Dr. Ann Neville, Director of European Consumer Centre, Ireland, “losses experienced by cross-border shoppers are estimated at EUR425 million per annum.”³⁰ Moreover, “[t]he European Commission has estimated that if EU consumers can rely on well-functioning and transparent ADR for their disputes, both national and cross-border, they could save” approximately €22.5 billion per year.³¹

B. Current Uses of Online Dispute Resolution

Similar to the flexible definition of ODR itself, ODR providers fall into numerous and varied categories, oftentimes without clear delineations between the various types. At the simplest level, ODR providers may be divided into private and public groups. Private ODR providers are, for the most part, business entities that seek to perform dispute resolution as a business endeavor. These platforms are currently unregulated and have no judicial enforcement mechanism.³² Instead, the

available at http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf. For the full study on the functioning of judicial systems in the E.U. Member States, prepared in 2012 by the European Commission for the Efficiency of Justice (CEPEJ), see EUR. COMM’N FOR THE EFFICIENCY OF JUST., STUDY ON THE FUNCTIONING OF JUDICIAL SYSTEMS IN THE EU MEMBER STATES (2014), *available at* http://ec.europa.eu/justice/effective-justice/files/cej_study_scoreboard_2014_en.pdf.

28. Regulation No 524/2013 of The European Parliament and of the Council of May 21, 2013 on Online Dispute Resolution for Consumer Disputes, 2013 O.J. (L 165) 1 (EU) [hereinafter ODR Reg.].

29. *Id.*

30. *EU Consumers*, *supra* note 18 (quoting Dr. Ann Neville, Director of ECC Ireland).

31. *Id.*

32. See Dusty Bates Farned, *A New Automated Class of Online Dispute Resolution: Changing the Meaning of Computer-Mediated Communication*, 2 FAULKNER L. REV. 335, 343 (2011) (“[W]hile individual ODR providers and institutions often have

outcome of the ODR process is enforced by either a community approach (the group uses feedback³³ and other mechanisms to tell the world of bad behavior reminiscent of the principles of polycentric governance discussed in Part III) or by a charge-back facility that is completed through payment (such as when a credit card provider reverses a charge as a means of refunding the amount lost).³⁴ The connection between trust in the system—including the ability to provide feedback and resolve disputes—and the willingness to sell and purchase items online is connected for both groups. For example, eBay, Amazon, and PayPal, all have ODR systems that are widely acknowledged as increasing the overall trust of the online buying, selling, and payment environment.³⁵

Public ODR providers are distinct from private providers as they are connected to, sometimes supported by, and often funded by the public.³⁶ Because these online platforms are analogous to virtual courthouses,³⁷ these systems are regulated, monitored, and required to comply with the regulations that apply to traditional courthouse settings. In essence, public ODR platforms exist to handle a narrow range of issues.³⁸ As such, the regulation of these virtual courthouses is more robust than their private-sector equivalents because these platforms are regulated in the

codes of professional responsibility, there is no accepted and authoritative code that governs the profession collectively.” (quoting Llewellyn Joseph Gibbons, *Online Dispute Resolution and the Need for More Than Virtu(e)al Professionalism*, 38 U. TOL. L. REV. 351, 355 (2006)). See generally Anjanette Raymond, *Yeah, but Did You See the Gorilla? Creating and Protecting an ‘Informed’ Consumer in Cross Border Online Dispute Resolution*, 18 HARV. NEGOT. L. REV. (forthcoming 2014) (manuscript at 6).

33. Rule & Singh, *supra* 20, at 163–64.

34. See Vikki Rogers, *Knitting the Security Blanket for New Market Opportunities – Establishing a Global Online Dispute Resolution System for Cross-Border Online Transactions for the Sale of Goods*, in ONLINE DISPUTE RESOLUTION, *supra* note 9, at 95, 102.

35. For a further discussion, see Raymond & Shackelford, *supra* note 1 (manuscript at 23–26).

36. One such example exists in Mexico. Called “Concilianet,” the platform is both hosted and supported by the government via the Office of the Federal Prosecutor for the Consumer (PROFECO). See CONCILIANET, <http://concilianet.profeco.gob.mx/concilianet/faces/inicio.jsp> (last visited Apr. 22, 2014).

37. See generally, Louis Del Duca, Colin Rule & Zbynek Loebl, *Facilitating Expansion of Cross-Border Ecommerce - Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law)*, 1 PENN. ST. J.L. & INT’L AFF. 59, 66–67 (2012).

38. This is true in the Concilianet example and will be true when the E.U. ODR/ADR platform comes into effect. See Press Release, Europa, A Step Forward for EU Consumers: Questions & Answers on Alternative Dispute Resolution and Online Dispute Resolution (Dec. 3, 2013) [hereinafter ADR Q&A], available at http://europa.eu/rapid/press-release_MEMO-13-193_en.htm.

same manner as brick-and-mortar courthouses, with adjustments made to accommodate the use of technology.³⁹ That is not to say that private providers cannot provide the design, support, and maintenance of these public platforms. The salient fact is that the platform itself will most likely be governed by the same rules as any local justice system such as a small claims court.

While several ODR platforms have failed in the past due to technological⁴⁰ and coverage limitations and cost-associated issues,⁴¹ a new breed of public ODR platforms is emerging that has expanded the services offered and therefore stands a greater likelihood of success. For example, Mexico has developed an online platform, “Concilianet,” that seeks to resolve disputes between registered merchants and their customers.⁴² In many instances, individuals and court-associated personnel design, monitor, and support public ODR systems.⁴³ As a result, these systems enjoy a high degree of support from both public funding and the judiciary.⁴⁴ In many ways, these systems stand in an

39. For example, unlike brick-and-mortar courthouses, ODR platforms will be connected to *national* ADR entities and will thus allow national ODR advisors “to provide general information on consumer rights and redress in relation to online purchases” and to “assist with the submission of complaints and facilitate communication between the parties.” ADR Q&A, *supra* note 38, at 2. *See also* Directive 2013/11/EU of the European Parliament and the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes, arts. 7, 16, 27, 2013 O.J. (L 165) [hereinafter ADR Directive]; ODR Reg., *supra* note 28, at art. 7.

40. One of the biggest issues that has arisen in ODR functionality is the inability of technology to fully capture the visual and other cues that are available in face-to-face interaction. Several studies have been completed in the area. *See* COLLEEN GETZ, C.A. WALKER & ASSOCS., EVALUATION OF THE DISTANCE MEDIATION PROJECT: REPORT ON PHASE II OF THE TECHNOLOGY-ASSISTED FAMILY MEDIATION PROJECT 30 (2010), available at <http://www.mediatebc.com/PDFs/1-2-Mediation-Services/Distance-Mediation-Project---Evaluation-Report.aspx>; Sarah Rogers, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence*, 24 OHIO ST. J. DISP. RESOL. 349, 361 (2009). However, this may be less of an issue as technology advances. *See* Farned, *supra* note 32, at 353; Philippe Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. DISP. RESOL. 301, 338 (2008).

41. *See generally* Katsh & Wing, *supra* note 5 (discussing the progression of ODR and the various platforms that have succeeded and failed).

42. *See Proveedores Participantes*, CONCILIANET, http://concilianet.profeco.gob.mx/concilianet/faces/de_quien.jsp (last updated May 2012) (providing a Spanish-language list of providers participating in Mexico’s Concilianet program). For a further discussion of the platform, see Raymond & Shackelford, *supra* note 1 (manuscript at 26–27).

43. This occurs in the planned ODR platform for the European Union. *See* ADR Directive, *supra* note 39, at art. 5, 6; ODR Reg., *supra* note 28, at art. 5, 6.

44. GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE 83 (2004) (noting “all governments that have addressed ODR consider it a welcome breakthrough”).

equal place with the more traditional brick-and-mortar courthouses, although they often handle disputes that do not require attendance in a physical courthouse such as criminal proceedings. These public systems are of high importance within the overall debate as they seek to provide a means of redress that stands outside a self-contained community and, in the case of Concilianet, has the backing and support of the local regulators—effectively making the outcome the same in the eyes of the law as a settlement.⁴⁵

The most anticipated public ADR/ODR platform to date will be implemented within the European Union by January 2016.⁴⁶ The Alternative Dispute Resolution and Online Dispute Resolution (ADR/ODR) Rules will establish a European Union-wide online and multilingual platform that will offer a single point of entry to consumers and traders who seek to resolve disputes out of court.⁴⁷ The ODR platform will allow online complaint submission and “an electronic case management tool which enables ADR entities to conduct the dispute resolution procedure with the parties through the ODR platform.”⁴⁸ The intended system is impressive—both for its ability to handle cross-border disputes as well as its ability to facilitate the resolution of disputes completely within an online environment.

At least one private ODR platform provider, Modria, seeks to bridge the private/public divide. Heralded by the *Wall Street Journal* as “[t]he small-claims court for the 21st century” because it exists beyond a self-contained community e-commerce environment,⁴⁹ Modria holds a unique place in the growing ODR industry. The Modria platform seeks to provide ODR facilities for a wide array of disputes, including e-commerce. To accomplish this feat, the Modria platform uses a four-stage process of dispute resolution: diagnosis, negotiation, mediation, and finally arbitration.⁵⁰ These four stages stand as a progression from a party-controlled complaint process to a process that is

45. See Duca, Rule & Loebel, *supra* note 37, at 66–67.

46. See European Commission, *New Legislation on Alternative and Online Dispute Resolution (ADR) and (ODR)*, EUR. COMM’N HEALTH & CONSUMERS, [hereinafter *New Legislation on ADR & ODR*] http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm (last updated Nov. 29, 2011).

47. See ADR Q&A, *supra* note 38.

48. ODR Reg., *supra* note 28, at para. 18.

49. Venture Capital Dispatch, *The Daily Start-Up: Modria Launches to Become the Online ‘Small-Claims Court for the 21st Century,’* WALL ST. J. BLOG (Nov. 19, 2012), <http://blogs.wsj.com/venturecapital/2012/11/19/the-daily-start-up-modria-launches-to-become-the-online-small-claims-court-for-the-21st-century/>.

50. MODRIA, <http://www.modria.com/> (last visited Apr. 12, 2014).

both external to the parties and managed by a neutral decision maker.⁵¹ As one progresses through the system, the level of party control diminishes and the outcome gathers greater legal impact as the award becomes globally enforceable. An impartial third-party mediator (also known as a decision facilitator) manages stage three with the intention of seeking to assist the parties in clarifying issues and brainstorming options.⁵² The final stage in the process, should no agreement be reached by the parties up to that point, requires that the parties select an impartial third-party arbitrator with the mandate of rendering a final and binding decision.⁵³

The Modria platform to date has seen enormous growth, as compared to other previous providers, and a cautious level of success in both the private and public sectors. For example, several businesses have initiated the use of the Modria platform within their business environment,⁵⁴ while a recent round of investors raised over \$5 million dollars to continue the growth of the platform.⁵⁵ In the public sector, Orleans Parish (New Orleans, Louisiana) has implemented Modria Resolution Center for Property Assessment Appeals to offer taxpayers an efficient and effective way to file and resolve property assessment appeals online.⁵⁶ The success of Modria should stand to demonstrate that ODR platforms are slowly beginning to gather support.

C. The Future of ODR

Looking ahead, some elements within the ODR community are going to extremes and are arguing that ODR can be a fully automated process. For example, the eBay Resolution Center is an ODR negotiation platform that was designed as “a completely automated web based communications tool”⁵⁷ allowing parties to communicate via the platform and attempt to reach a settlement amongst themselves.⁵⁸ The

51. See *About Modria Resolution Center*, MODRIA, <http://www.modria.com/resolution-center/> (last visited Apr. 12, 2014).

52. See *id.*

53. See *id.*

54. MODRIA, <http://www.modria.com/> (last visited Apr. 12, 2014).

55. See Colin Rule, *Modria Closes New Investment Round to Fuel Expansion*, MODRIA (July 8, 2013), <http://www.modria.com/modria-closes-new-investment-round-fuel-expansion/>.

56. See ORLEANS PARISH ASSESSOR'S OFF. RESOL. CENTER, <https://nolaassessor.modria.com/> (last visited Apr. 12, 2013).

57. See, e.g., Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2 DUKE L. & TECH. REV. 1, 1-16 (2003).

58. *Id.*

newest platforms, however, use automation for the majority (if not all) of cases. In fact, in 2006 noted dispute resolution Professor Rafal Morek argued: “Software is designed to support, and in certain instances replace ‘live’ neutrals. Thus, the role of technology in ODR must not be underestimated.”⁵⁹ Technology is becoming ever more central in resolving disputes.⁶⁰ This technology will undoubtedly include some level of automation and will likely use predictive negotiation algorithms as some portion of the dispute resolution process.⁶¹ But the question again is: how much is too much?

Technology is a necessary evil in the ODR environment because it can act both as a benefit in terms of access to justice and as a potential hindrance due to the uncertainty created by the newness of the system and the lack of widely available enforcement mechanisms. One of the main lessons from platform providers that have gone before this current crop is that most, if not all, of the prior providers have ultimately failed.⁶² The creators of these platforms cite one primary reason for this failure: cost.⁶³ Many platforms have launched, only to fail due to cost associated with the maintenance, upkeep, and service of the platform. And while one can expect such occurrences in the business-based world of platform

59. Rafal Morek, *The Regulatory Framework for Online Dispute Resolution: A Critical View*, 38 U. TOL. L. REV. 163, 178 (2006).

60. See Beth Trent & Colin Rule, *Moving Arbitration Online: The Next Frontier*, N.Y. L.J., Apr. 1, 2013, at S6.

61. See Davide Carneiro et al., *Using Genetic Algorithms to Create Solutions for Conflict Resolution*, 109 NEUROCOMPUTING 16 (2013), available at <http://repositorium.sdum.uminho.pt/bitstream/1822/26558/1/2013%20-%20Elsevier%20-%20Neurocomputing.pdf>.

62. See Ethan Katsh, *ODR: A Look at History – A Few Thoughts about the Present and Some Speculation about the Future*, in ONLINE DISPUTE RESOLUTION, *supra* note 9, at 9, 15 (noting that “[d]uring the Internet ‘bubble’ . . . many ODR start-ups appeared and then disappeared”).

63. Karim Benyekhlef & Nicolas Vermeys, *Bearing the Costs of B2C Online Dispute Resolution*, SLAW (Feb. 6, 2012), <http://www.slaw.ca/2012/02/06/bearing-the-costs-of-b2c-online-dispute-resolution/>. The cost issue continues to plague platform development. For example, the European Union is still unable to fully agree to the mechanism for funding the new European Union-wide ODR platform. See IRIS BENÖHR, SWEDISH INST. FOR EUROPEAN POLICY STUDIES, ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMERS IN THE FINANCIAL SERVICES SECTOR: A COMPARATIVE PERSPECTIVE 6–10, 12 (2013), available at http://www.sieps.se/sites/default/files/2013_6epa.pdf (comparing ADR schemes and their funding mechanisms in Germany, France, and the United Kingdom). The United Kingdom faces the same difficult decision. See DEP’T FOR BUS. INNOVATION & SKILLS, IMPLEMENTING THE ALTERNATIVE DISPUTE RESOLUTION DIRECTIVE AND ONLINE DISPUTE RESOLUTION REGULATION 51–52 (2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288199/bis-14-575-implementing-alternative-dispute-resolution-directive-and-online-dispute-resolution-regulation-consultation.pdf (containing a consultation survey asking what funding model would be appropriate for the United Kingdom’s ADR scheme).

development, it is surprising that cost issues have also greatly limited the long-term survival of public-based platforms.⁶⁴ In the private-based providers, the costs associated with the upkeep of the site are difficult to pass on to the users as the cost of the dispute is low. Thus, injured parties will rarely pay high fees for the use of the platform. “Consequently, platform designers are left with a serious question of survival: how can we fund the project? And if we should find funding, how will we maintain the platform over time” until costs come down?⁶⁵

Of course, for those that understand and build platforms the solution is simple: reduce costs by automating as much of the system as possible. The quickest means to this end is to remove the most costly portion of the platform: the human, neutral decision maker. This trend has already gained traction, as discussed by the Modria team on their website: “Our [Modria’s] software, developed over the past 20 years, can resolve the vast majority of disputes without requiring human intervention, saving you and your organization time and money.”⁶⁶

In many instances, a level of automation is already a large part of several ODR platforms.⁶⁷ For example, some negotiation support systems, such as the family mediation support known as DEUS,⁶⁸ allowed the parties to communicate within the platform, to exchange offers, and to view salient pieces of information that assist in settling the dispute.⁶⁹ And a few private systems allow for the use of technology-based metrics as intelligent negotiation support.⁷⁰ “These platforms, such as . . . Smartsettle, assist the parties in clarifying

64. See Nicholas W. Vermeys & Karim Benyekhlef, *ODR and the Courts, in ONLINE DISPUTE RESOLUTION*, *supra* note 9, at 295, 299 (discussing Michigan’s Cyber Court and the loss of funding as one looming reason behind the projects abandonment).

65. Raymond & Shackelford, *supra* note 1 (manuscript at 37).

66. *About Modria*, MODRIA, <http://www.modria.com/about/> (last visited Apr. 16, 2014).

67. See Lodder & Zeleznikow, *supra* note 9, at 61, 65.

68. John Zeleznikow & Emilia Bellucci, *Building Negotiation Decision Support Systems by Integrating Game Theory and Heuristics*, 7 *ARTIFICIAL INTELLIGENCE & L.* 872, 873–74 (2004), available at <http://citeseerx.ist.psu.edu/viewdoc/summary;jsessionid=E3BEF2624860ED266044EB586D53DF50?doi=10.1.1.1.5867>. “DEUS is a template-based system that helps mediators understand the extent of the issues in dispute.” *Id.* at 873. The goal of DEUS was to separate the people from the property at issue. *Id.* at 873–74. The system, however, was not concerned with the principles of justice. Its goal is to indicate the range and significance of issues in dispute. See *id.* at 874. The choice of the developers in naming the platform DEUS highlights the power that programmers perhaps hope that such systems may wield, which bears on the question of whether this is in the best interests of the justice system.

69. See Lodder & Zeleznikow, *supra* note 9, at 75–76.

70. These platforms, such as Smartsettle, assist the parties in clarifying interests, identifying trade-offs, and generating optimal solutions. See *id.* at 64–65.

interests, identifying trade-offs, and generat[ing] optimal solutions”⁷¹— all with the goal of assisting parties in resolving their dispute.⁷² Alternatively, platforms such as Cybersettle and Clicknsettle allow parties to settle their dispute with no human intervention whatsoever.⁷³

As more businesses begin to provide justice, the use of automated systems and algorithm progressions will only increase, especially if an unregulated environment allows businesses to factor cost as a major consideration in platform design.⁷⁴ As a result, it is no longer merely enough for us to “think whether, when dealing with disputes, we need to physically converge in courts.”⁷⁵ Businesses and consumers are no longer hesitant to resolve disputes online⁷⁶ provided trust exists within the e-commerce system that is being used. Instead, the question has evolved to demand an examination of the business of providing justice. As private businesses begin this process, providers must consider if and when the business aspects of the platform will override overarching

71. Raymond & Shackelford, *supra* note 1 (manuscript at 38).

72. See Lodder & Zeleznikow, *supra* note 9, at 65.

73. See CYBERSETTLE, <http://www.cybersettle.com> (last visited June 22, 2013). The website is now less descriptive about the Cybersettle platform and more descriptive about the new initiative in payment. See also Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2 DUKE L. & TECH. REV. at 2 (2003), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr>. For a full discussion, see Farned, *supra* note 32.

74. According to some observers, ODR providers “have been motivated by both business opportunities and a sense of social need.” Melissa Conley Tyler & Di Bretherton, *Seventy-Six and Counting: An Analysis of ODR Sites*, in ONLINE DISPUTE RESOLUTION (ODR): TECHNOLOGY AS THE “FOURTH PARTY”: PAPERS AND PROCEEDINGS OF THE 2003 UNITED NATIONS FORUM ON ODR 11 (Ethan Katsh et al. eds., 2003), available at <http://web.archive.org/web/20110616101712/http://www.odr.info/unece2003/pdf/Tyler.pdf>. See Ethan Katsh & Alan Gaitenby, *Introduction: Technology as the “Fourth Party,”* in ONLINE DISPUTE RESOLUTION (ODR): TECHNOLOGY AS THE “FOURTH PARTY”: PAPERS AND PROCEEDINGS OF THE 2003 UNITED NATIONS FORUM ON ODR (Ethan Katsh et al. eds., 2003), available at <http://web.archive.org/web/20110616101741/http://www.odr.info/unece2003/pdf/Intro.pdf>.

75. Loic Coutelier, *Prof. Richard Suskind Mentions Modria in Argument for More ODR in the UK*, MODRIA (Apr. 1, 2013), <http://www.modria.com/suskind-cites-modria/> (quoting Richard Suskind).

76. In fact, it already occurs in some very interesting settings. For example, the National Hockey League may be able to use ODR in its salary arbitration process. John B. Sprenzel, *Salary Arbitration in the National Hockey League: Taking the Next Step with Online Dispute Resolution*, 62 DISP. RESOL. J. 64, 66 (2007). And the National Mediation Board, with a grant from the National Science Foundation, worked with the National Center for Information Technology and Dispute Resolution to develop a platform to manage labor disputes for the federal government exclusively in the air and rail industries. See Press Release, UMass Amherst, Researchers at UMass Amherst Work with Federal Agency to Develop Tools for Online Labor Mediation (Jan. 11, 2005), available at <http://umass.edulumhome/news/articles/9552.php>.

considerations of justice.⁷⁷ Thus, it is time for us to begin considering the ethical implications of the rise of private, online justice providers.

II. A BRIEF INTRODUCTION TO THE ETHICS OF MACHINES AND ARTIFICIAL INTELLIGENCE

It is important to remember at this juncture that the ODR system is being designed for the purpose of providing efficient access to justice to a wider audience than that which is readily attained by traditional, in-person justice delivery systems. A recent study by the Consumer Financial Protection Bureau (CFPB) sheds light on the prevalence and “use of arbitration clauses in various types of consumer financial services contracts.”⁷⁸ The results may be a bit surprising to those who see arbitration as the future of business dispute resolution.

CFPB research indicates that large banks commonly use arbitration clauses in credit card and checking account agreements.⁷⁹ This “research also shows that while tens of millions of consumers are subject to arbitration clauses in the markets the CFPB studied, on average, consumers filed 300 disputes in these markets each year between 2010 and 2012 with the leading arbitration association.”⁸⁰ In comparison, in that same “three-year time period,” more than “3,000 cases were filed by consumers in federal court about credit card issues alone.”⁸¹ Moreover, the “Bureau observed that almost no consumers filed arbitrations about disputes under \$1,000.”⁸² Even though this study did not consider the use of ODR (as no providers are available to provide such a service at this time), the results are telling for the dispute resolution community. Justice is being denied to too many individuals when the amount in dispute is relatively low, and the survey might be read to suggest that individuals do not see arbitration as a better solution to the traditional brick-and-mortar justice system.

The ODR systems described above should reduce the number of individuals who fail to pursue low-value claims because the ODR systems are less costly, less time consuming, and do not suffer from the

77. Farned, *supra* note 32, at 342 (“[W]e know of many biases within ODR providers which undermine neutrality, the core value of ADR.”).

78. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS, SECTION 1028(A) STUDY RESULTS TO DATE 17 (2013) [hereinafter CFPB, ARBITRATION STUDY].

79. *Id.* at 12.

80. CFPB *Finds Few Consumers File Arbitration Cases*, CONSUMER FIN. PROTECTION BUREAU (Dec. 12, 2013), <http://www.consumerfinance.gov/newsroom/the-cfpb-finds-few-consumers-file-arbitration-cases/>.

81. *Id.*

82. *Id.*

logistical and caseload issues with which brick-and-mortar courtrooms must manage. However, mistrust of arbitration is a serious concern, one that the ADR community must begin to address. To do this, we should consider how to ensure a fair and just dispute resolution system that raises individuals' trust in the use of ADR generally. This requires that we explore the ethical questions that arise when computer programs make some decisions, even if those decisions are limited to a narrow scope. The ethics of ODR platforms and artificial intelligence come into play in three ways within the current discussion. First, the system platform itself must behave (both in front of and behind the scenes) in an ethical manner. For example, the World Justice Project (WJP), an independent, non-profit organization, has created "Rule of Law Index Scores" to examine and compare the legal infrastructures of a variety of countries.⁸³ Two of the factors in the WJP's scores and rankings are the "Criminal Justice" and "Civil Justice" measures.⁸⁴ In terms of the Criminal Justice measure, the index highlights that "[a]n effective criminal justice system is capable of investigating and adjudicating criminal offences effectively, impartially, and without improper influence, while ensuring that the rights of suspects and victims are protected."⁸⁵ The Civil Justice index specifies that "[c]ivil justice requires that the system be accessible, affordable, effective, impartial, and culturally competent."⁸⁶ Specific to our area of concern, these factors emphasize that an effective justice system must be impartial, without improper influence, and ensure the protection of rights. As is discussed in more detail below, the means to ensure such an effective system is through accountability and transparency.⁸⁷ Consequently, an ethical platform will guard against partiality and undue influence, and will

83. WORLD JUSTICE PROJECT, *supra* note 21; *see also* MARK DAVID AGRAST ET AL., THE WORLD JUSTICE PROJECT, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2011, at 117 (2011), *available at* http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2011_Report.pdf (describing the survey as being "administered to a representative sample of the general public, and to local experts, and then . . . analyzed and cross-checked pursuant to a rigorous triangulation methodology. The outcome of this exercise is one of the world's most comprehensive data sets of the extent to which countries adhere to the rule of law in practice. The 2011 Rule of Law Index builds on more than 400 variables drawn from the assessments of more than 66,000 people and 2,000 local experts in 66 countries").

84. *Factors*, WORLD JUST. PROJECT, <http://www.worldjusticeproject.org/factors> (last visited Apr. 1, 2014).

85. *Criminal Justice*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/factors/effective-criminal-justice> (last visited Jan. 13, 2014).

86. *Civil Justice*, WORLD JUST. PROJECT, <http://www.worldjusticeproject.org/factors/effective-civil-justice> (last visited Mar. 29, 2014).

87. *See infra* notes 127–**Error! Bookmark not defined.** and accompanying text.

protect the rights of the parties involved. To ensure the platform lives up to these standards—and to improve overall trust—the system, including the internal workings and the outcomes, must be transparent.

Second, the individuals that design, monitor, and ultimately review outcomes must be empowered to use ethical decision-making models in their process of review. Using ethical decision-making models is essential because ultimately, it is individuals who have the power to create, monitor, and adjust ODR platforms. As was described above, an effective justice system exists when improper influence over decision making is kept to a minimum.⁸⁸ To ensure that individuals are not unduly influenced by their employers who may insist that greater attention be paid to a client, the individual must be insulated from improper influence and must be empowered to use a decision-making model to make necessary design and outcome determinations. Third and finally, we must consider how to balance the interests of various stakeholders in the ODR context and begin to build in civic virtue to these systems.

A. The Platform

ODR platforms currently operate limited artificial intelligence (AI),⁸⁹ which is at times outcome determinative. The ethical challenges associated with programming ODR platforms are similar to the difficulties involved in designing an array of automated machines, such as ATMs.⁹⁰ However, “when AI algorithms take on cognitive work with social dimensions—cognitive tasks previously performed by humans—the AI algorithm inherits the social requirements[,]” some of which are not easily analyzed by non-legally or ethically trained programmers.⁹¹

When humans perform social functions, a standard of expectation arises in users.⁹² For example, most individuals can agree that we would hope our systems of justice have protections to ensure transparency, auditability, incorruptibility, predictability, responsibility, and a reliable

88. See *supra* notes 85–86 and accompanying text.

89. That is not to say that full AI has not been used or researched. Probably the best known system, PERSUADER, was attempting to use AI to create a non-human mediator. For a full discussion, see Farned, *supra* note 32, at 350–53.

90. The conversation becomes much more complex when you seek to also mimic the interaction and responses of a human through the use of a robot. See David Allen Larson, *Artificial Intelligence: Robots, Avatars, and the Demise of the Human Mediator*, 25 OHIO ST. J. ON DISP. RESOL. 105, 107–09 (2010).

91. Nick Bostrom & Eliezer Yudkowsky, *The Ethics of Artificial Intelligence*, in CAMBRIDGE HANDBOOK OF ARTIFICIAL INTELLIGENCE (William Ramsey & Keith Frankish eds., forthcoming 2014) (manuscript at 2), available at <http://scholar.googleusercontent.com/scholar?q=cache:BQJoq0HprqMJ:scholar.google.com/>.

92. See *id.*

system of exchange that is not overly burdensome.⁹³ Agreeing upon these basic and admittedly incomplete criteria can guide the discussion of what functionality the AI algorithm must seek to replicate and what should be left to human decision makers.⁹⁴ As an example, lawyers understand the importance of the legal principle of *stare decisis*, which requires judges to follow past precedent under certain conditions.⁹⁵ The ability to capture this legal principle within an AI algorithm, or if this principle should even be present in the ODR context,⁹⁶ is a serious ethical and legal issue that will need to be addressed and managed. Special attention would need to be paid to the circumstances where precedent should not be followed, such as to promote a more equitable dispute resolution.⁹⁷ Capturing these legal principles requires both transparency and predictability for those impacted by the system.

93. *See id.* (manuscript at 3).

94. *Id.*

95. *Id.*

96. Commentators have pointed out and questioned ethics in arbitration as a distinct question from ethics of lawyers and the judiciary. *See* Kristen M. Blankley, *Taming the Wild West of Arbitration Ethics*, 60 U. KAN. L. REV. 925, 929–32 (2012) (describing the disconnect between arbitration and the court system and the consensual nature of the process); Henry Gabriel & Anjanette H. Raymond, *Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards*, 5 WYO. L. REV. 453, 456–67 (2005) (discussing the ethical standards that should be applied); Edna Sussman & Solomon Ebere, *All's Fair in Love and War—Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration*, 22 AM. REV. INT'L ARB. 611, 2 (2011) (discussing guerilla arbitration tactics and the ethics responses from bar associations and other institutions); *see also* Cyrus Benson, *Can Professional Ethics Wait? The Need for Transparency in International Arbitration*, 3 DISP. RESOL. INT'L 78, 83, 85 (2009) (answering the titular question in the negative); R. Doak Bishop & Margrete Stevens, *Advocacy and Ethics in International Arbitration: International Code of Ethics for Lawyers Practicing before International Arbitral Tribunals*, in *ARBITRATION ADVOCACY IN CHANGING TIMES* 408, 408–10 (Albert Jan van den Berg ed., 2011) (describing rules for international arbitration).

97. For comparison's sake, Chief Justice John Roberts wrote about why *stare decisis* did not stop the Supreme Court from reaching its decision in a concurring opinion in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (Roberts, C.J., concurring). Specifically, he argued,

if adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished. This can happen in a number of circumstances, such as when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake.

Id. at 921.

In addition, any AI algorithm that seeks to replace even a minor portion of the justice system must be made robust against manipulation, which of course includes the ability of the business to alter outcomes and/or alter the decision-making process standing behind the algorithm. Although this Article cannot fully consider or address the need for enhancing cybersecurity in ODR platforms, there is little doubt that all systems can ever be completely secure—every system has vulnerabilities, and ODR is no different. The key for developers will be to proactively build in cybersecurity best practices from the start, such as those now being drafted by the National Institute of Standards and Technology at the behest of the Obama Administration in collaboration with industry.⁹⁸

Finally and relatedly, the system needs to be sufficiently user-friendly to function and needs to ensure some level of responsibility for the functioning of the system itself.⁹⁹ While “bureaucrats often take refuge in established procedures that distribute responsibility so widely that no one person can be identified to blame for the catastrophes that result[.]”¹⁰⁰ AI-based ODR systems will fail to function without ongoing adjustments, upkeep, and monitoring for errors and difficulties. Justice systems, for the most part, cannot shut down; this is especially true in cyberspace. When a website first launches nothing can cause doubt in the mind of the users like a slow, unresponsive system. This is especially true with websites that must immediately establish trust in the system from a group of individuals with a predisposition to distrust them. The ramifications of the healthcare.gov rollout illustrate this phenomenon.¹⁰¹

One final pressing issue within the convergence of AI and justice systems must also be considered: the non-local nature of the consequences or “extrapolating the distant consequences of actions.”¹⁰² As Professor Nick Bostrom and Eliezer Yudkowsky write:

To build an AI that acts safely while acting in many domains, with many consequences, including problems the engineers never explicitly envisioned, one must specify good behavior in such terms as “X such that the consequence of X is not harmful

98. See *Cybersecurity Framework*, NIST, <http://www.nist.gov/cyberframework/index.cfm> (last updated Mar. 4, 2014).

99. See Bostrom & Yudkowsky, *supra* note 91 (manuscript at 1–3).

100. *Id.* (manuscript at 3 (citing PHILLIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994))).

101. Ed Payne, Matt Smith & Tom Cohen, *Report: Healthcare Website Failed Test Ahead of Rollout*, CNN (Oct. 22, 2013), <http://www.cnn.com/2013/10/22/politics/obamacare-website-problems/>.

102. Bostrom & Yudkowsky, *supra* note 91 (manuscript at 5).

to humans”. This is non-local; it involves extrapolating the distant consequences of actions. Thus, this is only an effective specification—one that can be realized as a design property—if the system explicitly extrapolates the consequences of its behavior. A toaster cannot have this design property because a toaster cannot foresee the consequences of toasting bread.¹⁰³

In terms of judicial decision making, the impact is immediately apparent: while many judicial opinions rely upon the impact to the wider society, one must wonder how anyone will create a specification that distinguishes these situations from the more mundane legal application that sometimes occurs. Can an ODR platform be designed to understand that a mundane decision, such as allowing a customer to return a defective product, may have the knock-on effect of prompting consumer calls for a full-scale recall of the defective product in question? More importantly, if it could be designed with such an outcome in mind, are we comfortable with allowing that to be a determinative factor in the final decision?

B. The Information Systems Professionals

As is evident from the preceding discussion, ODR platform design creates numerous ethical issues as it seeks to replicate a portion of a regular justice system. One area that is often overlooked, however, is the information professionals themselves who design and monitor these systems. Keep in mind, ODR platform providers intend to use some level of human oversight and monitoring even of largely automated systems, some of which will include participation in the creation and monitoring of the final resolutions (awards). The inclusion of human intervention within the system also presents ethical issues because prior research indicates information professionals, like all of us, are imperfect ethical creatures.¹⁰⁴

One of the more relevant studies in this vein explores the “factors that influence the decision making of the individuals charged with implementing and managing computer monitoring systems” within the workplace.¹⁰⁵ It is important to note that, while this study focuses on information professionals, the job task that they are performing is easily

103. *Id.*

104. *See, e.g.*, KEVIN P. PAULI & DOUGLAS R. MAY, ACAD. OF MGMT. PROC., ETHICS AND THE DIGITAL DRAGNET: MAGNITUDE OF CONSEQUENCES, ACCOUNTABILITY, AND THE ETHICAL DECISION MAKING OF INFORMATION SYSTEMS PROFESSIONALS (2002), available at http://ils.indiana.edu/faculty/hrosenba/www/1574/pdf/pauli_ethics-it.pdf.

105. *Id.* at 1.

generalizable to a wider audience.¹⁰⁶ Individuals can be trained to monitor email or to discover misuse of the email system—or that process itself can be automated. Should a misuse of the email system be discovered, one can imagine the information professional having a reporting progression. For example, information professionals monitoring the system likely have a checklist of responses to identified emails. When an email triggers human attention, the information professional would read the email and determine if any action should be undertaken, up to and including notifying the appropriate supervisor of the person misusing the email system. In addition, the information professional is also likely aware of Employment Codes of Conduct. As such, the information professional is mindful of—at a minimum—the range of disciplinary actions that can be taken for the misuse of electronic communications. Thus, using the above example, it is easy to imagine an information professional being impacted by the potential consequence when determining whether to report an individual to his or her supervisor. To test this assumption, a study by Professors Kevin Pauli and Douglas May explored three questions:

- (1) Does the *magnitude of consequences* of a monitoring issue influence the ethical decision making of information system professionals?
- (2) Does the *accountability* of information system professionals in monitoring situations influence their ethical decision making?
- (3) Does accountability influence the relation between magnitude of consequences and the moral evaluation component of the ethical decision making model?¹⁰⁷

The Pauli and May study approaches these questions through a “descriptive model of ethical decision making” using “the first three stages of the ethical decision making process[. . .] moral recognition, moral evaluation, and moral intention.”¹⁰⁸ As with many ethical dilemmas, the “first stage reflects the identification of a situation as containing a moral issue.”¹⁰⁹ The “second stage entails the moral

106. *See id.*

107. *Id.* at 1–2.

108. *Id.* at 2; *see* James Rest, Muriel Bebeau & Joseph Volker, *An Overview of the Psychology of Morality*, in MORAL DEVELOPMENT: ADVANCES IN RESEARCH AND THEORY 1, 3–4 (1986) (proposing a four-component model for individual ethical decision making and behavior, whereby a moral agent must (a) recognize the moral issue, (b) make a moral judgment, (c) resolve to place moral concerns ahead of other concerns (establish moral intent), and (d) act on the moral concerns).

109. PAULI & MAY, *supra* note 104, at 2 (citing O.C. Ferrell & Larry G. Gresham, *A Contingency Framework for Understanding Ethical Decision Making in Marketing*, 49 J. MARKETING 87 (1985); Shelby D. Hunt & Scott Vitell, *A General Theory*

evaluations individuals make in attempting to deal with the moral issue identified.”¹¹⁰ “Finally, since intentions are one of the best predictors of individuals’ subsequent behaviors . . . , moral intent may lead to actual moral behavior.”¹¹¹ By using this well-researched model, the authors hoped to explore the ethical decision making that information professionals undergo when asked to monitor behavior. The importance of this research to this Article, however, is much greater because the study also measured the impact of the potential consequences from the discovery of improper behavior on the monitoring individual’s attention to the issue and willingness to act upon such discovery.¹¹² The findings, although not completely unanticipated, did have some unexpected outcomes as applied to ODR.

First, Pauli and May hypothesized that when employees’ “misbehavior” online might result in the maximum consequence of job termination, information systems professionals would “use greater amounts of moral evaluation . . . in deciding the proper course of action than when the consequence is the simple suspension of e-mail privileges.”¹¹³ Moreover, they hypothesized that the “[m]agnitude of consequences will positively influence both moral evaluation processes (i.e., utilitarian and deontological) of information systems professionals.”¹¹⁴ In fact, the results of the study “indicated that [the] magnitude of consequences influenced the professionals’ moral recognition and moral intentions, yet only marginally influenced deontological moral evaluations.”¹¹⁵

of Marketing Ethics, 6 J. MACROMARKETING 5 (1986); Linda Klebe Trevino, *Ethical Decision Making in Organizations: A Person-Situation Interactionist Model*, 11 ACAD. MGMT. REV. 601 (1986).

110. *Id.* (citing Michael A. Mayo & Lawrence J. Marks, *An Empirical Investigation of a General Theory of Marketing Ethics*, 18 J. ACAD. MARKETING SCI. 163 (1990)).

111. *Id.* (citing MARTIN FISHBEIN & ICEK AJZEN, *BELIEF, ATTITUDE, INTENTION, AND BEHAVIOR: AN INTRODUCTION TO THEORY AND RESEARCH* (1975); Icek Ajzen & Martin Fishbein, *Attitude-Behavior Relations: A Theoretical Analysis and Review of Empirical Research*, 84 PSYCHOL. BULL. 888 (1977)).

112. *See generally* PAULI & MAY, *supra* note 104.

113. *Id.* at 3.

114. *Id.* In the utilitarian approach to ethical reasoning, one emphasizes the utility—or the overall amount of good—that might be produced by an action or a decision. *See generally* Paul Conway & Bertrem Gawronski, *Deontological and Utilitarian Inclinations in Moral Decision Making: A Process Dissociation Approach*, 104 J. PERSONALITY & SOC. PSYCHOL. 216, 216 (2013). Deontological normative ethical theories, on the other hand, focus on moral obligations and duties (i.e., what is right) rather than on an action’s ends or consequences (i.e., what is good). *Id.* These are duties that one must observe, and they represent actions that are either moral or immoral in themselves. *See id.*

115. PAULI & MAY, *supra* note 104, at 1.

These results are not necessarily surprising, as it has long been argued that individual and situational factors are unlikely to influence decision making for issues an individual considers minor,¹¹⁶ such as a mere warning for an inappropriate email as might be present in the study scenario. Consistent with prior research, the Pauli and May study confirmed that at a certain point, the potential consequence of the inappropriate behavior is significant enough to demand a higher level of attention.¹¹⁷ The study noted that as the magnitude of consequences increased, individuals were more likely to identify the issue as one that triggered an ethical dilemma¹¹⁸ and to seek to react in an ethical manner—that is, to behave in a manner consistent with their ethical duty and with ethical intent.¹¹⁹ The key issue for this part of the study was to note that individuals monitoring the behavior of others were impacted by the potential consequences associated with the monitored behavior.¹²⁰ Should the monitoring individual recognize a potentially significant consequence, the monitoring individual was more likely to identify ethical dilemmas and to consider the consequence as a factor in determining the course of action to be taken by the monitoring individual.¹²¹

The outcomes of Pauli and May study, considered within the ODR context, are important because the system intends to use individuals to both monitor the system and to monitor the outcomes of the system. It is important to recognize the likely role that humans will play within the ODR system. As it currently stands, some countries intend to demand a

116. See, e.g., David J. Fritzsche & Helmut Becker, *Ethical Behavior of Marketing Managers*, 2 J. BUS. ETHICS, 291, 295–97 (1983); Thomas M. Jones, *Ethical Decision Making by Individuals in Organizations: An Issue-Contingent Model*, 16 ACAD. MGMT. REV. 366, 391 (1991); Joan M. McMahon & Robert J. Harvey, *The Effect of Moral Intensity on Ethical Judgment*, 72 J. BUS. ETHICS 335 (2007); Rest, Bebeau & Volker, *supra* note 108, at 24–27.

117. Compare PAULI & MAY, *supra* note 104, at 6, with McMahon & Harvey, *supra* note 116, at 351.

118. PAULI & MAY, *supra* note 104, at 6. According to Professor Thomas M. Jones, “[m]oral issues of high intensity will be more salient than those of low intensity because (a) their effects are more extreme (greater magnitude of consequences), (b) their effects stand out (higher concentration of effect), or (c) their effects involve significant others (greater social, cultural, psychological, or physical proximity).” Jones, *supra* note 116, at 380–81 (citing SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 187 (1984)). Moreover, Professor Jones argues that “because high-intensity moral issues are salient and vivid, they will be more likely to catch the attention of the moral decision maker and will be recognized as having consequences for others, a vital component of recognizing moral issues.” *Id.* at 381.

119. PAULI & MAY, *supra* note 104, at 2–3.

120. *Id.* at 5.

121. See *id.*

level of human intervention within the dispute resolution platform.¹²² Commentators have imagined this as a barrier to the system, unless the human activity is nothing more than a perfunctory monitoring and final approval agent.¹²³ For example, the ODR platform could be used by the parties to resolve the dispute through a fully computer-based process, such as through the use of a communication system and computer-aided decision-making algorithms.¹²⁴ After the conclusion of the process, the system could generate a suggested outcome, which an individual would then need to approve.¹²⁵ This would allow human involvement to both monitor and affirm final outcomes. However, human intervention at this late point in the dispute-resolution process will not accomplish the creation of an ethically designed platform alone. As the Pauli and May study suggests, individuals performing a mere monitoring function may fail to recognize ethical dilemmas when minor consequences are at issue.¹²⁶

Pauli and May also investigated the means to reduce the problematic accountability of the monitoring individual.¹²⁷ In particular, the study examined the effect of accountability (defined as the “expectation that one may be called on to justify one’s beliefs, feelings, and actions to others”) on the behavior of the information professional.¹²⁸ The research hypothesized that accountability will positively influence identification, evaluation, and intention¹²⁹ and that the information professional’s accountability would “motivate careful consideration of the implications of decisions.”¹³⁰ Thus, the study considered—as an independent variable—whether the accountability of the information professional had any impact upon his ethical decision making.¹³¹ The authors argued, “the relation between magnitude of consequences and utilitarian [and deontological] evaluations is expected to be stronger for information systems professionals in a high accountability situation as compared with those in a low accountability situation.”¹³² Almost

122. For example, see ADR Directive, *supra* note 39, at para. 24; ODR Reg., *supra* note 28, at art. 6.

123. See Raymond & Shackelford, *supra* note 1 (manuscript at 44–46).

124. For a further discussion, see Raymond, *supra* note 32 (manuscript at 17–21).

125. See Raymond & Shackelford, *supra* note 1 (manuscript at 44–46).

126. PAULI & MAY, *supra* note 104, at 2.

127. *Id.* at 3–4.

128. *Id.* at 3 (quoting Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999)).

129. *Id.*

130. *Id.*

131. *Id.* at 3–4.

132. *Id.* at 4.

surprisingly, “[a]ccountability had little direct effect on information system professionals’ ethical decision making; however, accountability did significantly moderate the relation between magnitude of consequences [for] both utilitarian and deontological moral evaluations.”¹³³

The relatively minor impact of accountability on the ethical decision-making processes of individuals is a troubling outcome as increasing accountability for ODR providers would be a straightforward means to pay more attention to cases involving minor consequences. In terms of the ODR system, individual accountability may be at a minimum because the system will likely invoke little human interaction or monitoring of outcomes—a point that will be more fully explored in short order.

The ethical decision-making model suggests other potential issues that are unexplored in the Pauli and May study. For example, as an information professional is tasked with designing the system, two salient facts must be considered. First, the information professional may be under the contracted employment of the business intending to implement the ODR system, which may also be owned by the business that is being served by the ODR provider. Second, the outcomes of the dispute resolution process may be of only minimal consequence to the individual, but their cumulative impact could be greater on a firm facing an array of disputants. One wonders how these stakeholders will balance such a competing set of obligations in an ethical manner. To examine these convergent issues, two areas of ethical decision-making research must be briefly examined: (1) the independent agent and (2) organizational influence on an individual.

First, several studies have concluded, “[i]ndividuals may tend not to perceive themselves as independent agents in moral situations.”¹³⁴ For example, Professors Herbert Kelman and Lee Hamilton reexamined the famous Milgram obedience studies,¹³⁵ in which a group of “subjects (‘teachers’) were ordered by the experimenter to administer (what the teacher thought were) increasingly powerful shocks to a ‘learner’ (an actor working with the researcher) when the learner failed to answer certain questions correctly.”¹³⁶ Kelman and Hamilton “argued that some

133. *Id.* at 1.

134. *E.g.*, Jones, *supra* note 116, at 389.

135. HERBERT KELMAN & LEE HAMILTON, CRIMES OF OBEDIENCE (1989).

136. Jones, *supra* note 116, at 377 (describing the Milgram experiments). *See generally* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (1974).

subjects felt that they *did* stop administering shocks, even though their hands were still manipulating the switches.”¹³⁷

The researchers noted, “[t]hese subjects regarded the decisions and the responsibility for those decisions as being entirely in the hands of the experimenter.”¹³⁸ The Kelman and Hamilton reexamination outcome should not be all that surprising given an array of headlines that tell the tale of individuals almost blindly following the instructions of a superior, which has resonance in the area of organizational corruption.¹³⁹

Individual, organizational, and situational factors impacting the ethical decision-making process of the individual are most concerning in light of the opaque nature of the creation of ODR platforms and algorithms behind an outcome of the dispute in a private justice system. As noted by Professor Rafal Morek, “in ODR, inefficiency, errors, or bias can be hidden under nicely crafted computer interfaces based on the way the program was constructed.”¹⁴⁰ Rational crime theory posits that the likelihood of being caught, “[t]ogether with the amount to be gained from cheating and the expected punishment,” is a central input in the decision making of individuals.¹⁴¹ Put summarily, it has been well supported and long known: individuals are more likely to misbehave when their misbehavior will go unnoticed.

Information professionals know that their coding and the specifics of the discrimination within the algorithm will be hidden from the majority of individuals. This highlights the accountability issue described above: What if no one knows I behaved in an unethical manner? This is most concerning in the face of the reality that the unethical behavior could result in nothing more than minor consequences to an individual. The issue has even greater salience in the ODR context,

137. Jones, *supra* note 116, at 389; *see also* KELMAN & HAMILTON, *supra* note 135, at 148.

138. Jones, *supra* note 116, at 389.

139. In terms of the organizational setting of the individual, Professors H.R. Smith and Archie Carroll “presented a detailed argument that organizational factors often create impediments to individual ethical behavior. In their view, socialization processes, environmental influences, and hierarchical relationships collectively constitute a ‘stacked deck,’ which impedes moral behavior.” *Id.* at 390; *see* H.R. Smith & Archie B. Carroll, *Organizational Ethics: A Stacked Deck*, 3 J. BUS. ETHICS, 95, 95 (1984). “Research conducted on small group conformity behavior, obedience to authority, and groupthink, also suggests that organizational factors may distort the ethical intentions of individuals.” Jones, *supra* note 116, at 390.

140. Morek, *supra* note 59, at 188–89.

141. Francesca Gino, Shahrar Ayal & Dan Ariely, *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 PSYCHOL. SCI. 393, 393 (2009). *See generally* Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis*, 1 J. PUB. ECON., 323, 331–32 (1972); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176 (1968).

though, when it is coupled with the fact that these decisions are often binding, leading to questions of competing values.

In summary, the information professionals that design and monitor the online justice system suffer from the same ethical limitations and face the same ethical dilemmas as individuals located in traditional businesses. However, in the online world, individuals will be better able to disengage from others and will be able to hide biases from oversight through the use of coding, algorithms, and inattentive monitoring. While some level of monitoring may increase the attentiveness to ethical dilemmas, individuals will still be influenced by the organizational influences of the business within which they work. This business will include the ODR provider, who may be influenced by their clients to create the algorithm or overlook outcomes that favor the business clients. It is important to note that widely used ODR platforms are still in their infancy—so no tangible issues of conflicts or ethical dilemmas have been discovered. And, while no one is suggesting the current ODR providers are in any way pushing justice to favor their clients, one must consider future providers within the realities of a business world. This brief review of very important research should lead the readers to appreciate the need to instill ethical codes and regulation to ensure an online justice system that provides the same protections as traditional brick-and-mortar justice.

C. Balancing Conflicting Factors in the ODR Context

As with any justice delivery system, the number of stakeholders and their varying needs must be balanced when considering the introduction of a new technology. In India, for example, the rise of ADR has led to a decrease in India's overwhelming backlog of millions of cases; but in some cases, an imbalance of power can result in justice being denied in the name of efficiency.¹⁴² The ODR context in particular evokes an array of factors, some of which have been mentioned only in passing so far, including efficiency, due process, transparency, power dynamics and coercion, and conflict of interest.

Space constraints prevent a full accounting of all of these factors at the present time, necessitating further research, but each are briefly addressed in turn. Efficiency is a hallmark of the move to ODR, opening the doors of justice to an array of disputants who would otherwise be priced out or unable to resolve their claims. Yet, as in India, efficiency

142. See Raymond & Shackelford, *supra* note 1 (manuscript at 41–42); see also David B. Lipsky & Ariel C. Avgar, *Online Dispute Resolution through the Lens of Bargaining and Negotiation Theory: Toward an Integrated Model*, 38 U. TOL. L. REV. 47, 52 (2006).

must be balanced against due process protections.¹⁴³ As with most arbitral mechanisms, typically the decisions in ODR—depending on the specific context in which it is used—are binding.¹⁴⁴ This means that the parties give up substantial due process rights to appeal adverse judgments or enjoy other procedural protections during the “trial” process. Thus, as policy makers seek to regulate and businesses develop ODR systems, important questions must be asked and answered about under what circumstances societies are most comfortable with promoting the use of ODR, even in low-value disputes.

The conflict between transparency, power dynamics, and conflicts of interest must also be considered—and it is all the more important if ODR does indeed become that much more popular in resolving disputes. In particular, the lack of transparency in many ODR decisions means that precedent will not function in the same way that it does in regular trial courts; they will instead resemble small claims courts in which a transcript is often never kept. Perhaps that is not a problem for many low-value disputes, but over time this could impact the development of this facet of commercial law, prompting concerns of fragmentation of the type often seen in international arbitration, especially as ODR is being used across a wide array of legal systems.¹⁴⁵ Concerns over a lack of transparency can also be exacerbated by power dynamics—especially when the other party has some affiliation to the ODR system itself. Such concerns could prompt policy makers to not allow the likes of Amazon to design ODR platforms that they also use to resolve disputes with consumers out of fear of a conflict of interest, especially given the difficulty of checking programmers’ code.¹⁴⁶ They also point to the need for instilling civic virtue into ODR communities given the widely varied ODR regulatory environment.¹⁴⁷

As with all types of ADR, the parties gain control by using ODR, which may be especially attractive to businesses that do not want disputes with consumers publicized. But the foregoing values discussion shines a light on the necessity of policy-maker involvement—especially in the United States, which has, to date, taken a *laissez-faire* approach to ODR regulation. Thus, the final Part of this Article discusses the

143. See Raymond & Shackelford, *supra* note 1 (manuscript at 41–42).

144. See, e.g., *Modria Terms of Service*, MODRIA, <http://www.modria.com/terms-of-service/> (last updated May 18, 2012).

145. See, e.g., Rep. of the Int’l Law Comm’n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/CN.4/L.702 (July 18, 2006), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.702.

146. See *supra* note 140 and accompanying text.

147. See *infra* Part III.

potential benefits and challenges of regulating ODR to promote the ethical resolution of disputes.

III. BEYOND ETHICS TO REGULATION: POLICIES AND STRATEGIES FOR HARMONIZING THE INTERESTS OF JUSTICE AND COMMERCE IN THE ODR CONTEXT

Much of this Article has focused on issues surrounding ODR design, its application to resolving public- and private-sector disputes, and the ethical challenges associated with building an efficient and fair system for dispensing justice online. What has been missing from the preceding discussion is an analysis of where we go from here: Is it possible to regulate ODR so as to harmonize the interests of justice and commerce?¹⁴⁸ And even if it is indeed possible, what form should those regulations take, and do they lead us to a place where businesses and societies want to go?

This final Part is structured to begin to answer these pressing questions as follows. It first provides context for the analysis to follow by investigating the challenges associated with regulating cyberspace using insights from Professors Lawrence Lessig and Andrew Murray, among others. It then applies lessons from the interdisciplinary literature on polycentric governance to the topic of ODR, which is a multilevel, multipurpose, multi-type, and multi-sectoral model championed by scholars including Nobel Laureate Elinor Ostrom and Professor Vincent Ostrom that challenges orthodoxy by demonstrating the benefits associated with self-organization and networking regulations at multiple levels.¹⁴⁹ Finally, it concludes by analyzing how business and state interests in dispute resolution might be furthered by taking a polycentric approach to the dispensation of justice in cyberspace.

148. See, e.g., Thomas Schultz, *Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust*, 6 N.C. J.L. & TECH. 71, 89–90 (2004) (“To a large extent, government is the ideal host for dispute resolution, because government has a strong incentive to resolve disputes to keep society functioning smoothly. Government is also a good host for dispute resolution because it usually has no vested interest in the outcome of most of the matters it is in charge of deciding.” (citing COLIN RULE, *ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS* 174 (2002))).

149. McGinnis, *supra* note 10, at 171–72; Elinor Ostrom, *Polycentric Systems as One Approach for Solving Collective-Action Problems 2* (Vincent & Elinor Ostrom Workshop in Political Theory & Policy Analysis, Ind. Univ., Working Paper No. 08–06, 2008), available at http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/4417/W08-6_Ostrom_DLC.pdf?sequence=1.

A. Challenges to Regulating ODR in “Cyberspace”

The question of regulation in the context of ODR is a complex one given the multi-stakeholder issues at play and the fact that ODR providers—and especially platform designers—set the terms on which disputes may be resolved in this space through code. Fortunately, there is an array of modalities that may be called upon to control behavior in dynamic and multi-faceted arenas such as cyberspace.¹⁵⁰ These include approaches ranging from bottom-up self-regulation to top-down command-and-control regimes.¹⁵¹ As Bostrom and Yudkowsky highlight:

It is relatively easy to envisage the sort of safety issues that may result from AI operating only within a specific domain. It is a qualitatively different class of problem to handle an AGI [Artificial General Intelligence] operating across many novel contexts that cannot be predicted in advance. . . . Verifiably constructing a trustworthy AGI will require different methods, and a different way of thinking, from inspecting power plant software for bugs—it will require an AGI that *thinks like* a human engineer concerned about ethics, not just a simple *product* of ethical engineering.¹⁵²

The various methods of control alluded to by Professor Bostrom harken back to the work of Professor Lawrence Lessig, who remains among the most influential scholars in this area.¹⁵³ He has identified four modalities of cyber regulation: architecture, law, the market, and social norms that may be used individually or collectively by policy makers.¹⁵⁴ Taking the first modality, Professor Lessig was the first to succinctly say: “Code is Law” (referring to software and hardware code, not a cryptographic code).¹⁵⁵ The argument goes that code, or architecture, regulates cyberspace by “set[ting] the terms” on which it is

150. ANDREW D. MURRAY, THE REGULATION OF CYBERSPACE: CONTROL IN THE ONLINE ENVIRONMENT 28–29 (2007).

151. *Id.*

152. Bostrom & Yudkowsky, *supra* note 91 (manuscript at 4–5).

153. *See generally* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999).

154. *Id.* at 87–88; *see also* Sarah E. Galbraith, *Second Life Strife: A Proposal for Resolution of In-World Fashion Disputes*, 2008 B.C. INTELL. PROP. & TECH. F. 1, 28–29 (2008) (discussing the role of norms in ODR).

155. LESSIG, *supra* note 153, at 6.

experienced.¹⁵⁶ The same may be said of ODR platform designers insofar as they control what protections, procedures, and assurances are built into these systems. As developers revise the underlying code, so too does regulation itself progress.¹⁵⁷ This underscores the extent to which private-sector actors in the United States like Modria bear the primary responsibility for fashioning an equitable ODR system. However, given the profit motive explored below and difficulties associated with checking code to ensure that it functions as advertised, other modalities should be considered in line with the “trust but verify” adage.

Architecture is just the beginning of cyber regulation; even if it is critical because in a network-architecture sense, each layer of the Internet “only uses functions from the layer below, and only exports functionality to the layer above.”¹⁵⁸ The market also plays a critical role in shaping norms of ODR platform designers. For example, as Modria becomes increasingly profitable, other competitors will enter this burgeoning industry, which in turn will help shape emerging norms and best practices. Eventually, leading enterprises acting as norm entrepreneurs could be selected to help monitor peer behavior,¹⁵⁹ potentially resulting in a “norm cascade” in which normative standards become internalized and eventually help shape customary international law.¹⁶⁰

Finally, law will shape the legal environment of these industries, serving to codify industry best practices or potentially supplant them if policy makers and their constituents feel that justice is not being sufficiently served. Governments can and do shape code. As Professor Lessig has argued, this may be beneficial if, in the U.S. context, that power is used to ensure the continuation of core constitutional values in cyberspace.¹⁶¹ A logical extension of this argument in the ODR context could include policy makers in the United States and elsewhere regulating to ensure the applicability of certain constitutional due process rights in this emerging private justice delivery system, such as the right to present evidence, cross-examine witnesses, representation, and potentially even substantive due process. The European Union has proposed such protections be in place, including the monitoring of

156. Lawrence Lessig, *Code is Law: On Liberty in Cyberspace*, HARV. MAG., Jan.–Feb. 2000, at 37, available at <http://harvardmagazine.com/2000/01/code-is-law.html>.

157. LESSIG, *supra* note 153, at 20.

158. MURRAY, *supra* note 150, at 43.

159. See ANNEGRET FLOHR ET AL., THE ROLE OF BUSINESS IN GLOBAL GOVERNANCE: CORPORATIONS AS NORM-ENTREPRENEURS 10 (2010).

160. See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 895–98 (1998).

161. See Lessig, *supra* note 156, at 39.

outcomes.¹⁶² It seems to be in the best interests of both dispute resolution providers and policy makers to have some agreed-upon rules for the road backed up by the monitoring of both the platform design and outcomes.¹⁶³

Informed experimentation that makes use of all the modalities of regulation should be encouraged, from code and market-based incentives to laws and norms, with best practices subsequently being reinforced at multiple scales through incentive structures and—if necessary—sanctions for rule breakers. Modeling such a dynamic system of governance operating at multiple levels and with a range of public- and private-sector actors is no easy feat, requiring a concept capable of capturing and measuring the organized chaos inherent in such regimes. It is for this reason that we now turn to the literature on polycentric governance to determine to what extent this approach will help find common ground between regulators and businesses providing ODR services.

B. Applying Polycentric Governance to ODR

The concept of polycentricity has been receiving increasing attention from scholars across a range of disciplines. At its most basic level, polycentric governance is a system—sometimes referred to as a “‘regime complex:’ a collective of partially overlapping and nonhierarchical regimes.”¹⁶⁴ According to Professor Elinor Ostrom, “[p]olycentric systems are characterized by multiple governing authorities at differing scales rather than a monocentric unit.”¹⁶⁵ Recognizing the diverse array of regulatory modalities and stakeholders at play in dynamic arenas such as cyberspace, polycentric governance assumes that the state is far from the only source of authority.¹⁶⁶ Instead, in the best-case scenario, a rich array of actors and institutions functioning at multiple levels interact with one another while organically

162. ODR Reg., *supra* note 28.

163. See also Am. Bar Ass’n Task Force on Elec. Commerce & Alt. Dispute Resolution, *Addressing Dispute in Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW. 415, 458–68 (2002) (setting forth a mixed arrangement of recommended disclosures and substantive practice guidelines for ODR providers).

164. Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 277 (2004).

165. Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 GLOBAL ENVTL. CHANGE 550, 552 (2010).

166. Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137, 137–38 (2008).

addressing governance gaps and strengthening the system as a whole without the need for comprehensive top-down regulation.¹⁶⁷

One of the more straightforward ways to conceptualize polycentric governance is to get away from thinking of laws or treaties *per se* and get more into what these regimes are trying to do: solve problems. It is this emphasis on leveraging an array of stakeholders, each making innovative contributions to address a common problem while identifying and instilling local norms, that can in time be codified into formal regimes that set polycentrism apart from other governance systems.¹⁶⁸ Professor Michael McGinnis explains that, “[t]he basic idea [of polycentric governance] is that any group . . . facing some collective problem should be able to address that problem in whatever way they best see fit,” which includes crafting governance structures able to facilitate problem solving.¹⁶⁹ In other words, “[a] system of governance is *fully polycentric* if it facilitates creative problem-solving at all levels”¹⁷⁰ In this way, ODR providers should perhaps be given space to innovate and solve problems, potentially through industry councils as a stepping stone to identifying best practices, before policy makers move in to pick technological winners and losers. As Robert McDowell, commissioner of the Federal Communications Commission, has said, “No government . . . can make decisions in lightning-fast Internet time.”¹⁷¹

The literature on polycentric governance varies by discipline, but much of the credit for developing the field rightly goes to Nobel Laureate Elinor Ostrom,¹⁷² Professor Vincent Ostrom, and their colleagues, many of whom are affiliated with the Vincent and Elinor Ostrom Workshop in Political Theory and Policy Analysis at Indiana University. Over a period of decades, these scholars and their collaborators challenged the prevailing wisdom across an array of fields, such as the belief in consolidating services in inner cities to avoid duplication and to enjoy

167. See Vincent Ostrom et al., *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry*, 55 AM. POL. SCI. REV. 831, 831–32 (1961) (describing polycentric political systems in the context of a metropolitan region).

168. See *id.*

169. Michael D. McGinnis, *Costs and Challenges of Polycentric Governance: An Equilibrium Concept and Examples from U.S. Health Care* 1, 2 (Vincent & Elinor Ostrom Workshop in Political Theory & Policy Analysis, Ind. Univ., Working Paper No. W11-3, 2011), available at http://php.indiana.edu/~mcginnis/Beijing_core.pdf.

170. *Id.* at 3.

171. Jerry Brito, *The Case against Letting the U.N. Govern the Internet*, TIME TECH (Feb. 13, 2012), <http://techland.time.com/2012/02/13/the-case-against-letting-the-united-nations-govern-the-internet/#ixzz28OQIU0Ds>.

172. See Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641, 641, 643–44 (2010) (publishing Elinor Ostrom’s Nobel Prize lecture).

economies of scale.¹⁷³ Elinor Ostrom in particular applied this framework to a range of collective action problems, in the process critiquing the classic tragedy of the commons model and showing that rational actors can and do cooperate to stave off overexploitation through building and enforcing local norms.¹⁷⁴ What is more, oftentimes small-to-medium scale groups were found to enjoy better outcomes when managing common problems than is true for occasions when central governments prescribe a regulatory regime.¹⁷⁵ This makes some intuitive sense given the local expertise enjoyed by polycentric systems, which is at times absent in classic top-down, state-based regulation.

In summary, polycentric governance embraces local self-regulation and multi-stakeholder governance, and it emphasizes targeted measures to mitigate common problems. By “ordering and structuring our perception of the world,” concepts such as polycentricism help us relate certain phenomena to one another, to “make judgments about the relevance and significance of information, to analyze specific situations, or to create new ideas.”¹⁷⁶ Concepts are critical tools of social science, representing a useful starting point for analyzing subjects as complex as ODR.¹⁷⁷ But, as with all systems of governance, polycentrism has its benefits and drawbacks. On the positive side, this concept encourages innovation and regulatory competition as well as “flexibility across issues and adaptability over time.”¹⁷⁸ Just as the states are laboratories for democracy in the U.S. federal system, as Justice Louis D. Brandeis famously observed,¹⁷⁹ so too are firms (such as Modria) and nations (such as Mexico) laboratories for polycentric governance in the ODR context. But on the negative side, polycentric networks are also susceptible to fragmentation and gridlock caused by the same overlapping authority that is also one of the system’s strengths, and they still must meet standards of coherence, effectiveness, and

173. See, e.g., ELINOR OSTROM ET AL., PATTERNS OF METROPOLITAN POLICING (1978) (reporting on a major study of police organization in eighty metropolitan areas).

174. See Ostrom, *supra* note 172, at 641, 648–49, 656–58.

175. See Elinor Ostrom, *Polycentric Systems: Multilevel Governance Involving a Diversity of Organizations*, in GLOBAL ENVIRONMENTAL COMMONS: ANALYTICAL AND POLITICAL CHALLENGES IN BUILDING GOVERNANCE MECHANISMS 105, 113–17 (Eric Brousseau et al. eds., 2012).

176. Klaus Dingwerth & Philipp Pattberg, *Global Governance as a Perspective on World Politics*, 12 GLOBAL GOVERNANCE 185, 186 (2006).

177. *Id.* at 198.

178. Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7, 15 (2011).

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

sustainability.¹⁸⁰ There are also ethical and political problems in play, including a version of Garrett Hardin's "lifeboat ethics," and an unwillingness of certain stakeholders to be pressured in targeted forums.¹⁸¹ Consequently, an analysis of polycentric governance and the regulatory modalities it presupposes represent merely a beginning and not an end to this investigation.

Professor Elinor Ostrom created an informative framework of eight design principles for the management of common pool resources that helps to guide discussion and promote the efficient functioning of a given polycentric system. These include the importance of: (1) "*clearly defined boundaries* for the user pool . . . and the resource domain;"¹⁸² (2) "*proportional equivalence between benefits and costs*;"¹⁸³ (3) "[c]ollective choice arrangements ensur[ing] that the resource users participate in setting . . . rules;"¹⁸⁴ (4) "[m]onitoring . . . by the appropriators or by their agents;"¹⁸⁵ (5) "[g]raduated sanctions" for rule violators;¹⁸⁶ (6) "[c]onflict resolution mechanisms [that] are readily available, low cost, and legitimate;"¹⁸⁷ (7) "[m]inimal recognition of rights to organize;"¹⁸⁸ and (8) "governance activities [that] are . . . organized in multiple layers of nested enterprises."¹⁸⁹ Not all of Professor Ostrom's design principles are applicable to the ODR context. However, some do have salience and are briefly addressed in turn.

According to Professor Ostrom, "[t]he boundary rules relate to who can enter, harvest, manage, and potentially exclude others' impacts. Participants then have more assurance about trustworthiness and cooperation of the others involved."¹⁹⁰ But the concern can still arise, even with adequately defined group boundaries, that communities have an insufficient stake in the outcome of their actions. Educating platform designers and managers about some of the procedural protections

180. See Keohane & Victor, *supra* note 178, at 8, 15–16, 19.

181. See Garrett Hardin, *Lifeboat Ethics: The Case against Helping the Poor*, PSYCHOL. TODAY, Sept. 1974, at 38.

182. SUSAN J. BUCK, THE GLOBAL COMMONS: AN INTRODUCTION 32 (1998) (outlining Ostrom's factors).

183. Ostrom, *supra* note 175, at 118 tbl.5.3 (citing ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 90 tbl.3.1 (1990)).

184. BUCK, *supra* note 182, at 32.

185. *Id.*

186. *Id.*

187. *Id.*

188. Ostrom, *supra* note 175, at 118 tbl.5.3.

189. *Id.*

190. *Id.* at 119.

available in the traditional justice system may ameliorate this state of affairs in the ODR context.

The proportionality design principle underscores the need for equity such that “some users [do not] get all the benefits and pay few of the costs.”¹⁹¹ Such a principle has application to the ODR context by speaking to the importance of ensuring that developers are not stacking the deck in favor of sophisticated participants. Professor Ostrom’s third design principle requires “that most of the individuals affected by a resource regime are authorized to participate in making and modifying the rules related to boundaries, [and] assessment of costs.”¹⁹² This principle argues for including a feedback mechanism allowing disputants to comment on their ODR experience and thus potentially play a part in improving the system. Moreover, this design principle denotes the importance of rule making by engaging the private sector in a public-private dialogue before moving to codify best practices at various regulatory levels. Thus, policy makers around the world should take note of emerging industry best practices before drafting new regulations, similar to the National Institute of Standards and Technology (NIST) process mentioned above.¹⁹³

In the United States, rule making often involves active collaboration between the public and private sectors. For example, in 2002, the American Bar Association’s (ABA) Task Force on Electronic Commerce and Alternative Dispute Resolution began considering the emergence of ODR as a legitimate means to resolve e-commerce disputes.¹⁹⁴ In forming the Task Force, the ABA engaged various industry participants from the ODR community, including academic commentators and e-commerce specialists, with the intention “to propose protocols, workable guidelines and standards that [could] be implemented by parties to online transactions.”¹⁹⁵ “The Task Force was asked to focus specifically on ‘the challenges raised by multi-jurisdictional business-to-business (“B2B”) and business-to-consumer (“B2C”) transactions,’” a task that was almost unheard of at the time of inception.¹⁹⁶

191. *Id.* at 120.

192. *Id.*

193. *See Cybersecurity Framework, supra* note 98.

194. AM. BAR ASS’N TASK FORCE ON ELEC. COMMERCE & ALT. DISPUTE RESOLUTION, ADDRESSING DISPUTES IN ELECTRONIC COMMERCE (2002), *available at* <http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalReport102802.authcheckdam.pdf>.

195. *Id.* at 1–4.

196. *Id.* at 1.

Professor Ostrom's fourth design principle, blind trust, can only do so much to mitigate rule-breaking behavior.¹⁹⁷ Eventually, it must be buttressed by monitoring.¹⁹⁸ Community members typically conduct such monitoring in small communities to ensure "the conformance of others to local rules."¹⁹⁹ This may be done in the ODR context through the creation of industry "think tanks" and member groups to share information on best practices. Eventually, enterprises, potentially such as Modria, acting as norm entrepreneurs could be selected by these industry groups to monitor peer behavior and help ensure compliance.²⁰⁰ Other related insights from Professor Ostrom's principles, such as the need for graduated sanctions for rule violators and effective dispute resolution, speak directly to the importance of addressing legal ambiguities and establishing norms of behavior for ODR providers. If this is not done voluntarily, then governments will feel a greater urgency to step in directly, highlighting the need to harmonize state and ODR-provider interests.

C. Harmonizing State and Business Interests

Given that Professor Elinor Ostrom's design principles were created for a very different context—the management of local common pool resources such as lakes and forests—their application here is admittedly an extension beyond what the author originally intended. However, toward the end of her long and productive career, Professor Ostrom worked to apply these design principles to issues of global commons governance such as climate change.²⁰¹ It is part of the compelling analytical power of polycentric governance generally—and Professor Ostrom's design principles in particular—that they may be extended to new, at times completely unrelated, contexts but still have the capacity to tell us something new about how these emergent systems are and should be operating. Indeed, the foregoing discussion of polycentric governance and its application to ODR underscores the diverse actors, power centers, regulatory modalities, and design principles that should be considered in crafting interventions in the ODR marketplace. If done correctly, such as by ensuring a level playing field and guaranteeing certain core procedural rights for ODR users and providers, polycentric regulation

197. See Ostrom, *supra* note 175, at 120–21.

198. See *id.*

199. *Id.* at 121.

200. FLOHR ET AL., *supra* note 159, at 8–10.

201. See, e.g., Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* 11–12 (World Bank, Policy Research Working Paper No. 5095, 2009), available at <http://www.iadb.org/intal/intalcdi/pe/2009/04268.pdf>.

has the potential to help assuage ethical concerns about the building of virtual courthouses. But there is also the danger that state-based regulation, however well-intentioned it might be, risks crowding out innovative, bottom-up norms and best practices generated through a polycentric system providing ODR tools.²⁰² This highlights the difficult balancing act that policy makers must undertake when considering whether, when, and how to regulate ODR.

Most publicly traded businesses are motivated by maximizing value to shareholders, with the notable exception of firms organized in states allowing benefits corporations (B-Corps) that place profit alongside having a positive impact on society as a driving force behind the enterprise.²⁰³ Indeed, the B-Corp movement is but one sign of a larger trend whereby more managers and boards of directors are recognizing the drawbacks of a relentless focus on short-term shareholder value on long-term business performance and sustainability. Professor Lynn Stout, for example, has critiqued this approach in her book, *The Shareholder Value Myth*.²⁰⁴ In it, Professor Stout points out that there is no enforceable legal duty for managers to focus on such short-term metrics to the exclusion of long-term strategies that may be better for overall firm performance, and, in fact, such a focus solely on stock price oftentimes winds up hurting investors along with employees, customers, and the public.²⁰⁵ That is to say, there is an increasingly recognized benefit in the literature to taking a wider accounting of the actions of publicly traded organizations, as may be seen through the rise of B-Corps, an increasing number of firms using integrated reporting, and a resurgent corporate social responsibility movement. Given that the regulation of ODR, especially in the U.S. context, is unlikely in the near term due to the nascence of the industry and gridlock in Congress,²⁰⁶ the onus is on ODR providers and the courts to shape this burgeoning industry in a way that not only increases value to investors, but also serves the larger ends of equitable dispute resolution critical to the proper functioning of both e-commerce and a healthy democratic system.

202. See Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 AM. ECON. REV. 746 (1997) (reporting an empirical analysis of crowding-out behaviors).

203. *Quick FAQ's*, BENEFIT CORP INFO. CENTER, <http://benefitcorp.net/quick-faqs> (last visited Apr. 13, 2014) (“A benefit corporation is a new class of corporation that voluntarily meets higher standards of corporate purpose, accountability, and transparency.”).

204. LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012).

205. See *id.* at 3–4.

206. See, e.g., Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1103–07 (arguing that Congress is gridlocked).

Indeed, some ODR providers, such as SquareTrade, have already adopted an ethical code of conduct meaning that it could serve as an invaluable norm entrepreneur.²⁰⁷

Were ODR firms to take a wider view of their business interests to better align them with classic state-based justice systems, they could help build civic virtue in the ODR context from the bottom-up in conformance with polycentric principles. According to Professor Don Howard, civic virtues are those that are “specific to life in a community or polis, or, rather, to the flourishing of the community.”²⁰⁸ Norm entrepreneurs and users in the ODR context could use group-shunning techniques and even levy sanctions potentially through the common law to help ensure the proactive uptake of virtuous best practices by developers. This represents another application of polycentric governance, in particular the power of small-scale, organized groups to manage common problems. Given that the Internet is comprised of nearly three billion users, the notion of communities capable of norm building may seem like a stretch. But in fact, much has been written about the diverse array of communities active in cyberspace. Simply by perusing your smartphone, you will likely see an array of such communities from social media sites such as Facebook and Twitter, travel sites like TripAdvisor or Yelp, or an array of shopping and gaming platforms. According to Professor Howard, “[t]hese structures have a complicated topology and geography, with overlap, hierarchy, varying degrees of mutual isolation and mutual interaction. There are also communities of corporations or corporate persons, gangs of thieves, and bands of angels doing charity on scales small and large.”²⁰⁹ What is more, Professor Howard argues that these communities will each construct norms in their own ways and at their own rates but that this process has the potential to make positive progress toward addressing multi-faceted issues such as promoting the ethical use of ODR.²¹⁰ This is, in essence, a call for a polycentric approach to problem solving in cyber regulation given that, in the words of Professor Elinor Ostrom, solutions “negotiated at the global level, if not backed up by a variety of efforts at national, regional, and local levels . . . are not guaranteed to work well.”²¹¹

207. See Brian A. Pappas, *ONLINE COURT: Online Dispute Resolution and the Future of Small Claims*, 12 *UCLA J.L. & TECH.* 7–8 (2008).

208. Don Howard, *Civic Virtue and Cybersecurity* 9 (n.d.) (unpublished manuscript) (on file with author).

209. *Id.* at 14–15.

210. *Id.* at 14–22.

211. See Ostrom, *supra* note 201, at 4.

Within the ODR context, Crowdsourced Online Dispute Resolution (CODR) can provide a low-cost, fast, and democratic dispute resolution process that may promote trust among consumers.²¹² CODR systems do exist in practice, although their general use is mostly limited and still in the early stages of development.²¹³ To date, there are three types of CODR platforms: “(1) online opinion polls, (2) online mock trials, [and] (3) CODR procedures rendering decisions that are enforced by private authorities.”²¹⁴ Online opinion polls are the most common but tend to be littered with simple or non-legal issues.²¹⁵ Opinion polls may also be based on some aspects of dispute resolution. For example, for a period of time the People’s Court Raw allowed TV viewers to vote on the outcome of the case, though no weight was given to the poll.²¹⁶ Online mock trials also use community voting, although these platforms are really mechanisms that assist attorneys to prepare for trial. Websites such as eJury and VirtualJury both allow individuals to assist in trial preparation and case development through the use of use of mock juries and focus groups.²¹⁷ To date, crowdsourcing for the purpose of creating an enforceable and thereby legally recognized outcome has yet to be done, perhaps for good reason. That is not to say, though, that commentators have not argued for the more widespread adoption of such an alternative to brick-and-mortar justice. In fact, Professors Jaap van den Herik and Daniel Dimov argue, “CODR will probably become in the future the online judicial system of the online communities. They need such a judicial system because the basic principle of virtual communities is that the problems must be solved as much as possible within the online community itself.”²¹⁸ Interestingly, they also note a similar issue that has been raised for this Article, highlighting: “[A]t present, the spread of CODR is limited not only by the lack of information about its existence, but also because of the lack of a theoretical framework of CODR that can be used for designing CODR platforms.”²¹⁹ We suggest the need to consider the creation of a private justice system that is built upon an impartial system of resolving disputes. Such a system can be created

212. Jaap van den Herik & Daniel Dimov, *Towards Crowdsourced Online Dispute Resolution*, 7 J. INT’L COMM. L. & TECH. 99, 99 (2012).

213. *See id.*

214. *Id.* at 100.

215. *Id.* at 101.

216. *See, e.g.*, Colin Rule, *The People’s Court - Raw*, CIS BLOG, (Apr. 29, 2008, 5:46 PM), <http://cyberlaw.stanford.edu/blog/2008/04/peoples-court-raw>.

217. EJURY.COM, <http://www.ejury.com/> (last visited Apr. 13, 2014); VIRTUALJURY, <http://www.virtualjury.com/> (last visited Apr. 13, 2014).

218. van den Herik & Dimov, *supra* note 212, at 109.

219. *Id.*

through the use of polycentric regulation that reinforces both accountability and transparency. In essence, it is time to insist upon the inclusion of ethics within ODR frameworks.

CONCLUSION

Mixtures of regulatory modalities working at multiple levels are needed to ensure virtuous ODR services. Eventually, relevant governmental agencies could enforce self-generated community codes of conduct and industry best practices. Through polycentric partnerships, it then might be possible to harmonize diverse interests among stakeholders within these virtual courthouses. Ultimately, while ODR can serve a productive purpose and increase efficiency for the resolution of low-value disputes, trust must be earned by instilling civic virtue from the bottom-up, in keeping with the literature on polycentric governance, easing the task for policy makers to harmonize the interests of governments in promoting justice and business in the bottom line.