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Process Pluralism in the Post-COVID Dispute Resolution Landscape

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PROCESS PLURALISM IN THE POST-COVID DISPUTE RESOLUTION LANDSCAPE

by: Orna Rabinovich-Einy*

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I. INTRODUCTION

Among her numerous contributions as a founder of the field, Professor Menkel-Meadow coined and developed the term “process pluralism,” one of the most influential concepts in the dispute resolution arena. Process pluralism serves both as a descriptive lens in observing the dispute resolution landscape and as a normative prism through which various procedural schemes can be evaluated and procedural reform can be devised.¹

In the last few years process pluralism has gained new meaning as diversity in procedural avenues increasingly encompassed a broader range of mediums. Initially, such additional procedural choices existed mainly in written asynchronous form, but with the onset of COVID-19, a plethora of remote proceedings emerged, varying from synchronous and asynchronous written proceedings to audio and video-based processes.² These developments raised a host of questions

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1. See Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL’Y 37, 37–39 (2002); see also Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 7–9 (2004) [hereinafter Menkel-Meadow, *Legal Dispute Resolution in a Multidisciplinary Context*] (discussing how process pluralism is used in the dispute resolution and procedural reform contexts).

2. See PEW CHARITABLE TRS., *HOW COURTS EMBRACED TECHNOLOGY, MET THE PANDEMIC CHALLENGE, AND REVOLUTIONIZED THEIR OPERATIONS* 1 (2021),

as to the desirability of such plurality.³ For the readers of Menkel-Meadow's work these questions are not new. Years ago, she asked whether more procedural options are necessarily a good thing, ultimately underscoring the need for sensitivity to context in modern and complex societies, thereby making the case that the time had come to move from the Fuller-shaped approach of process integrity to one in which procedural hybridization reflects "an integrity of its own."⁴

This Article proceeds as follows: Part II describes the concept of process pluralism, the backdrop against which it emerged, and the new reality in which this term is grounded. Part III elaborates on the connection between process pluralism and technology, analyzing the different meanings such connection has had in light of the changes technology itself has undergone in recent years. In Part IV, studies conducted on online and remote proceedings illuminate the ways in which different designs of online schemes can significantly shape the degree of access to justice, procedural fairness, and the fairness of outcomes that such processes provide. Finally, Part V concludes the Article.

II. THE CONCEPT OF PROCESS PLURALISM

The concept of process pluralism emerged in response to two alternative views of dispute resolution mechanisms in our society. The first was what might be termed a traditional view under which courts presented the preferred route for addressing a wide range of individual and social disputes that would fall under the rubric of "legal disputes." For many years this view was assumed but not pronounced, as courts were the dominant means for resolving disputes in modern societies in which social and religious ties have disintegrated.⁵

The alternative approach, which emerged in response to what were seen as the failings and limitations of the courts in addressing conflict,

<https://www.pewtrusts.org/-/media/assets/2021/12/how-courts-embraced-technology.pdf> [<https://perma.cc/YD4R-85XP>].

3. See ALICIA BANNON & JANNA ADELSTEIN, *THE IMPACT OF VIDEO PROCEEDINGS ON FAIRNESS AND ACCESS TO JUSTICE IN COURT 2-3* (2020), <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court> [<https://perma.cc/R59N-HP7B>].

4. Carrie Menkel-Meadow, *Hybrid and Mixed Dispute Resolution Processes: Integrities of Process Pluralism*, in *COMPARATIVE DISPUTE RESOLUTION* 405, 417-19 (Maria Federica Moscati et al. eds., 2020) [hereinafter Menkel-Meadow, *Hybrid and Mixed*].

5. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* 10-11 (1983) (stating that "[l]itigation is the all-purpose remedy that American society provides its aggrieved members. But as rights are asserted, combat is encouraged; as the rule of law binds society, legal contentiousness increases social fragmentation. Solace lies in the comforting assurance that there is no tolerable, or preferable, alternative. Throughout the twentieth century social theorists have insisted that a formal legal system, with a trained professional class of legal experts, is the superior form of civilized social organization.").

hailed the role of alternative processes, mostly mediation that emerged as of the last quarter of the 20th century, and viewed these new forms of justice as superior to the court.⁶ In response to the adoption of alternatives, some critics expressed the traditional view in objecting to the adoption of mediation and the encouragement of settlement in the courts.⁷ Over time, as alternatives were institutionalized in the court setting, the dichotomous approach to “courts” on the one hand and “alternatives” on the other hand was transposed with an understanding that we were now in an era in which formal and informal avenues often comingle (or as Professor Menkel-Meadow described it, we saw the rise of “semi-formal” procedures).⁸

Process pluralism connotes the idea that it is desirable to have a wide selection of processes in our justice system, capturing a unique mix of goals and values, and allowing for a contextualized tailoring of processes to the particulars of the dispute and characteristics of the parties, thereby creating “an integrity of its own—seeking flexibility and variability.”⁹ In other words, we need to figure out, as Menkel-Meadow emphasizes, “[w]hat human problems are best resolved, handled, or solved by what processes.”¹⁰

All of this, as Menkel-Meadow has been telling us for many years, will enhance justice. “[O]ne size does not fit all,” she writes, and “new forms of hybridity, variation and mixed processes may enhance human problem solving, increase creativity and flexibility in outcomes and dispute prevention, as well as resolution—and, hopefully, strengthen both peace and justice in their different forms.”¹¹ Modern societies with all their diversity, she emphasizes, require pluralism and diversity in process.¹² Indeed, in recent decades this insight has per-

6. See generally Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996) (critiquing the adversarial system and providing a solution via alternative models of legal process).

7. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that ADR should not be adopted because “[c]onsent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done”); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360–61 n.8 (1985) (arguing that informal processes increase “the likelihood of prejudice against ethnic minorities of color”); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1601 (1991) (demonstrating the dangers for women participating in mandatory mediation in the divorce context).

8. See Carrie Menkel-Meadow, *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the ‘Semi-Formal,’* in REGULATING DISPUTE RESOLUTION 405, 417–19 (Felix Steffek et al. eds., 2013) [hereinafter Menkel-Meadow, *Semi-Formal*].

9. Menkel-Meadow, *Hybrid and Mixed*, *supra* note 4, at 419.

10. Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 565 (2006).

11. Menkel-Meadow, *Hybrid and Mixed*, *supra* note 4, at 407.

12. *Id.* at 13.

meated not only into the alternative (or appropriate) dispute resolution realm, but also the formal court arena, a distinction which has in itself been blurred by the growing array of procedures offered along the dispute resolution continuum.¹³

Why would process pluralism enhance justice? This is because procedures shape access to justice, procedural justice, and, ultimately, shape the outcomes reached. In terms of access to justice, procedural arrangements determine whether we can effectively access and use avenues of redress, and different design choices will leave a different group of people outside the reach of specific dispute resolution processes because of such features as their cost, complexity, location, jurisdiction, and language employed. Since different people have different capabilities and preferences, a wide choice of processes that differ along these axes should enhance access to justice, particularly for those members of disempowered groups who have traditionally faced higher barriers in accessing the courts.

In terms of procedural justice, different procedural schemes could impact whether parties experience processes as fair and as ones that provide them with an opportunity to express voice. Over the years, research has demonstrated the significance of procedural justice perceptions not only to parties' assessments of whether the particular procedure was fair, but also its centrality in shaping parties' perceptions of the legitimacy of the entity delivering such dispute resolution processes. While the pillars of procedural justice have been found to remain significant across social groups, locales, and settings, the levels of procedural justice experienced by different parties under varying procedural structures can be expected to differ. Therefore, here too, more options can enhance parties' sense of fairness.

13. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 1–5 (1991) [hereinafter Menkel-Meadow, *Pursuing Settlement in an Adversary Culture*]; see also Menkel-Meadow, *Semi-Formal*, *supra* note 8, at 419–28 (discussing the formal, informal, and semi-formal use of ADR in courts); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 174–89 (2003) (discussing how ADR processes shaped the court system in previous decades); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 3–7 (2001) (exploring how court-institutionalized mediation has affected self-determination); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 863–67 (2008) (discussing the gap between court-oriented mediations and the potential of mediation); Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 399–401 (2004) (analyzing court-oriented mediation and its effect on success); Orna Rabinovich-Einy, *The Legitimacy Crisis and the Future of Courts*, 17 CARDOZO J. CONFLICT RESOL. 23, 23 (2015) (arguing that current problems are manifestations that stem from blurring the sharp distinctions between courts and alternatives).

Finally, different procedures are bound to lead parties to different outcomes. In some cases, third parties render these decisions, while in other instances parties devise their own resolutions. In court and arbitration, rights-based outcomes are sought, while in mediation the goal is oftentimes to reach interest and needs-based outcomes. Indeed, a principal driver for the adoption and use of mediation is its ability to produce outcomes that are different from those reached in court and that expand our “remedial imagination.”¹⁴ So here also, if we believe that different problems could be resolved in various ways, depending on parties’ needs, rights, situation, and choices, then we would view process pluralism as a positive development.

When Menkel-Meadow wrote about process pluralism, she referred to a wide array of contexts that crossed familiar distinctions and categorizations, with disputes ranging from domestic to international¹⁵ and from civil to criminal,¹⁶ and functions ranging from dispute resolution to rule-making and consensus building.¹⁷ In the second decade of the 21st century, process pluralism took on a new meaning as technology became another layer of process diversification, as we shall see in the following Part.

III. LEGAL PLURALISM AND ONLINE PROCEEDINGS

A. *First Wave: The 1990s*

While online dispute resolution (“ODR”) had already emerged in the 1990s, it was seen as a discrete arena, fit for disputes that emerged in the online setting, which at the time was a milieu that was separate from face-to-face interactions.¹⁸ Indeed, even for the online disputes, mostly in the context of e-commerce, online proceedings were perceived as inferior to the richer and fuller opportunities for engagement offered through physical encounters. Nevertheless, it was also clear that there needed to be dispute resolution processes available

14. Menkel-Meadow, *Pursuing Settlement in an Adversary Culture*, *supra* note 13, at 7.

15. See generally Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319 (exploring theories of conflict resolution in the international and domestic context).

16. See generally Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161 (2007), <https://doi.org/10.1146/annurev.lawsocsci.2.081805.110005> (discussing how restorative justice affects criminal and civil spheres); see generally Carrie Menkel-Meadow, *Process Pluralism in Transitional/Restorative Justice*, 3 INT’L J. OF CONFLICT ENGAGEMENT & RESOL. 3 (2015) (discussing how democracy, the rule of law, and institutional design may require more for successful transitional justice).

17. See generally Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2004) (exploring how consensus building may provide a model for democratic and political engagement in current processes).

18. Orna Rabinovich-Einy, *The Past, Present, and Future of Online Dispute Resolution*, 74 CURRENT LEGAL PROBS. 125, 129–30 (2021).

for those engaging in online activities that could provide effective, low-cost redress.

Some online entities quickly realized that they needed to take responsibility for problems that arose on their platforms if they wished to draw in users and engender trust in their services. eBay, whose elaborate dispute resolution scheme is often viewed as the “poster child” of ODR, was a pioneer in the field. After conducting a pilot experiment on its site, eBay offered a full-fledged ODR system to its users: first, through an external start-up, and later, through its internal trust and safety program, it created an ODR system that has come to address over 60 million disputes a year.¹⁹

But the significance of the eBay ODR system extends beyond its primacy and scope; it has to do mainly with its use of technology to expand process pluralism. While most other ODR entities at the time tried to create online equivalents to familiar face-to-face processes, eBay was probably the first entity to embrace the unique qualities of online digital communication to rethink the nature of processes employed,²⁰ their qualities,²¹ and the values and goals they advance.²² Indeed, this mind shift was an important development, which paved the way for the second wave of ODR.

B. *Second Wave: Early 2000s*

It was only with the spread of smartphones and social media that online and offline activities began to comingle. As habits and expectations evolved and technology improved (not only in terms of connectivity, but also in terms of interface and user experience), it became possible, in some cases even expected, to have online resolution avenues available for a growing array of contexts and disputes.²³ Even concerns over the digital divide diminished somewhat with growing

19. ETHAN KATSH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES* 34–35 (2017).

20. eBay was a pioneer in designing an “automated negotiation” process, which did not have an offline equivalent. See Rabinovich-Einy, *supra* note 18, at 133.

21. Online processes differ from offline ones in their degree of structure and the level of confidentiality they afford. See Orna Rabinovich-Einy, *Technology’s Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253, 268–83 (2006).

22. The digital trail that comes with online proceedings can promote the goal of dispute prevention by detecting pattern of recurring disputes and reforming the environment in which transactions are formed or interactions occur so as to reduce or eliminate such disputes altogether. See *id.* at 273 (referring to an instance when SquareTrade used user data to determine that its platform was lacking a solution for a particular type of dispute, and SquareTrade made appropriate changes based on that feedback).

23. See Orna Rabinovich-Einy & Ethan Katsh, *The New New Courts*, 67 AM. U. L. REV. 165, 184–90, 203–12 (2017).

evidence of the widespread use of online communication by members of disempowered groups for various ends.²⁴

During this time, the courts were adopting ODR; Modria and Mat-terhorn began operating across growing numbers of local and state courts,²⁵ and the Civil Resolution Tribunal in British Columbia provided a proof of concept for a diagnosis phase in formal proceedings.²⁶ Outside courts, novel types of online proceedings were emerging in diverse settings ranging from smart contracts²⁷ to school bullying.²⁸ Menkel-Meadow was, of course, ahead of the game and saw the opportunities for process pluralism enhanced through the novel dimension of choice of medium, but she was also duly cautious in recognizing the challenges and dangers associated with the widespread adoption of online processes.²⁹

At the same time, we started seeing assessments of ODR proceedings that gave reason to think that in some contexts, for some parties, such processes could increase various dimensions of justice, including: access to justice (due to the convenience of handling proceedings online from anywhere and anytime, people engage more with the process when it is conducted online, as parties raise more problems and are more responsive to complaints against them, rather than just “lumping it” or defaulting);³⁰ procedural justice (in those cases where parties felt they were better able to express themselves in writing, asynchronously);³¹ and even substantive justice, with the elimination

24. See *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/> [<https://perma.cc/2XCC-UAEQ>] (listing smartphone use across various demographics).

25. Rabinovich-Einy, *supra* note 18, at 135–36.

26. *Id.* at 133–34.

27. See *The Justice Protocol*, KLEROS, <https://kleros.io/> [<https://perma.cc/GP4B-SXVW>]; see also Amy J. Schmitz & Colin Rule, *Online Dispute Resolution for Smart Contracts*, 2019 J. DISP. RESOL. 103, 114–21 (exploring ODR sites and how they can resolve smart contract disputes); Orna Rabinovich-Einy & Ethan Katsh, *Blockchain and the Inevitability of Disputes: The Role for Online Dispute Resolution*, 2019 J. DISP. RESOL. 47, 57–71 (discussing how various forms of ODR have developed to address smart contracts).

28. See *Resolving Digital Conflicts, Together*, AGREE ONLINE, <https://www.agree-online.com/> (last visited Dec. 20, 2022) (focusing on resolving disputes among children and adolescents, including bullying and cyber-bullying incidents).

29. Carrie Menkel-Meadow, *Is ODR ADR?: Reflections of an ADR Founder from 15th ODR Conference, the Hague, Netherlands, 22–23 May 2016*, 3 INT’L J. ON ONLINE DISP. RESOL. 4, 5 (2016).

30. J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 2030–34, 2037–39 (2017).

31. Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL’Y 331, 375–80 (2016) (finding that participants in a simulated lab experiment of online proceedings reported the highest level of experienced fairness when they communicated with decision-makers in writing and received communications from decision-makers via pre-recorded videos); Avital Mentovich et al., *Legitimacy and Online Courts: Procedural Justice, Access to Justice and Income* (draft on file with authors) (demonstrating positive perceptions of procedural justice of online court proceedings in the traffic context, draw-

of race-based outcome disparities, as we have seen in one study of ODR in the traffic arena.³²

C. *Third Wave: COVID-19*

The dawn of the third decade of the 21st century brought about yet another development: the rise of remote proceedings in the wake of COVID-19. Clearly, the health, economic, and social-related consequences we are experiencing have been devastating. The pandemic has, however, accelerated some developments, and one could say that it has been a positive force in spreading and mainstreaming the use of technology in courts (as well as outside the formal legal system), further buoying the previous move to adopt ODR in courts. Such use was not limited to what was traditionally seen as ODR, but came to encompass what has been termed by Richard Susskind—“remote courts.”³³

Suddenly, everyone began conducting remote proceedings. Many courts were forced to shut down completely while others restricted their hearings to urgent cases in light of social distancing requirements. Even where in-person court sessions continued to take place, the use of online proceedings became essential to prevent extreme backlogs and delays, as court personnel contracted COVID or were exposed to people who were later diagnosed with COVID.

The adoption of remote proceedings in courts and for alternative proceedings outside the courts quickly became a global phenomenon, although local variations existed in terms of scope and types of proceedings adopted. Some courts employed videoconferencing platforms such as Zoom and Skype; others relied on audio and paper-based decision-making, while others still chose to adopt and expand ODR systems and processes that do not rely on real-time communications and are mostly text-based.³⁴

Whatever the strategy adopted, it seems fair to say that internationally, courts have substantially expanded their use of technology, employing some form of online or remote proceedings during the

ing on surveys collected from participants in real court traffic cases); Katie Sykes et al., *Civil Revolution: User Experiences with British Columbia's Online Court*, 37 WINDSOR Y.B. ACCESS TO JUST. 161, 186–88 (2020) (finding that, overall, users were satisfied with the online process and that those who could compare it to a physical court proceeding preferred the online process).

32. See Avital Mentovich et al., *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 ALA. L. REV. 893, 961–67 (2020).

33. Richard Susskind, *The Future of Courts*, 6 THE PRACTICE (2020), <https://thepractice.law.harvard.edu/article/the-future-of-courts/> [<https://perma.cc/P7CW-8X6U>].

34. *Id.*; David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISC. 246, 250–51 (2020); Tania Sourdin et al., *Court Innovations and Access to Justice in Times of Crisis*, 9 HEALTH POL'Y & TECH. 447, 448 (2020).

pandemic.³⁵ As the course and spread of the pandemic changed over the last few years, courts have reopened, with many resuming full-scale operations in person. Nevertheless, for many of those observing the use of technology in and outside the court system, it is clear that online and remote proceedings are here to stay as part of the plurality of options offered by our modern-day “multidoor courthouse.”³⁶ The following Part expands on the desirability of such developments.

IV. EVALUATING [ONLINE] PROCESS PLURALISM

How should we view these developments from a process pluralism perspective? As Menkel-Meadow tells us, “process pluralism also has its dangers.”³⁷ For many ODR enthusiasts, the widespread adoption of remote proceedings was a mixed blessing. They feared that ODR was being equated with Zoom or with videoconferencing, erasing many years of serious work in terms of process design and plurality of options, which relied heavily on asynchronous communication.³⁸

At the same time, the ODR community came to realize the significance some users attach to the availability of easy-to-use, readily available synchronous video communication and came to adjust its thinking on the need for such options as part of the procedural choices that are made available to users and providers.³⁹

Another lesson for ODR was the need to adjust and spread quickly—this required an infrastructure that involved not only designers and platforms that could scale their operations and adjust to new arenas, but also dedicated individuals and groups that could offer guidance on training, ethical standards, and dispute system design principles. The implications of the shift from face-to-face proceedings to

35. See Engstrom, *supra* note 34, at 250–51; see also PEW CHARITABLE TRS., *supra* note 2, at 1 (discussing how American courts used online proceedings during the COVID–19 pandemic).

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

37. Menkel-Meadow, *Hybrid and Mixed*, *supra* note 4, at 407.

38. See Ana Goncalves & Daniel Rainey, *Mediating Online Is Much More than “Doing it on Zoom,”* KLUWER MEDIATION BLOG (Feb. 28, 2021), <http://mediationblog.kluwerarbitration.com/2021/02/28/mediating-online-is-much-more-than-doing-it-on-zoom/> [<https://perma.cc/A46S-HXAE>]; see also Simon Boehme, *You Mediate on Zoom. Now What?*, MEDIUM (Sept. 3, 2020), <https://simonboehme.medium.com/you-mediate-on-zoom-now-what-91f2335ed692> [<https://perma.cc/PAF5-QLAR>] (explaining how ODR is much more than Zoom); Amy J. Schmitz & John Zeleznikow, *Intelligent Legal Tech to Empower Self-Represented Litigants*, 23 COLUM. SCI. & TECH. L. REV. 142, 146 (2021) (stating that “ODR offerings to date have been fairly limited, especially with the growing reliance on video platforms like Zoom and TEAMS for mediation (which has often inaccurately been called ODR)”).

39. Indeed, for some operating in the dispute resolution field, ODR and remote proceedings fall under the same heading. See Meredith McBride, *ODR in the ERA of COVID-19*, ABA (Oct. 27, 2020), https://www.americanbar.org/groups/family_law/committees/alternative-dispute-resolution/odr/ [<https://perma.cc/5V6H-4E2G>].

real-time video communication on existing principles, values, and goals needed to be explored and addressed. This shift was very different from the impact of the previous move to asynchronous written communication in ODR, and existing guidelines and trainings from the ODR context were often inadequate to address these novel developments that were occurring at mass scale.⁴⁰

Thus, for example, questions of accessibility arise with respect to the ability of people from low socio-economic backgrounds to join a videoconferencing session due to insufficient bandwidth.⁴¹ At a time of quarantine, their ability to find a private area within what is often a small living space that may be occupied with young children was limited and made the prospect of meaningful participation in a live session via video challenging, to say the least.⁴² COVID also made it

40. See generally Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes*, 71 DEPAUL L. REV. 537 (2022) (analyzing the different implications various mediums can have on parties, society, and the realization of procedural values and goals). The following guidelines were developed by the International Council for Online Dispute Resolution (ICODR) as the use of Zoom began to spread. See *ICODR Video Mediation Guidelines*, INT'L COUNCIL FOR ONLINE DISP. RESOL. (Apr. 2020), <https://icodr.org/guides/videomed.pdf> [<https://perma.cc/5GWW-GA3M>]; see also *ICODR Video Arbitration Guidelines*, INT'L COUNCIL FOR ONLINE DISP. RESOL. (Apr. 2020), <https://icodr.org/guides/videoarb.pdf> [<https://perma.cc/7YLG-KS5U>] (providing guidelines for online dispute resolution facilitators to ensure that a video arbitration is accessible, competent, confidential, fair/impartial/neutral, and secure).

41. See CAL. COMM'N ON ACCESS TO JUST., REMOTE HEARINGS AND ACCESS TO JUSTICE: DURING COVID-19 AND BEYOND 13–14 (2020), https://www.ncsc.org/_data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf [<https://perma.cc/7VC4-PHWN>]; see also *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/?menuItem=2ab2b0be-6364-4d3a-8db7-ae134dbc05cd> [<https://perma.cc/CM87-MZST>] (presenting data on bandwidth use in the U.S. across demographics); Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1891 (2021) (stating that “tenants who are facing eviction may stop paying phone bills in an effort to keep up with rental payments, leaving them without an active device to use for an eviction hearing”); PEW CHARITABLE TRS., *supra* note 2, at 2 (finding that “litigants without legal representation, especially those with other accessibility needs, faced significant disadvantages, even when systems were technically open to them”); *id.* at 13–14 (stating that “[i]n a review of nearly 10,000 court documents from all 50 states and D.C., between February and October 2020, researchers from Wesleyan University found that only 253 documents mentioned language access and just 154 contained information for people with disabilities. In total, less than 3% of the documents referenced access for people with limited English proficiency, less than 1.5% mentioned the needs of people with disabilities, and none specifically addressed technology accommodations for these populations.”).

42. One difficulty that is particularly acute for disempowered parties has to do with the use of interpreters in a remote hearing. See NUFFIELD FAM. JUST. OBSERVATORY, REMOTE HEARINGS IN THE FAMILY JUSTICE SYSTEM: A RAPID CONSULTATION 15 (2020), https://www.nuffieldfjo.org.uk/wp-content/uploads/2021/05/nfjo_remote_hearings_20200507-2-.pdf [<https://perma.cc/Z7QW-DBUA>]; see also ALICIA SUMMERS & SOPHIA GATOWSKI, NEVADA COURT IMPROVEMENT PROGRAM REMOTE HEARING STUDY 9 (2020), https://nvcourts.gov/AOC/Programs_and_Services/Court_Improvement/Documents/Studies_and_Research/2020_NVCIP_Remote_Hear-

more difficult, in some cases impossible, to find a public space from which parties could connect to a hearing, let alone a quiet and discrete one.⁴³

Interestingly, a recent National Center for State Courts study of remote proceedings in Texas found that access to the courts actually increased in remote proceedings—not only of parties, but also of witnesses, victims, and others, all of whom found it easier to participate and defaulted less frequently.⁴⁴ At the same time, we know that mere participation is an insufficient measure of access, and the question arises as to what extent such participation was effective. There is reason for concern given some of the other studies of video proceedings—describing frequent connectivity problems for tenants in landlord-tenant cases, lack of preparation,⁴⁵ as well as concerns over more elusive challenges to access such as the ability to decipher more subtle cultural expectations from disputants in these settings (dress code, language use, and the like).⁴⁶ While courts made an effort to generate codes of conduct for the remote setting, these rules left much room for confusion and misunderstanding for pro se litigants.⁴⁷

Another important concern had to do with the difficulty of accessing counsel. In the case of represented parties who were not in the same room as their counsel, the new medium presented many challenges to their ability to consult their lawyer in confidence (access to telephone communication with counsel could prove inferior in light of the thin nature of such communication).⁴⁸ For those who could not

ings_Report/ [https://perma.cc/SMJ9-EWSB] (stating in a study of online family proceedings that parents appeared most by telephone and strategies needed to be considered to engage parents in the process by video).

43. Bannon & Keith, *supra* note 41, at 1890 (stating that access to the internet through public libraries was unavailable during the pandemic).

44. NAT'L CTR. FOR ST. CTS., THE USE OF REMOTE HEARINGS IN TEXAS STATE COURTS: THE IMPACT ON JUDICIAL WORKLOAD ii (2021), https://www.ncsc.org/_media/_imported-ncsc/files/pdf/newsroom/TX-Remote-Hearing-Assessment-Report.pdf [https://perma.cc/HX8U-JH7L]; see also PEW CHARITABLE TRS., *supra* note 2, at 1 (finding that default rates of defendants in legal proceedings dropped, meaning that participation by them increased).

45. PEW CHARITABLE TRS., *supra* note 2, at 12–13.

46. In addition, discomfort with technology could inhibit willingness to engage with the process. Sternlight & Robbennolt, *supra* note 40, at 568. The ability to present an organized version of one's story could prove crucial in videoconferencing, given such phenomena as Zoom fatigue. *Id.* at 576. Both capabilities may be lacking with disempowered parties.

47. See, e.g., E-HEARINGS TASK FORCE OF THE ADVOC.' SOC'Y ET AL., BEST PRACTICES FOR REMOTE HEARINGS 6 (May 13, 2020), https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/BestPracticesRemoteHearings/Best_Practices_for_Remote_Hearings_13_May_2020_FINAL_may13.pdf [https://perma.cc/6VNE-MMS3]; JUD. COLL., GOOD PRACTICE FOR REMOTE HEARINGS 2–4, <https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf> [https://perma.cc/UU5P-63NT].

48. While this complaint was voiced most strongly in the criminal context, it also presented a significant challenge in civil proceedings. See TAYLOR BENNINGER ET AL., STAN. CRIM. JUST. CTR., VIRTUAL JUSTICE? A NATIONAL STUDY ANALYZING THE

afford hiring a lawyer, the shift to remote proceedings presented new barriers to obtaining legal aid and for such counsel to operate remotely.⁴⁹ Access is not merely about participation; it is also about its nature and quality.

Alongside the issue of access, another important layer of justice has to do with parties' procedural experiences and their perceptions of procedural justice.⁵⁰ In this context, the impact of having to turn off their video due to limited bandwidth can be detrimental for parties who feel unheard and unseen when giving testimony and hearing others.⁵¹ The impact on voice and a sense of fairness of real-time communication where only some of the parties are shown is very different from both physical proceedings and from ODR settings in which everyone communicates asynchronously in writing.⁵² Similar concerns arise where parties' words are cut off due to connectivity problems, and perhaps more acute concerns arise over audio proceedings, particularly in those proceedings in which some of the parties use video.⁵³

TRANSITION TO REMOTE CRIMINAL COURT 7–9 (2021), <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/08/Virtual-Justice-Final-Aug-2021.pdf> [<https://perma.cc/37NA-MQNC>] (establishing the cost in terms of attorney-client communication in the criminal context based on surveys of defense attorneys and finding that “the shift to virtual proceedings has hurt attorneys’ ability to communicate with their clients”).

49. See BANNON & ADELSTEIN, *supra* note 3, at 9–10; see also NATALIE BYROM ET AL., THE IMPACT OF COVID-19 MEASURES ON THE CIVIL JUSTICE SYSTEM 22 (2020), <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf> [<https://perma.cc/QN7K-LKUV>] (stating that “[t]he Housing Law Practitioners Association shared findings from their survey which provided evidence of the difficulties facing legal aid funded advice providers in transitioning to providing advice remotely”); Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. 197, 217 (2021) (stating that “[d]efense counsel’s inability to consult with the client in person during the proceeding may further interfere with effective representation”).

50. Turner, *supra* note 49, at 264–65; BYROM ET AL., *supra* note 49, at 25 (finding in a survey of mostly attorneys, a strong population, that they prefer face-to-face proceedings due to procedural justice concerns).

51. See Celia Kitzinger, *Remote Justice: A Family Perspective*, TRANSPARENCY PROJECT (Mar. 29, 2020), <http://www.transparencyproject.org.uk/remote-justice-a-family-perspective/> [<https://perma.cc/3Z6V-P3GR>]; see also NUFFIELD FAM. JUST. OBSERVATORY, *supra* note 42, at 10 (finding that parties associated remote proceedings with lower levels of empathy and human connection, elements that could translate into lower perceptions of procedural fairness); JUD. COLL., *supra* note 47, at 3 (instructing parties to look at the camera when speaking, and not at the person whom they are addressing); Elizabeth G. Thornburg, *Observing Online Courts: Lessons from the Pandemic*, 54 FAM. L.Q. 181, 193 (2020) (finding based on observations of virtual court hearings, that the ability of judges to master the technology and convey empathy was the most prominent factor in generating a sense of justice).

52. Mentovich et al., *supra* note 31 (finding high levels of procedural justice among real court users of online traffic proceedings); Sela, *supra* note 31, at 375–79 (finding high levels of procedural justice perceptions in simulated online proceedings).

53. See Sternlight & Robbennolt, *supra* note 40, at 581; see also BANNON & KEITH, *supra* note 41, at 1891 (stating that “a self-represented tenant sought to access a video hearing on both his phone and his wife’s phone but was unable to do so, and he was therefore forced to appear over audio while the judge, the plaintiff’s lawyer, and the plaintiff’s witness all appeared via video,” which made it impossible for him to share

In addition to the impact on one's sense of voice, concerns have been raised that the characteristics of videoconferencing may diminish parties' sense of dignity and their ability to establish whether the judge was impartial.⁵⁴ At the same time, others have highlighted the positive psychological impact of participating from a familiar and relaxed setting, as well as the mitigation of adversarial tactics when proceedings are conducted remotely.⁵⁵ A recent study based on mock video proceedings finds that they could not only meet procedural justice standards but even surpass the traditional physical gathering on certain dimensions.⁵⁶

Another question has to do with substantive outcomes. Various past studies have shown empirically that disempowered parties fare substantially worse in videoconferencing proceedings.⁵⁷ This could be attributed to several causes. One source impacting the favorability of outcomes reached through videoconferencing for parties belonging to disempowered groups has to do with the effectiveness of such parties' performance through this medium, whether those parties are perceived as reliable and whether communication problems affect their ability to tell a coherent and comprehensible story.⁵⁸ Interestingly, one recent lab experiment demonstrated that the volume level can

documents); Ruth Higgins, *Courts in the Pandemic—A View from the Bench*, BAR NEWS, <https://barnews.nswbar.asn.au/winter-2020/courts-in-the-pandemic/> [<https://perma.cc/FA8A-GJCE>] (stating that in audio hearings parties may talk simultaneously and it may be difficult to discern who is speaking).

54. Sternlight & Robbenolt, *supra* note 40, at 586–88.

55. BERKELEY RSCH. GRP., THE PSYCHOLOGICAL IMPACT OF REMOTE HEARINGS 5–6 (2021), <https://media.thinkbrg.com/wp-content/uploads/2021/08/05105717/BRG-Remote-Hearing-Impact-2021-Final.pdf> [<https://perma.cc/Y2BX-3STJ>].

56. LINDA MULCAHY ET AL., EXPLORING THE CASE FOR VIRTUAL JURY TRIALS DURING THE COVID-19 CRISIS: AN EVALUATION OF A PILOT STUDY CONDUCTED BY JUSTICE (2020), <https://ssrn.com/abstract=3876199> [<https://perma.cc/G3AM-8759>]. But see also BYROM ET AL., *supra* note 49, which portrays a more mixed picture of the impact of video proceedings on procedural justice and user satisfaction (this comprehensive report examining the implications of the shift to videoconferencing on users' experiences during the pandemic found that video online proceedings did meet baseline procedural justice standards, but nevertheless concluded that remote video proceedings are inferior to face-to-face options due to participants' preference for meeting in person, as well as the frequent technical problems reported in such proceedings).

57. Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1089 (2004); Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 259 (2008); Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 898 (2010); Dane Thorley & Joshua Mitts, *Trial by Skype: A Causality-Oriented Replication Exploring the Use of Remote Video Adjudication in Immigration Removal Proceedings*, 59 INT'L REV. L. & ECON. 82, 82 (2019); JEAN-PIERRE DOUGLAS-HENRY & BEN SANDERSON, VIRTUAL HEARINGS 13 (2020), <http://viewer.zmags.com/publication/051503a3#051503a3/10> [<https://perma.cc/CXL7-8J7B>].

58. Bannon & Keith, *supra* note 41, at 1895–96; Sternlight & Robbenolt, *supra* note 40, at 573–74.

impact the credibility assigned to the speaker,⁵⁹ and another study highlighted the impact of the camera angle on credibility assessment,⁶⁰ features which the speaker may not even have control over, let alone be aware of. A recent study comparing face-to-face arbitrations with remote ones—both video and written proceedings—found that individual plaintiffs whose cases were arbitrated remotely won less often and recovered lower sums than those whose cases were conducted face-to-face, a phenomenon the author terms the “remote penalty.”⁶¹

In addition, structural issues having to do with the ways in which remote proceedings are conducted, as opposed to physical encounters, may also shape the nature of outcomes. Thus, for example, the fact that remote proceedings lack opportunities offered by in-person proceedings—such as forms to fill out, additional information garnered through physical observation, or in-person information and support—means that disadvantaged disputants may obtain worse outcomes.⁶²

Finally, implicit bias by judges may increase where proceedings are conducted remotely. Judges, like all other human beings, are subject to biases and heuristics that impact the way in which they process, understand, and weigh information.⁶³ Such biases operate against members of disempowered groups and are what explain the persistent phenomenon of disparities in legal outcomes where minorities are involved.⁶⁴ While written asynchronous proceedings have been found to eliminate outcome disparities in one context, video proceedings are likely to operate differently.⁶⁵ This is because videoconferencing not only exposes judges to parties’ identity features, but also to legally irrelevant information about the parties, such as their living conditions

59. Elena Bild et al., *Sound and Credibility in the Virtual Court: Low Audio Quality Leads to Less Favorable Evaluations of Witnesses and Lower Weighting of Evidence*, 45 L. & HUM. BEHAV. 481, 481 (2021).

60. BANNON & ADELSTEIN, *supra* note 3, at 7; *see also* Sternlight & Robbennolt, *supra* note 40, at 561–62 (discussing the impact of the size of images on emotions).

61. David Horton, *Forced Remote Arbitration*, 108 CORNELL L. REV. (forthcoming 2022) (manuscript at 7). This was found to be the case even after controlling for case type and representation. *Id.*

62. BANNON & ADELSTEIN, *supra* note 3, at 5 (referring to the findings in the early study of remote proceedings in the immigrant removal proceedings context, according to which “respondents may have been less likely to participate fully in video proceedings due to logistical hurdles requiring advanced preparation, such as the need to mail an application for relief in advance of the hearing, rather than bringing one to court and physically handing over a copy”); Turner, *supra* note 49, at 218 (stating that “[t]he lack of family and friends visible in the courtroom—and ready to provide information or support as needed—can further hurt the defendant’s case before the court”); BENNINGER ET AL., *supra* note 48, at 9 (stating “that the shift to virtual proceedings eliminated the productive hallway conversations that often occur between defense attorneys and both prosecutors and other court actors”).

63. *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195 (2009).

64. *See* Thornburg, *supra* note 51, at 201–02 (raising the question, “what inferences might be drawn from what one sees in the background”).

65. *See, e.g.*, Sternlight & Robbennolt, *supra* note 40, at 577–78.

(messy house, noisy kids, etc.). This state of affairs may prove most detrimental for parties belonging to disadvantaged groups both because they may not have a quiet and secluded space at home from which to conduct the proceeding and because they may be less aware of the need to obscure such information (and potentially less experienced in employing technological tools to that end).⁶⁶

How, then, can we ensure that process pluralism does indeed promote justice? Menkel-Meadow tells us that we need “to analyze, understand, and implement both process values . . . and substantive justice values.”⁶⁷ In remote proceedings, this was not carefully thought through. Many of those adapting face-to-face processes to the reality of COVID initially had not realized there is an entire field of practice and study that deals with the shift in medium of dispute resolution proceedings, formal and informal.

This oversight had several implications. For one, initially, the opportunity to expand the use of ODR was overlooked, and the immediate desire was to allow proceedings to continue operating in a mode that was as similar as possible to that conducted face-to-face. This has meant that the entire premise of ODR—reimagining processes for enhancing justice—was overlooked and altered. The emphasis instead was placed mainly on conducting the proceeding as planned under emergency conditions,⁶⁸ sometimes at a cost to justice. Even where levels of access were sustained, though, opportunities for enhancing effective access and fairness might not have been realized.⁶⁹

A second implication was that, initially, some of those behind the adoption of remote proceedings understood the change in medium as a technical change. Those engaged in ODR have had a head start in realizing the connection among medium, values, and justice.⁷⁰ This is the entire premise of process pluralism—that the mix of traits matters,

66. *But see id.* at 597; Andrew Guthrie Ferguson, *Courts Without Court*, VAND. L. REV. (forthcoming 2022/23) (manuscript at 33) (stating that exposure to the lives of defendants may have an equalizing effect since “[o]nline criminal courts and virtual technology reveal the equality façade,” as opposed to the seemingly equal situation that exists when all parties convene in a courtroom).

67. Menkel-Meadow, *Legal Dispute Resolution in a Multidisciplinary Context*, *supra* note 1, at 19.

68. *See* Sykes et al., *supra* note 31, at 162.

69. *See* PEW CHARITABLE TRS., *supra* note 2, at 12 (stating that “[f]or people without the tools needed to use court technology, such as high-speed internet and a sufficiently powerful computer, the move toward modernization failed to improve their interactions with the civil legal system and may even have made them more difficult”).

70. ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* 93 (2001) (using a triangle comprised of trust, experience, and expertise, which signifies the ways in which technology impacts the values embodied in online dispute resolution processes); Orna Rabinovich-Einy, *Beyond Efficiency: The Transformation of Courts Through Technology*, 12 UCLA J.L. & TECH. 1, 4–5 (2008) (advancing a comprehensive view of values and justice to advance procedural values).

precisely because the right mix can or may (but not necessarily) enhance justice.

Indeed, change of medium can dramatically impact access, perceptions of fairness, and outcomes of dispute resolution proceedings, but such impact may operate in different directions. As opposed to some of the rather promising findings on the impact of certain court ODR processes on justice, in the case of remote proceedings, the limited research conducted has raised some questions. We find significant challenges in terms of access for the less privileged who have difficulty with real-time synchronous video communication,⁷¹ as well as some anecdotal reason for concern in terms of procedural justice.⁷² While outcomes have yet to be studied, as mentioned, there is some evidence, mostly from past research, that parties belonging to disempowered groups fare worse when their case is being heard remotely through video.⁷³ Interestingly, while efficiency is a dominant driver for the adoption of remote proceedings,⁷⁴ some empirical findings cast doubt on whether videoconferencing proceedings are concluded more quickly than equivalent face-to-face ones.⁷⁵

TABLE 1: ODR VS. REMOTE PROCEEDINGS

	ODR	Remote Proceedings
Motivation for Adoption	Choice, reimagine	Forced, sustain
Principal Goal	Access, efficiency	Maintain activity, efficiency
Communication	Asynchronous, written	Real-time video/ audio, written document exchange

In the table above we can see a comparison of ODR and remote proceedings. The table demonstrates the different rationales and goals for their adoption, which could explain some of the differences in terms of justice levels achieved for each type of process. This is, of course crude, as not all ODR processes operate under the “reimagining processes for delivering justice” paradigm, and some remote proceedings may be successful in fulfilling (more than merely

71. BANNON & ADELSTEIN, *supra* note 3, at 5, 10.

72. *See supra* note 51 and accompanying text.

73. *See* Sternlight & Robbenolt, *supra* note 40, at 580; *see also* Turner, *supra* note 49, at 266 (finding in a survey of criminal defense lawyers that in terms of perceptions of fairness of outcomes in remote proceedings “[m]ore than two-thirds of defense attorneys believe that online proceedings lead to less favorable results for defendants”).

74. Turner, *supra* note 49, at 212.

75. *See* Horton, *supra* note 61, at 4.

maintaining) the ongoing activities of courts. Indeed, this is precisely why we need to be sensitive to context and apply the conceptual framework of process pluralism—to tailor procedural characteristics to the context, while ensuring that goals and values are defined and met through system design.

In light of both the promise and challenges associated with the impact of technology on justice, how do we view process pluralism in the age of new technologies? Does it present a positive development? I would say that it depends. The devil is in the design. Technology offers another important layer for the plurality of designs of dispute resolution processes. Like other design features, it can work to enhance or reduce justice. Change in medium is far from technical; it can have far-reaching effects on the accessibility and fairness of dispute resolution processes. If we want our justice system to maintain its commitment to basic values and goals of fairness, equality, and justice, we need to systematically study the impact of design choices on justice across settings, dispute types, and disputant characteristics.⁷⁶

Despite generating many negative outcomes, the COVID crisis has nevertheless opened up new and exciting opportunities. Up until the spread of the Coronavirus, the ODR community tended to overlook the potential of video communication to address some disputants' process needs in various contexts. The introduction of video hearings, certainly in lieu of some in-person court hearings, can significantly reduce barriers to accessing court and, where designed accordingly, could sustain or enhance perceptions of procedural fairness and the attainment of just outcomes. Technology presents us with the opportunity to reimagine our dispute resolution landscape in a way that is focused on disputants and addresses the deepest, most persistent problems that have plagued our system, which previous transformations have failed to eradicate.

To fulfill their potential, online proceedings, whether asynchronous or synchronous, need to adhere to the principles of process pluralism by:

- (1) Recognizing plurality *within* technological dispute resolution options, including hybrid forms of online-offline proceedings, an option that has not received sufficient attention in the design of online proceedings, treating such choice as a dichotomous one;⁷⁷

76. See LISA BLOMGREN AMSLER ET AL., DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT 37 (2020); see also David Freeman Engstrom & RJ Vogt, *The New Judicial Governance: Courts, Data, and the Future of Civil Justice*, DEPAUL L. REV. (forthcoming) (manuscript at 8) (describing how data will allow courts to “harness new data flows and manage their increasing centrality in ways that promote the just, equitable, and efficient administration of justice”).

77. See Menkel-Meadow, *Hybrid and Mixed*, *supra* note 4, at 411 (highlighting the significance of hybrid procedural schemes).

(2) Pushing our imagination in generating new types of processes that are not limited to familiar structures, by adopting such processes as diagnosis (which was pioneered in the Civil Resolution Tribunal in British Columbia)⁷⁸ or crowdsourced dispute resolution (first developed by eBay in its negative feedback removal process, but also adopted more recently in the smart contract context);⁷⁹

(3) Embracing context and refraining from procedural imperialism—we should not employ the same online process across courts, case types, and party distinctions. Indeed, we should remember that we did not seek to displace courts with mediation, but to expand parties' options and offer a multitude of procedural options, allowing us to “fit[] the forum to the fuss”;⁸⁰ and

(4) Adopting processes that meet both procedural and substantive aspects of justice—a goal that must be evaluated continuously and may require procedural reforms over time.⁸¹

V. CONCLUSION

The rise of ADR presented a watershed moment in the evolution of our justice system. The institutionalization of “alternatives” in courts, tribunals, and organizations have served to undermine the long-held view that equated courts with justice, and that saw court proceedings as appropriate for addressing a wide range of disputes. By advancing the notion that justice could be found “in many rooms”⁸² and that “one size does not fit all,” such developments have served as a foundation for process pluralism.

In the last few decades, and more strongly since the onset of COVID, the permeation of technology into dispute resolution in and outside the courts has added another important dimension to the notion of process pluralism: choice of medium, and the availability of new types of processes that are free from the constraints that have

78. Shannon Salter & Darin Thompson, *Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal*, 3 MCGILL J. DISP. RESOL. 113, 114 (2016–2017) (discussing the implementation of the Civil Resolution Tribunal and its impact on the British Columbia civil justice system).

79. See generally Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97 (2001) (exploring problem solving and how it needs cognitive and behavioral dimensions to be more effective).

80. See generally Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994) (exploring the various dispute resolution options and how individual goals and obstacles influence how “the forum fits the fuss”).

81. Menkel-Meadow, *Legal Dispute Resolution in a Multidisciplinary Context*, *supra* note 1, at 19 (highlighting the significance of pursuing both procedural and substantive justice, each presenting an important goal in and of itself).

82. Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 13 J. LEG. PLURALISM & UNOFFICIAL L. 1 (1981).

come with the need to rely on synchronous communication, human capacity, physical space, and geographical location.

But novel technological processes are far from a panacea to the problems that have plagued the justice system for years—inaccessibility, complexity, high costs, and a fairness deficit. While new technologies promise to enhance efficiency, lower costs, and enhance convenience for many, the shift in medium inevitably impacts the ability of various individuals and, more significantly, the ability of members of different social groups, to initiate and effectively utilize dispute resolution processes. Context and design matter; therefore, if we are to realize technology's empowering and equalizing potential, its use and design must be tailored to the particulars of the case and the characteristics and needs of the parties. This could mean refraining from employing technology in one context, while tailoring the medium and nature of online communication employed in another context to parties' capabilities and the nature of the dispute. The implication of various design schemes needs to be studied systematically, over time, and across contexts and demographics to generate meaningful insights on the impact of design choices on the values embodied in our procedures and the goals advanced by our systems.

At the end of the day, the procedural backbone of our justice system is what ultimately shapes its fairness—whether the processes can be used by all echelons of society, how procedures are experienced by different users, and what type of outcomes can be reached and enforced by various members of society.

