PROPOSED GUIDELINES FOR ARBITRAL DISCLOSURE OF SOCIAL MEDIA ACTIVITY

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ABSTRACT

The statutes and rules governing the disclosures of conflicts of interest by arbitrators, which failed to provide much clarity even prior to the advent of social media, do not provide any concrete guidance about the disclosure of an arbitrator's social media connections with the arbitration participants. The absence of clear, consistent standards governing social media disclosures is problematic for both arbitrators and the parties who select and appear before them. This problem will only get worse as arbitrators make increasing use of social media for personal and professional purposes, and as challenges to arbitration awards based on inadequate disclosure of social media activity work their way through the courts. Arbitrators who fail to make adequate disclosures about their social media activity expose themselves to ethical and reputational risk and their awards to vacatur. Arbitrators who search for and fully disclose their social media connections—in an era when many of their peers do not—are likely to be unfairly punished for their transparency in the marketplace for arbitration services. And in today's uncertain environment, the parties to an arbitration do not know how to interpret an arbitral disclosure that does not contain any reference to social media activity. Does it mean that there are no social media connections between the arbitrator and the participants in the arbitration, to the best of the arbitrator's recollection? Does it mean that the arbitrator searched the social media platforms she uses and identified no such connections? Or does it mean that the arbitrator has social media connections to the participants in the arbitration, but views those connections as immaterial? Unfortunately, absent a uniform approach, there is no way to know the answers to these questions. Arbitrators need clearer guidance to ensure compliance with ethical rules and the standards governing vacatur of arbitral awards.

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They also need to know that they will not be competitively disadvantaged by being more transparent about their social media connections than their peers. And the parties to an arbitration are entitled to consistent disclosures about social media activity so that they can realize one of the primary benefits of arbitration—the ability to meaningfully participate in the selection of an impartial arbiter. This Article proposes the first comprehensive set of guidelines for the disclosure of an arbitrator's social media connections. If adopted by the arbitral community, these guidelines will level the playing field and yield consistent disclosures that will benefit all the participants in an arbitration, as well as safeguard the integrity of the arbitration process. The guidelines, which offer specific disclosure recommendations across all social media categories that arbitrators are likely to use, are based on three core principles. First, adherence to the guidelines should ensure compliance with the most exacting disclosure standards imposed upon arbitrators by existing statutes and rules. Second, arbitrators should disclose with arbitration participants all ongoing social media relationships that arise out of affirmative conduct by the arbitrator. And third, while it is reasonable to expect arbitrators to conduct a search of their social media activity to identify disclosable relationships, it should be practicable and not overly burdensome for arbitrators to do so.

I. INTRODUCTION

The fulsome disclosure of conflicts of interest is essential to the integrity of the arbitration process. Proponents of arbitration often tout the parties' ability to select the arbiters of their disputes as one of the primary advantages of arbitration over litigation.[1] Rather than accept the fickle decisions of the judicial assignment wheel, the parties to an arbitration, often with input and advice

[1] *See, e.g.*, Stuart M. Riback, *Strategizing a Case in Litigation Versus Arbitration*, BUS. L. TODAY (July 16, 2018), https://businesslawtoday.org/2018/07/strategizing-case-litigation-versus-arbitration [https://perma.cc/NKU5-GH2J] (noting that an advantage of arbitration is that it "affords greater opportunities for choosing the decision maker"); E. Norman Veasey, *The Conundrum of the Arbitration vs. Litigation Decision*, BUS. L. TODAY (Dec. 14, 2015), https://businesslawtoday.org/2015/12/the-conundrum-of-the-arbitration-vs-litigation-decision [https://perma.cc/LAH3-QLBS] (summarizing the results of interviews with corporate counsel who identified "the ability to select the arbitrators" as an aspect of arbitration that they "valued highly"); Ferdinando Emanuele & Milo Molfa, *Arbitration Versus Litigation*, FINANCIER WORLDWIDE (Oct. 2013), https://www.financierworldwide.com/arbitration-versus-litigation [https://perma.cc/GAZ9-YUFT] (opining that "party autonomy" in selecting the arbitral tribunal is one of the "advantages of arbitration").

from counsel, typically have substantial input into who will decide their dispute.[2] This is meaningful for at least three reasons. First, the parties might prefer an arbitrator with relevant prior expertise to a judge or jury with no background in the subject matter of the dispute. Second, certain arbitrators may possess experiences, skills, or traits the parties deem desirable in the context of their particular dispute.[3] And third, while judges with conflicts of interest are subject to recusal in rare cases,[4] the parties' ability to hand-pick an arbitrator—or, at a minimum, eliminate undesirable arbitral candidates[5]—might promote greater decision-making impartiality than the litigation process allows. While litigants have to live with some version of a lottery system to select their judges and jury pools,[6] the parties to an arbitration typically have the benefit of knowing the professional backgrounds of arbitrator candidates. They also have the benefit of knowing the arbitrators' disclosures about the specific connections they have to the parties, lawyers, and witnesses, before weighing in on whom to select as the decider of their dispute. This not only allows the participants in an arbitration to make better-informed decisions about the selection of their neutral than litigants,[7] but might also promote greater satisfaction

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[2] *See, e.g.*, CARRIE J. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 336 (3d ed. 2018) ("As a part of the customization associated with arbitration, disputants often have an opportunity to choose their decision-makers to a degree far beyond that which is afforded to litigants."). Of course, a significant inequality of bargaining power, such as that existing in the context of an adhesion contract, could reduce the amount of input the party with less power has in the arbitrator selection process. *Id.*

[3] *Id.* at 308 ("Disputants who want a decision maker with a particular background or expertise can write those requirements into the arbitration agreement."); *id.* at 340 (discussing how factors such as age, education, gender, race, ethnicity, religion, professional experience, and political affiliations might impact arbitral outcomes).

[4] Recusal or disqualification of a judge based on a conflict of interest is unusual. *See, e.g.*, A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 488 (2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_488.pdf [https://perma.cc/K7TU-99ZQ] [hereinafter ABA Opinion 488] ("Judges are presumed to be impartial. Hence, judicial disqualification is the exception rather than the rule.").

[5] *See Rule 15. Arbitrator Selection, Disclosures and Replacement*, JAMS COMPREHENSIVE ARB. RULES & PROC., (June 1, 2021), https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-15 [https://perma.cc/X2JC-6DJA] (discussing methods for selecting arbitrators involving ranking and striking candidates).

[6] *See, e.g.*, *FAQs: Filing a Case*, U.S. CTS., https://www.uscourts.gov/faqs-filing-case [https://perma.cc/T5E4-CAL2] (last visited Nov. 24, 2021) ("The majority of courts use some variation of a random drawing."); LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES 248 (2013) ("Because of random assignment to the judges in each district, there should be no systematic differences between the cases assigned to Rs and Ds in the same category of cases in the same district.").

[7] In fact, litigants typically do not have any input as to whom will judge their dispute other than where to file the case, whether to voluntarily dismiss the case, whom to strike from the jury

with arbitration outcomes in view of the more democratic nature of arbitrator selection.[8] Of course, these benefits of arbitral disclosure cannot be realized absent robust, consistent disclosures by members of the arbitral community.

Unfortunately, the hodgepodge of rules, statutes, and judicial decisions governing what arbitrators must disclose is difficult to navigate. The Code of Ethics for Arbitrators in Commercial Disputes (Code of Ethics) requires arbitrators to disclose "any interest or relationship likely to affect impartiality or which might create an appearance of partiality."[9] The Uniform Arbitration Act—applicable to many state arbitration proceedings—imposes a slightly different standard, mandating disclosure of "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding,"[10] while the Federal Arbitration Act ("FAA") contains no affirmative disclosure requirements.[11] The Supreme Court's seminal decision on the vacatur of arbitral awards for non-disclosure of conflicts of interest, *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[12] has spawned two different disclosure standards—a broad "impression of possible bias" standard and a narrower reasonableness standard—that have divided the federal courts.[13] And organizations

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pool, or whether to move to recuse the judge. *See, e.g.*, FED. R. CIV. P. 41(a) (allowing a plaintiff to voluntarily dismiss a lawsuit under certain circumstances); FED. R. CIV. P. 47(b) (allowing the parties to make peremptory challenges to jurors consistent with 28 U.S.C. § 1870); FED. R. CIV. P. 47(c) (allowing the court to strike jurors for cause); 28 U.S.C. § 455 (allowing parties to seek disqualification of federal judge for bias); *see also* MENKEL-MEADOW ET AL., *supra* note 2, at 336 ("Litigants do, of course, try to forum shop, and one part of their interest in doing so is to secure decision makers they believe will be favorable to their side.").

8 *See, e.g.*, Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 UNIV. CHI. L. REV. 424, 431 (1986) ("[I]f the parties have personally participated in selecting the neutral, they may be psychologically disposed to accept his statement of the case, whether it is a binding decision . . . or an advisory opinion.").

9 THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES 4 [Canon II(A)] (AM. ARB. ASS'N 2004), https://adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf [https://perma.cc/P8XB-TZ2N].

10 UNIF. ARB. ACT § 12 (UNIF. L. COMM'N 2000).

11 *See generally* Federal Arbitration Act, 9 U.S.C. §§ 1–16.

12 393 U.S. 145 (1968).

13 Edward C. Dawson, *Speak Now or Hold Your Peace: Prearbitration Express Waivers of Evident-Partiality Challenges*, 63 AM. UNIV. L. REV. 307, 318–19 (2013) (finding that federal and state courts "have disagreed over which opinion to follow and even over whether Justice Black's opinion is actually a majority opinion" and "differed widely in their interpretation and application of the tests laid out by both opinions"); Merrick T. Rossein & Jennifer Hope, *Disclosure and Disqualification Standards for Neutral Arbitrators: How Far To Cast the Net and What Is Sufficient To Vacate Award*, 81 ST. JOHN'S L. REV. 203, 209 (2007) ("Because it is generally accepted as a plurality opinion, *Commonwealth Coatings* has left courts free to reject 'evident partiality'

that administer arbitration proceedings, like the American Arbitration Association (AAA) and JAMS, still impose additional (and sometimes different) disclosure rules upon arbitrators presiding over their matters.[14] This mixture of disclosure guidelines, several of which may be simultaneously applicable to the same arbitration proceeding, has given rise to uncertainty and inconsistency.[15] It is no wonder, then, that arbitrators "are often unsure about what facts need to be disclosed"[16] regarding their personal and professional connections and, therefore, that they "may make different choices about disclosures than other arbitrators in the same situation."[17]

Before the advent of social media, compliance with the arbitral duty to disclose was typically a three-step process. First, arbitrators being considered for a matter reviewed the disclosures of the disputants by identifying the parties, lawyers, and witnesses involved in the dispute.[18] Second, arbitrators cross-checked those names against their memories, their own and their law firms' conflicts databases, and any other records they kept of personal and professional contacts. Third, arbitrators applied the muddled mélange of disclosure standards previewed above to any "hits" and made the call about what, if anything, to disclose. This disclosure analysis required (and in the social media age, still requires) a difficult balancing act. On the one hand, most arbitrators care about the integrity of the arbitration process (as well as their professional reputations) and want to get it right. A violation of a disclosure obligation could have negative ethical and professional implica-

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as the broad 'appearance of bias' standard in favor of (what has been interpreted as) Justice White's more narrow standard requiring disclosure of relationships such that a 'reasonable person would . . . conclude that an arbitrator was partial.'" (alteration in original) (quoting Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 647 (6th Cir. 2005))).

14 *See infra* Part II(A)(iii).

15 *See, e.g.*, INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION 1 (Aug. 10, 2015), https://www.ibanet.org/MediaHandler?id=E2fe5e72-eb14-4bba-b10d-d33dafee8918 [https://perma.cc/36TZ-SPQ5] [hereinafter IBA GUIDELINES] (finding that "[a]rbitrators and party representatives are often unsure about the scope of their disclosure obligations" and that "[p]arties, arbitrators, institutions and courts face complex decisions about the information that arbitrators should disclose and the standards to apply to disclosure"); Rossein & Hope, *supra* note 13, at 251 (discussing the "patchwork" of different arbitral disclosure standards).

16 INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION 3 (May 22, 2004), https://sccinstitute.com/media/37100/iba_publications_arbitration_guidelines_2004.pdf [https://perma.cc/5UVE-SPHW].

17 *Id.*

18 *See, e.g.*, *id.* at 15 (describing the scope of a party's duty of disclosure in an arbitration proceeding) [General Standards 7(a)–(b)].

tions and result in vacatur of an arbitral award.[19] On the other hand, more conflicts disclosures generally mean less business for arbitrators.[20] Parties and their counsel are likely to be wary of selecting arbitrators with disclosable conflicts over those without disclosable conflicts (even where the arbitrator makes clear that the conflicts would not impact her neutrality and are being disclosed in an abundance of caution), particularly if they have the benefit of a robust menu of qualified arbitrators to choose from.[21] This balance was difficult to strike, even before start of the social media era.

LinkedIn, Facebook, Twitter, and other social media platforms created additional disclosure concerns and considerations. These online tools for forming and developing personal and professional relations have transformed the nature of our relationships and, in the process, significantly complicated the arbitral disclosure equation. For one thing, the ability to connect over social media has exponentially expanded the number of connections that social media users have with other people and organizations. Social media platforms enable users to have hundreds, if not thousands or millions, more connections than they did in the pre-social media era.[22] Some users limit their social media communications to close acquaintances, while others indiscriminately connect with just about anyone they find interesting or potentially useful from a personal or professional perspective. Indeed, those who use social media aggressively to build their networks and accumulate contacts may not even know all the individuals who are part of their social networks. The very fact that social media users employ such different

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19 *See infra* Part II(B).

20 *See* Rebecca K. Helm, Andrew J. Wistrich, & Jeffrey J. Rachlinski, *Are Arbitrators Human?*, 13 J. EMPIRICAL LEGAL STUD. 666, 667 (2016) (noting that "[a]rbitrators face stiff competition for their positions").

21 *Id.*

22 *See, e.g.*, Christo Petrov, *69+ LinkedIn Statistics That Matter in 2021*, TECHJURY (Dec. 7, 2021), https://techjury.net/blog/linkedin-statistics [https://perma.cc/HPX6-97JQ] (summarizing statistics about the average number of connections per member on LinkedIn). Many prominent lawyers have thousands of Twitter followers. *See Ben Crump (@AttorneyCrump)*, TWITTER, https://twitter.com/attorneycrump [https://perma.cc/79NP-YUNZ] (last visited Nov. 26, 2021) (Ben Crump is a civil rights attorney.); *Kevin O'Keefe (@kevinokeefe)*, TWITTER, https://twitter.com/kevinokeefe [https://perma.cc/7BPY-R8F7] (last visited Nov. 26, 2021) (Kevin O'Keefe is the CEO of LexBlog.com.); *Bob Ambrogi (@bobambrogi)*, TWITTER, https://twitter.com/bobambrogi [https://perma.cc/U4VC-89TN] (last visited Nov. 26, 2021) (Bob Ambrogi is a blogger for AboveTheLaw.com.); *Margaret Hagan* (@margarethagan), TWITTER, https://twitter.com/margarethagan [https://perma.cc/TD2L-LRFD] (last visited Nov. 26, 2021) (Margaret Hagan is the Director of Stanford Law's Legal Design Lab.); *Richard Painter (@RWPUSA)*, TWITTER, https://twitter.com/RWPUSA [https://perma.cc/7RUP-Z74H] (last visited Nov. 26, 2021) (Richard Painter is a University of Minnesota Law professor and a former White House ethics lawyer.).

standards of selectivity for making and developing online relationships with new contacts adds complexity to the disclosure calculus. Depending on the user, the existence of a social media relationship might signify a thoughtful, intentional desire to develop a relationship, or a mindless, split-second decision to click on an invitation to connect. In addition, social media gives rise to both mutual and one-sided associations, while pre-social media relationships were almost all mutual, at least to some degree. Add the fact that many arbitrators are older and less familiar with social media functionality than many of the parties and lawyers who appear before them, and it is easy to see just how difficult it is to achieve consistency in arbitral social media disclosure. Consider the following hypothetical examples:

- Arbitrator A is an active social media user. Over the preceding three years, she has "liked" six Facebook and LinkedIn posts made by attorneys and law firms involved in a dispute for which she is being considered as the arbitrator. She is neither a Facebook "friend" nor a LinkedIn connection of the lawyers or the firms. Should Arbitrator A disclose her "likes" on the posts of the attorneys and firms involved in the arbitration?

- Arbitrator B is new to her community and is hoping to connect with attorneys to build her alternative dispute resolution practice. She accepts LinkedIn "connect" requests from all attorneys, regardless of whether she has met them or knows anything about them or their practices. She also sends "connect" requests to all attorneys suggested as contacts by LinkedIn. Arbitrator B is a candidate to arbitrate a dispute where one of the parties is represented by a lawyer whom she has never met, but who is a LinkedIn connection by virtue of her network-building approach. Does the arbitrator need to disclose this LinkedIn connection? Does she need to conduct a search of LinkedIn to identify this connection if she does not recall connecting with the lawyer?

- Arbitrator C is a prominent lawyer in her community. She regularly uses Twitter to post her views on political and legal issues. A lawyer involved in an arbitration for which Arbitrator C is being considered has "retweeted" Arbitrator C's posts ten times in the past five years, although the

two have never met. Does Arbitrator C need to disclose the lawyer's retweets of her posts?

- Arbitrator D is a member of a Facebook group of area cyclists. She regularly posts pictures from her weekend bike rides and comments on posts made by other members of the group. One of the party representatives in an arbitration for which Arbitrator D is being considered is a member of the same Facebook group, although Arbitrator D and the party are neither Facebook "friends" nor real-life friends. Does Arbitrator D need to disclose the fact that she belongs to the same Facebook group as the party representative?

Today, in the absence of any guidelines for the disclosure of social media activity, arbitrators undoubtedly would provide inconsistent responses to these questions. Some arbitrators would view social media relations as more or less important than other arbitrators because of how they interact with social media. Many would assume that the parties and counsel to an arbitration have the same views about the importance of social media relationships as arbitrators do. Those who are not familiar with how to search a social media platform for their contacts might limit disclosures to those in their social networks that they can recall from memory. Others may be influenced by their peers' lack of social media disclosures to exclude social media activity from their conflicts checks altogether, particularly in view of the negative impact that disclosures can have on the likelihood of being selected. This type of disclosure inconsistency will increasingly undermine the credibility of the arbitration process, especially as more arbitrators become more active on social media.

The situation cries out for an objective framework that will inform arbitrators' social media disclosure decisions and set uniform expectations for the parties and counsel who receive and evaluate arbitral disclosures. But although a few commentators have recognized the challenges that social media relationships pose for arbitrator disclosure,[23] there are still no disclosure guidelines pointed directly at an arbitrator's social media connections. This Article attempts to fill that void with the first set of comprehensive

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[23] *See, e.g.*, Ruth V. Glick & Laura J. Stipanowich, *Arbitrator Disclosure in the Internet Age: Some Guidance Concerning the Obligation to Disclose Internet Activity and Online Relationships*, 67 DISP. RESOL. J. 22, 23–24 (Feb.–Apr. 2012).

disclosure guidelines for arbitral social media activity. Part II of the Article surveys the existing rules regarding arbitral disclosure. While these rules are at times inconsistent and not specific to social media, they provide the general standards for arbitral disclosure with which the proposed guidelines should comply. Part III summarizes the scant specific guidance on social media disclosure that can be gleaned to date from the cases and scholarship in this area. Part IV catalogs the types of social media platforms and examines survey data to determine which types of platforms are most likely to be used by arbitrators. Finally, Part V sets forth our proposed disclosure guidelines, which are premised on the guiding principles: (1) that the guidelines should promote compliance with existing disclosure rules; (2) that the scope of disclosure should extend to affirmative conduct by an arbitrator that results in an ongoing social media relationship; and (3) that the research obligations imposed on arbitrators by the guidelines should be practicable.

II. The Existing Rules Governing Arbitral Disclosure Are Muddled and Devoid of Concrete Guidance on the Disclosure of an Arbitrator's Social Media Connections

Arbitration is a method for resolving disputes in which a third party makes a final and binding decision, which may be challenged only on limited grounds in the courts.[24] While arbitration is a flexible process that gives parties latitude to determine the procedures that will be followed in any particular proceeding,[25] arbitrations typically are decided either by a sole arbitrator or a panel of three

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[24] *See, e.g.*, Rossein & Hope, *supra* note 13, at 210 (discussing the "great deference" given to the decisions of arbitrators, the "general presumption in favor of upholding arbitration awards where challenged," and the fact that "[a]rbitration awards receive one of the narrowest standards of judicial review in all of American jurisprudence"); Menkel-Meadow et al., *supra* note 2, at 401 (noting that "[a]rbitration has more limited opportunities for appeal" than litigation).

[25] *See, e.g.*, Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) ("[S]hort of authorizing trial by battle or ordeal, or, more doubtfully by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract."); Menkel-Meadow et al., *supra* note 2, at 308 ("To a large extent, disputants can design the parameters of the process they want under the rubric of arbitration.").

arbitrators, chosen by the parties to the arbitration.[26] The parties' ability to select the arbitrator (or arbitrators) who will decide their dispute is one of the hallmarks of the arbitration process and distinguishes it—favorably, in the eyes of many proponents of alternative dispute resolution—from litigation.[27] Indeed, the selection of the arbitrator or arbitral panel is arguably the most important choice that parties make in an arbitration.[28]

The impartiality and independence of the arbitrator[29] are fundamental to the integrity of the arbitration process.[30] There are

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26 IRENE WARSHAUER, N.Y. STATE BAR ASS'N DISP. RESOL. SECTION, THE BENEFITS OF MEDIATION AND ARBITRATION FOR DISPUTE RESOLUTION IN SECURITIES LAW 4 (2011), https://nysba.org/NYSBA/Sections/Dispute%20Resolution/Dispute%20Resolution%20PDFs/Securities mediationfinal.pdf [https://perma.cc/TU5W-3JZM]. "Tripartite panels are most commonly found in commercial and international arbitrations and labor disputes. Unless otherwise provided for by rule or agreement, typically each party to the arbitration agrees to appoint one arbitrator, the 'party-appointed arbitrator,' and the two party-appointed arbitrators then select a third arbitrator, most often referred to as the 'umpire,' or sometimes the 'chair' or the 'neutral.'" David J. McLean & Sean-Patrick Wilson, *Is Three A Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations*, 9 PEPP. DISP. RESOL. L.J. 167 (2008).

27 *See, e.g.*, QUEEN MARY UNIV. L. SCH. IN LONDON SCH. OF INT'L ARB., 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION (2018), https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF [https://perma.cc/9JEF-FD8L] (finding that survey respondents considered the parties' ability to select the arbitrators as one of the most valuable characteristics of arbitration). Advocates of arbitration also cite the parties' ability to design their own dispute resolution process, increased speed and efficiency, cost-effectiveness, and confidentiality as some of its other features that make it superior to litigation. WARSHAUER, *supra* note 26, at 5 (noting that the median time from the filing of an arbitration demand to the award was eight months in domestic cases and twelve months in international cases, compared to a median length of 28.4 months in the United States District Court for the Southern District of New York (citing STAT. DIV., ADMIN. OFF. OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 172–74, tbl.C-5 (2009))).

28 *See, e.g.*, Rossein & Hope, *supra* note 13, at 204 (describing the selection of the arbitrator as an "essential component" of the process for "creating a fair and impartial [arbitral] forum").

29 A sole arbitrator and the chairperson of a three-member arbitration panel are required to be impartial. MENKEL-MEADOW ET AL., *supra* note 2, at 421 (noting that "parties sometimes elect a process in which each party selects one or more non-neutral arbitrators" who then "select a neutral arbitrator who serves as Chair of the panel"). In many cases, even arbitrators who are appointed by parties to a three-member arbitral panel—and who may then have a role in picking the panel chair—also must act impartially. *See, e.g.*, IBA GUIDELINES, *supra* note 15, at 12 ("Because each member of an Arbitral Tribunal has an obligation to be impartial and independent, the [IBA Guidelines] do not distinguish between sole arbitrators, tribunal chairs, party-appointed arbitrators or arbitrators appointed by an institution.") [Explanation to General Standard 5(a)].

30 *See, e.g.*, IBA GUIDELINES, *supra* note 15, at 4 ("Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.") [General Standard 1]; Dominique Hascher, *Independence and Impartiality of Arbitrators: 3 Issues*, 27 AM. UNIV. INT'L L. REV. 789, 789–91 (2012) ("Independence and impartiality of arbitra-

essentially two ways that the parties to an arbitration (and their counsel) can determine whether an arbitrator has connections to the participants[31] that might compromise the arbitrator's ability to be impartial: (1) conducting their own independent investigation; and (2) reviewing the disclosures made by the arbitrator. We focus here on the second of these windows, into the neutrality of the arbitrator.[32] In order to furnish the parties to an arbitration with the facts they need to make informed assessments about an arbitrator's impartiality,[33] neutral arbitrators are required to disclose information, including their connections to the participants in an arbitration, that might create an appearance of partiality or an actual conflict of interest.[34] It is axiomatic that an arbitrator's duty to disclose is "an essential undertaking for the independent and impartial resolution" of a dispute that has been submitted to

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tors are derived from their essential obligation towards the arbitrating parties, which is the adjudication of the dispute submitted to their jurisdiction in the arbitration agreement. . . . Arbitrators serve an adjudicatory role and, as a result, must be independent of the parties and impartial."); Ann Ryan Robertson, *Evident Partiality Based on Non-Disclosure: Betwixt and Between in the United States*, 12 VINDOBONA J. INT'L COM. L. & ARB. 113, 113 (2008) (noting that the impartiality of the arbitrator is "a fundamental and universally accepted tenet of international arbitration").

31 The term "participants," when used in this Article to refer to the individuals and entities with whom an arbitrator might have an association that could be viewed as compromising her neutrality, shall mean the parties to the arbitration (including party representatives for organizational parties), counsel for the parties, and the witnesses who will testify during the arbitration proceeding.

32 While independent investigations certainly have a role to play in the discovery of social media activity by arbitrators that could undermine their impartiality, such investigations are outside the scope of this Article for three reasons. First, and most importantly, the ability of the parties to independently investigate an arbitrator's social media connections does not impact the arbitrator's legal and ethical obligations to disclose those connections. *See infra* Parts II(A)–(B). Second, because arbitration parties are dissimilarly situated with respect to having the resources and sophistication required to conduct such inquiries, they may not serve as a reliable check on the arbitrator's disclosure obligations. Third, many social media platforms allow users to employ privacy settings to shield their social media activity from scrutiny by the general public. *See infra* Part V.

33 Of course, the parties to an arbitration select neutrals based on other factors as well, including their (1) professional, technical, legal, or commercial background; (2) experience; (3) skills; (4) reputation; and (5) scheduling flexibility. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation" (Symposium Keynote Presentation),* 7 DEPAUL BUS. & COM. L. J. 383, 432 (2009).

34 Rossein & Hope, *supra* note 13, at 204. The duty to disclose conflicts is an ongoing obligation that continues from the arbitrator selection phase of the proceeding throughout the entire arbitration process.

arbitration.[35] Indeed, the disclosure obligation has been described as the "[c]ornerstone of an arbitrator's duty of independence."[36]

Arbitration is typically initiated because of a dispute resolution clause in an agreement between the parties or because the parties mutually agree that arbitration is preferable to litigation as a method for resolving their dispute.[37] Agreements to arbitrate are enforceable, based on provisions in the FAA and state arbitration laws.[38] The FAA was enacted in 1925 to "promote[ ] the use of arbitration to resolve conflicts involving commercial transactions among businesses in different states."[39] If a contract involves interstate commerce in the United States, the arbitration is governed by the FAA, which, when applicable, preempts state law.[40] If the FAA does not apply, state arbitration statutes provide the rules for arbitrations conducted in the United States.[41] Many states have adopted some form of either the Uniform Arbitration Act ("UAA") or the Revised Uniform Arbitration Act ("RUAA")—which are model state arbitration statutes—or have drafted arbitration protocol statutes of their own, which are similar to one or both of these model laws.[42]

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[35] Hascher, *supra* note 30; *see also* MENKEL-MEADOW ET AL., *supra* note 2, at 417 ("[B]ecause of the broad scope of arbitrators' powers once they are in place, questions of bias, conflicts of interest, disclosure and impartiality may represent the most important category of ethical duties for arbitrators.").

[36] AHMED S. EL-KOSHERI & KARIM Y. YOUSSEF, THE INDEPENDENCE OF INTERNATIONAL ARBITRATORS: AN ARBITRATOR'S PERSPECTIVE, INT'L CHAMBER OF COM., INDEPENDENCE OF ARBITRATORS: 2007 SPECIAL SUPPLEMENT 43, 51 (2008).

[37] Dawson, *supra* note 13, at 315.

[38] STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 235 (1999) ("There is a strong public policy in favor of arbitration as a means of relieving court congestion, and both federal and state courts will interpret agreements to arbitrate broadly and exceptions narrowly.").

[39] LUCILLE M. PONTE & THOMAS D. CAVENAGH, ALTERNATIVE DISPUTE RESOLUTION IN BUSINESS 158 (1999).

[40] GOLDBERG ET AL., *supra* note 38, at 235 ("The FAA displaces state law in the state courts to the extent that state law conflicts with the goals or policies of the [FAA].").

[41] Robert L. Ebe, *The Nuts and Bolts of Arbitration*, 22 FRANCHISE L. J. 85, 86 (2002).

[42] *Id.* The UAA, which was promulgated in 1955, was adopted by thirty-five states prior to its revision in 2000. UNIF. ARB. ACT, 7 pt. IA U.L.A. 1–98, prefatory note (2009 & Supp. 2015). Fourteen other states have enacted arbitration laws that are substantially similar to the UAA. Bruce E. Meyerson, *The Revised Uniform Arbitration Act: 15 Years Later*, 71 DISP. RESOL. J. 1, 1 n.3 (2016). As of January 1, 2021, twenty-two states had enacted some version of the RUAA, which revised the UAA in 2000 based on "the increasing use of arbitration, the greater complexity of many disputes resolved by arbitration, and the developments" in arbitration law. UNIF. ARB. ACT, prefatory note (UNIF. L. COMM'N 2000); ALASKA STAT. ANN. §§ 09.43.30–.595 (West 2015); ARIZ. REV. STAT. ANN. §§ 12-3001 to -3029 (2015); ARK. CODE ANN. §§ 16-108-201 to -233 (West 2015); COLO. REV. STAT. ANN. §§ 13-22-201 to -230 (West 2015); CONN. GEN. STAT. ANN. §§ 52-407aa to -407eee (West 2018); D.C. CODE ANN. §§ 16-4401 to -44320 (West 2015);

Arbitration parties often use an organization—which may be for-profit or not-for-profit—to administer the proceeding.[43] These third-party administrators ("TPA") offer services that range from providing a standard set of rules and guidelines to govern the proceedings, to supplying a physical location to conduct the hearing, to overseeing the entire arbitration.[44] While the parties to an arbitration are theoretically free to develop their own rules to govern the proceeding, many arbitrations are conducted pursuant to the rules of a TPA either because the arbitration clause in the parties' contract adopts those rules, or because the parties decide to use them after their dispute arises.[45]

Absent a contractually-specified method for selecting the arbitrator or arbitral panel, the parties to an arbitration, particularly a commercial arbitration, often rely on a TPA to manage the arbitrator selection process.[46] This often involves granting the parties access to the TPA's roster of approved arbitrators (or a subset of that roster), and narrowing down the list until the parties agree or arrive at some form of a compromised decision.[47] TPA rules estab-

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FLA. STAT. ANN. §§ 682.01–.25 (West 2015); HAW. REV. STAT. ANN. §§ 658A-1 to -29 (West 2015); KAN. STAT. ANN. §§ 5-423 to -453 (West 2018); MICH. COMP. LAWS ANN. §§ 691.1681–.1713 (West 2015); MINN. STAT. ANN. §§ 572B.01–.31 (West 2015); NEV. REV. STAT. ANN. §§ 38.206–.248 (West 2015); N.J. STAT. ANN. §§ 2A:23B-1 to -32 (West 2015); N.M. STAT. ANN. §§ 44-7A-1 to -32 (West 2015); N.C. GEN. STAT. ANN. §§ 1-569.1 to .31 (West 2015); N.D. CENT. CODE ANN. §§ 32-29.3-01 to -29 (West 2015); OKLA. STAT. ANN. tit. 12, §§ 1851–1881 (West 2015); OR. REV. STAT. ANN. §§ 36.600–.740 (West 2015); 42 PA. STAT. AND CONS. STAT. ANN. §§ 7321.1–.31 (West 2018); UTAH CODE ANN. §§ 78B-11-101 to -131 (West 2015); WASH. REV. CODE ANN. §§ 7.04A.010–.903 (West 2015); W. VA. CODE ANN. §§ 55-10-1 to -33 (West 2015). *See generally Arbitration Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=A0ad71d6-085f-4648-857a-e9e893ae2736 [https://perma.cc/324Q-FRVN] (last visited Nov. 26, 2021) (tracking introduction and adoption of state arbitration laws).

43 Dawson, *supra* note 13, at 315–16. These organizations include the AAA, JAMS, and the International Institute for Conflict Prevention and Resolution ("CPR"). *See* AAA Homepage, https://adr.org [https://perma.cc/7BE8-KU2Q] (last visited Dec. 17, 2021); JAMS Homepage, https://www.jamsadr.com [https://perma.cc/8N77-GVRP] (last visited Dec. 17, 2021); CPR Homepage, https://www.cpradr.org/resource-center/rules/arbitration [https://perma.cc/T88A-YNKS] (last visited Dec. 17, 2021).

44 GOLDBERG ET AL., *supra* note 38, at 236.

45 *Id. See also* MENKEL-MEADOW ET AL., *supra* note 2, at 308 ("In most cases . . . efficiency and commonsense urge parties to adopt a set of already-existing rules, either in whole or in part. Perhaps the most common source of default sets of rules comes from one of the prominent organizations providing arbitration administration.").

46 MENKEL-MEADOW ET AL., *supra* note 2, at 308.

47 PONTE & CAVENAGH, *supra* note 39, at 172. For example, after providing the parties with a list of neutral arbitrators from its approved roster with experience or expertise relevant to the dispute (along with their professional biographies), a TPA might then coordinate a selection process in which the parties would strike the names of a certain number of arbitrators they deem

lish selection processes that require arbitrators to make disclosures about actual or potential conflicts of interest.[48] While there are variations, these processes generally allow parties to ask follow-up questions based on the disclosures, object to arbitrators based on their disclosures (or answers to follow-up questions), and provide a method for resolving any objections.[49] If the arbitration is not administered by a TPA (sometimes referred to as an "ad hoc" proceeding), arbitrator selection is governed by whatever rules are set forth in the parties' arbitration agreement; or, if there are none, a process agreed to by consent of the parties to the arbitration.[50]

As a general matter, arbitration statutes and TPA rules create two types of provisions that impact arbitral disclosure. The first category is comprised of ethical regulations, statutory provisions, and TPA rules that impose affirmative disclosure obligations on arbitrators. The second is made up of rules prescribing the standards for vacating arbitral awards, based on an arbitrator's failure to disclose an actual or potential conflict of interest. Arbitrators must be mindful of, and comply with, both types of rules in order to meet their ethical obligations and insulate their awards against after-the-fact challenges based on alleged non-disclosure of conflicts.[51] As set forth below, the general disclosure standards contained in these rules are of limited assistance to arbitrators when deciding whether to disclose their social media connections for three reasons. First, multiple contradictory rules may be applicable to the same arbitration proceeding. Second, courts inconsistently interpret the rules. And third, the rules do not provide any specific guidance with respect to the disclosure of an arbitrator's social media activity or connections. To provide context for the social media disclosure guidelines proposed herein, and to help illustrate why there is such a pressing need for them, we turn now to an overview of the "patchwork" of rules and judicial decisions that have created ambi-

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unacceptable to preside over the matter and then rank the remaining candidates. The TPA would manage the process and appoint the arbitrator remaining on the list who was most acceptable to the parties. *Id.*

48 Dawson, *supra* note 13, at 315; *see also infra* Part II(A)(iii).

49 Dawson, *supra* note 13, at 315.

50 *Id.* at 315–16.

51 Motions to vacate arbitral awards based on inadequate arbitral disclosure typically arise out of a post-award discovery by the losing party, where an arbitrator had a relationship with the opposing party or counsel that she did not disclose. *See, e.g.*, Mark H. Alcott, *It Ain't Over Even When It's Over: Post-Award Attacks on Arbitrators*, 7 DISP. RESOL. INT'L 5, 5 (2013) ("[T]he arbitration community in the United States has become increasingly concerned about post-facto challenges to arbitration awards based on purported arbitrator partiality or bias, arising from an interest or relationship that was not disclosed.").

guity with respect to the scope of arbitral disclosure of conflicts of interest, even before factoring in the social media element.[52]

A. *Rules Imposing Affirmative Disclosure Requirements*

The starting point for determining what arbitrators are required to disclose is the collection of rules and guidelines that impose affirmative disclosure requirements upon arbitrators. While these provisions speak in general terms and are sometimes inconsistent with one another,[53] their goal is to provide the parties to an arbitration with adequate information to make informed decisions about arbitrator selection. Affirmative arbitral disclosure rules can be found in (1) the RUAA (although not the FAA or the UAA), (2) ethics codes, and (3) TPA rules. We consider each in turn.

i. The RUAA

Neither the FAA nor the UAA imposes any affirmative disclosure obligations on arbitrators.[54] However, the RUAA requires all arbitrators, whether neutral or non-neutral, before accepting an appointment, to make a "reasonable inquiry" and disclose to all parties and any other arbitrators involved in the matter "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator."[55] This is an objective standard.[56]

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52 *See, e.g.*, Rossein & Hope, *supra* note 13, at 255 ("The courts differ as to what arbitrators should disclose to prevent disqualification of an arbitrator and/or vacatur of an award. Even when the courts agree on the standard, it is applied inconsistently. The recent efforts by various organizations and states to develop codes of conduct and standards have resulted in a patchwork of rules.").

53 *See, e.g.*, *id.* at 251 ("Various codes adopted by such organizations as the ABA/AAA and NASD, and statutory schemes . . . have attempted to articulate clear requirements and standards for violations. Although each attempt contributed positively to clarifying the requirements, it remains a patchwork of different standards.").

54 Meyerson, *supra* note 42, at 8 ("Although the Code of Ethics and arbitration rules of the prominent administering agencies provide that arbitrators shall make certain disclosures to the parties before accepting appointment, neither the FAA nor the UAA has such a requirement."). However, as discussed in *infra* Part II(B), the FAA and the UAA provide that an arbitral award may be set aside if the arbitrator exhibits "evident partiality" toward one of the participants in an arbitration proceeding. An inadequate disclosure may provide the basis for a finding of evident partiality. Thus, notwithstanding the absence of affirmative disclosure obligations in the FAA and the UAA, those laws remain relevant to the disclosure calculus.

55 Rev. Unif. Arb. Act § 12 (Unif. L. Comm'n 2000).

56 *Id.* at cmt. 3; *see also* Rossein & Hope, *supra* note 13, at 241 ("The Drafting Committee [of the RUAA] was unequivocal about providing an objective standard for disclosure requiring

While the RUAA does not purport to provide an exhaustive list of the information that must be disclosed under section 12, it expressly identifies "a financial or personal interest in the outcome of the arbitration proceeding" and "an existing or past relationship with any of the parties . . . their counsel or representatives, a witness, or other arbitrators" as matters within the scope of the disclosure obligation.[57] The RUAA's disclosure requirement is a "continuing obligation" that remains in effect after the arbitrator is appointed.[58] Failure to comply with the RUAA's disclosure obligations constitutes grounds to vacate an arbitral award under the RUAA.[59]

Thus, arbitrators involved in domestic arbitrations that do not involve interstate commerce in states that have adopted some version of the RUAA must comply with the RUAA's disclosure provisions. However, arbitrators presiding over proceedings in states that have not adopted the RUAA, or U.S. arbitrations involving interstate commerce, are not subject to statutory affirmative disclosure requirements.

ii. Ethics Codes and Guidelines

Regardless of which arbitration statute governs an arbitration proceeding, an arbitrator has an independent ethical duty to make full and fair disclosures.[60] However, the ethics guidelines do not always prescribe a uniform disclosure standard.[61]

The Code of Ethics, promulgated by the American Bar Association and AAA in 2004, and which is applicable to all arbitration proceedings in the United States, imposes the most demanding dis-

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those 'facts that a reasonable person would consider likely to affect the arbitrator's impartiality in the arbitration proceeding' to be disclosed." (citation omitted)).

57 REV. UNIF. ARB. ACT §§ 12(a)(1)–(2).

58 *Id.* § 12(b).

59 *Id.* §§ 12(c)–(d).

60 *See, e.g.*, THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 9, at 4 [Canon II(C)] (listing the types of relationships and interests arbitrators must disclose and stating that "[t]he obligation to disclose [these] interests or relationships . . . is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration any such interests or relationships which may arise, or which are recalled or discovered."); UNCITRAL ARBITRATION RULES, art. 11 (U.N. COMM'N INT'L TRADE L. 2014), at 12, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf [https://perma.cc/X234-493Y] ("An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.").

61 Dawson, *supra* note 13, at 203 ("Rules and ethics standards vary concerning the extent of such disclosures.").

closure standard of all the ethical codes and guidelines potentially applicable to U.S. arbitrators.[62] It requires arbitrators, before accepting an appointment, to disclose, among other things, "[a]ny known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties."[63] This includes relationships with "any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness."[64] The duty to disclose under the Code of Ethics is a continuing duty. It requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable and at any stage of the arbitration, any disclosable interests or relationships that arise, or that the arbitrator recalls or discovers, after the commencement of the proceeding.[65]

The Code of Ethics imposes an affirmative duty to investigate as part of the disclosure process: "[p]ersons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships [required to be disclosed]."[66] While the precise contours of this duty are somewhat elusive, "court decisions make clear that whatever the Code of Ethics means by 'making a reasonable effort' to inform oneself under the Code, that is a greater burden than what is required" to avoid vacatur of an award under the FAA.[67] This gives rise to "two separate levels of inquiry"—whether a court should vacate an award and whether an arbitrator fulfilled her ethical duties under

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62 THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 9, at 4 [Canon II].

63 *Id.* [Canon II(A)(2)]. The Code of Ethics also mandates disclosure of "[a]ny known direct or indirect financial or personal interest in the outcome of the arbitration," "[t]he nature and extent of any prior knowledge they may have of the dispute," and "[a]ny other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure." *Id.* [Canon II(A)(1), (3)–(4)].

64 *Id.* [Canon II(A)(2)]. It also includes relationships involving the families or household members of the participants in the arbitration, as well as their current employers, partners, or professional or business associates "that can be ascertained by reasonable efforts."

65 *Id.* [Canon II(C)].

66 *Id.* [Canon II(B)]. The Code of Ethics is explicit in stating that the duty to investigate disclosable interests and relationships, like the duty to disclose itself, is an ongoing obligation that continues throughout the arbitration process. THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 9, at 4 [Canon II(C)].

67 Tracey B. Frisch, *Arbitrator Disclosure: Ignorance Is Not Bliss*, DISP. RESOL. MAG., at 30 (Fall 2018). The standard for vacatur of an award under the FAA for inadequate disclosure is discussed in *infra* Part II(B).

the Code of Ethics.[68] As the Code of Ethics places an affirmative burden on arbitrators to make reasonable efforts to ensure that they are aware of any possible conflicts—which the FAA does not—it is possible that an arbitrator's breach of her disclosure obligations under the Code of Ethics will not result in a judicial vacatur of the arbitration award in that matter.[69]

Arbitrators presiding over proceedings in the United States may also be subject to state ethical requirements. For example, if an arbitrator fails to make a required disclosure under the California Ethics Standards for Neutral Arbitrators in Contractual Arbitration ("California Standards"), she is subject to "mandatory and automatic disqualification once a party serves a timely notice of disqualification."[70] The California Standards impose affirmative disclosure requirements.[71]

The International Bar Association ("IBA") Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"), adopted in 2014, furnish arbitrators in the international arbitration arena with another set of ethical guidelines regarding disclosure.[72] The IBA Guidelines establish seven standards of independence and disclosure to govern the selection, appointment,

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68 *Id.*

69 *Id.* (While the Code of Ethics does not "establish new or additional grounds for judicial review of arbitration awards" (THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 9, at 1 [pmbl.]), courts have recognized the independent significance of enforcing the ethical rules.); *See, e.g.*, Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., No. 05-CV-10540, 2006 WL 1816383, at *27 (S.D.N.Y. June 28, 2006), *aff'd*, 492 F.3d 132 (2d Cir. 2007) ("It is important that courts enforce rules of ethics for arbitrators in order to encourage businesses to have confidence in the integrity of the arbitration process, secure in the knowledge that arbitrators will adhere to these standards.").

70 Rossein & Hope, *supra* note 13, at 205; CALIFORNIA ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, Standard 7(d). Other state ethics rules allow for more discretion than the California Standards in determining whether a prospective arbitrator should be removed for failing disclose an actual or potential conflict. Rossein & Hope, *supra* note 13, at 205.

71 CALIFORNIA ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, *supra* note 70, at 8.

72 IBA GUIDELINES, *supra* note 15. The rationale for the initial adoption of the IBA Guidelines in 2004 was that "greater consistency and fewer unnecessary challenges . . . could be achieved by providing lists of specific situations . . . that do, or do not warrant disclosure or disqualification of an arbitrator." Robertson, *supra* note 30, at 122. The IBA Guidelines were revised and re-adopted in 2014 after the IBA Arbitration Committee conducted a review of the Guidelines "to reflect on the accumulated experience of using [the 2004 IBA Guidelines] and to identify areas of possible clarification or improvement." IBA GUIDELINES, *supra* note 15, at i [prefatory note].

and continuing role of an arbitrator.[73] The IBA Guidelines use an objective third party standard to assess the materiality of conflicts of interest.[74] Under General Standard 2, conflicts of interest will disqualify an arbitrator if a reasonable and informed third party would have "justifiable doubts as to the arbitrator's impartiality or independence."[75] Doubts are "justifiable" under General Standard 2 if a reasonable third party with knowledge of the relevant facts and circumstances "would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."[76] The IBA expressly provides that "[a]n arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence,"[77] and that, when in doubt, arbitrators should err on the side of disclosure.[78]

The IBA Guidelines attempt to provide arbitrators with more concrete guidance on the significance of certain kinds of conflicts by grouping them into three "Application Lists": the Red List, the

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[73] IBA GUIDELINES, *supra* note 15, at 4–16 (setting forth "General Standards Regarding Impartiality, Independence and Disclosure"). While the IBA Guidelines, like the Code of Ethics, "are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties," the IBA's objective in adopting them was to provide the international arbitration community with a widely accepted set of rules that "will assist parties, practitioners, arbitrators, institutions and courts in dealing with these important questions of impartiality and independence." *Id.* at 3.

[74] *Id.* at 5 [General Standard 2(b)] (instructing the arbitrator to assess whether information should be disclosed "from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances"); *id.* [Explanation to General Standard 2(b)] ("In order for standards to be applied as consistently as possible, the test for disqualification is an objective one.").

[75] *Id.* [General Standard 2(b)]. The "justifiable doubt" standard in the IBA Guidelines is derived from the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration. *Id.* at 6 [Explanation to General Standard 2(b)]. Article 12 of the UNCITRAL Model Law provides that an arbitrator "shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence." U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. Doc. A/40/17, annex I, A/61/17, annex I, U.N. Sales No. E.08.V.4 (2008).

[76] IBA GUIDELINES, *supra* note 15, at 5 [General Standard 2(c)]. General Standard 2(d) of the IBA Guidelines states that the IBA Guidelines' "Non-Waivable Red List" (discussed *infra*) contains examples of situations that always give rise to a justifiable doubt about the arbitrator's impartiality and therefore should preclude the arbitrator from accepting an invitation to serve. *Id.* [General Standard 2(d)].

[77] *Id*. at 15 [General Standard 7(d)].

[78] *Id*. at 7 [General Standard 3(d)].

Orange List, and the Green List.[79] The Red List contains examples of the most serious conflicts of interest for an arbitrator.[80] It contains a sub-list of non-waivable conflicts, such as where an arbitrator's law firm "regularly advises" a party to the arbitration and "derives significant financial income therefrom"; it also contains a sub-list of other serious conflicts that can be waived by the parties, including where an arbitrator is a lawyer in the same firm as counsel for one of the arbitration parties.[81] The Orange List identifies examples of conflicts that should be disclosed to the parties because, while they are less substantial than those on the Red List, they may "give rise to doubts as to the arbitrator's impartiality or independence."[82] Some examples of Orange-List relationships are "[a] close personal friendship" between the arbitrator, a manager or director of a party or its counsel, and a professional association between the arbitrator and a party.[83] The Green List consists of situations that might be viewed as conflicts of interest, but do not need to be disclosed—this is because, from the relevant "objective point of view," they do not give rise to an appearance of, or actual, conflict of interest.[84] The only reference to social media in the IBA Guidelines is in the Green List, which takes the position that a relationship between an arbitrator and an arbitration party "through a social media network" does not have to be disclosed.[85]

While there do not appear to be judicial decisions or other authorities that have compared the disclosure burdens imposed by the Code of Ethics and the IBA Guidelines, it is clear that the standards are not identical.[86] There are at least three reasons why it would be reasonable to infer that the Code of Ethics requires more robust disclosures than the IBA Guidelines. First, the IBA Guidelines assess whether a potential conflict is disclosable from the perspective of a third party outside the arbitration,[87] while the Code of

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79 *Id.* at 17–27; *see also* Peter L. Michaelson, *In International Arbitration, Disclosure Rules at the Place of Enforcement Matter Too*, DISP. RESOL. J. (Nov. 2007/Jan. 2008), at 2.

80 IBA GUIDELINES, *supra* note 15, at 17.

81 *Id.* at 17, 20–22.

82 *Id.* at 18.

83 *Id.* at 22–25.

84 *Id.* at 19.

85 *Id.* at 27.

86 An arbitrator presiding over a proceeding in the United States that involves at least one party from outside the United States presumably would be subject to both the Code of Ethics and the IBA Guidelines, unless the parties' agreement to arbitrate provided otherwise.

87 IBA GUIDELINES, *supra* note 15, at 19 (stating that "there should be a limit to disclosure, based on reasonableness" and finding that "in some situations, an objective test should prevail over the purely subjective test of 'the eyes' of the parties").

Ethics looks at it through the "eyes of any of the parties" to the arbitration.[88] The arbitration parties themselves presumably would be more sensitive to conflicts and have a greater appetite for disclosure than a disinterested third party. Second, it seems that there are more relationships between arbitrators and arbitration participants that "might reasonably affect impartiality or lack of independence in the eyes of any of the parties" ("Code of Ethics standard")[89] than would cause a neutral third party to have "justifiable doubts as to the arbitrator's impartiality or independence" ("IBA Guidelines standard").[90] The Code of Ethics does not contain any requirement that the parties' concerns about the arbitrator's impartiality be "justifiable"—just that they be reasonable. Moreover, the focus of the Code of Ethics on all relationships that "might reasonably affect" the arbitrator's impartiality seems to set a lower bar for disclosure than the IBA Guidelines. Third, while the Code of Ethics is silent as to the disclosure implications of social media relationships, the IBA Guidelines state that a "relationship" between an arbitrator and a party "through a social media network" does not need to be disclosed.[91]

iii. TPA Rules

Layered beneath the statutes and ethical guidelines that establish standards for arbitrator disclosure are the disclosure rules of prominent TPAs. These rules apply to TPA-administered arbitration proceedings, which are the majority of commercial arbitrations.[92] While TPA rules (like ethical guidelines) do not have the force of law—meaning that a violation of a TPA rule does not, in and of itself, invalidate an arbitral award[93]—arbitrators who preside over TPA-administered proceedings have strong incentives to

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88 THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 9, at 4 [Canon II(A)(2)].

89 *Id.*

90 IBA GUIDELINES, *supra* note 15, at 5.

91 *Id.* at 27.

92 *See, e.g.*, James Clanchy, *Arbitration Statistics 2019: Rise of the Sole Arbitrator*, LEXISNEXIS DISP. RESOL. BLOG (July 30, 2020), https://www.lexisnexis.co.uk/blog/dispute-resolution/arbitration-statistics-2019-rise-of-the-sole-arbitrator [https://perma.cc/JZ28-KMUM] (finding that institutions arbitrated fifty-six percent of international commercial arbitrations); QUEEN MARY UNIV. OF LONDON SCH. OF INT'L ARB. & PINSENT MASONS, INTERNATIONAL ARBITRATION SURVEY – DRIVING EFFICIENCY IN INTERNATIONAL CONSTRUCTION DISPUTES 5 (2019) (finding that two-thirds of international construction disputes were administered by arbitration institutions).

93 *See, e.g.*, Rossein & Hope, *supra* note 13, at 249 ("[W]hile courts may look to ethics codes for guidance, they are not the law and thus not binding on arbitrators.").

comply with TPA rules. The breach of a TPA rule might not only result in the arbitrator's removal from the TPA's approved roster—which could have a severe negative impact on the arbitrator's business prospects[94]—but could have a broader detrimental impact on the arbitrator's professional reputation.[95] Moreover, the violation of a TPA disclosure rule would also likely impact a court's decision about whether to set aside an arbitration award rendered in a TPA-administered proceeding.[96]

The AAA Commercial Rules ("AAA Rules") contain the following disclosure standard for arbitrators in AAA matters:

> Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.[97]

The plain language of Rule 17(a) seems to anticipate broad and fulsome disclosure of an arbitrator's relationships with the participants in an arbitration, as it suggests that "any past or present relationship with the parties or their representatives" is "likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence."[98] In an effort to incentivize transparency and pro-

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[94] *See, e.g.*, AM. ARB. ASS'N, FAILURE TO DISCLOSE MAY LEAD TO REMOVAL FROM THE AAA ROSTER (Oct. 2019), https://adr.org/sites/default/files/document_repository/Failure_to_Disclose_May_Lead_to_Removal.pdf [https://perma.cc/3VQU-YBJD] ("[A]rbitrators may be placed on inactive status whenever any of their awards are challenged in court based on allegations that the arbitrator failed to properly disclose relationships . . . inactive status means that the arbitrator is not being proposed for the parties' consideration on new cases and will likely have no impact on the arbitrator's status on pending cases.").

[95] A violation of a TPA disclosure rule—like a disclosure requirement found in a statute or professional code—could also be viewed as undermining the integrity of the arbitration process itself, which arguably has a negative impact on all arbitrators.

[96] *See, e.g.*, Rossein & Hope, *supra* note 13, at 231 ("While the FAA provides the basis for the review of an arbitration award, the parties' agreement may provide the rules, usually an agreed upon institutional code or guiding statute, to guide the arbitration and arbitrators. This includes, in particular, standards for arbitrator disclosure."); Lee Korland, Comment, *What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the Federal Arbitration Act*, 53 CASE W. L. REV. 815, 822 (2003) ("Failure to disclose such a conflict [to a TPA] might give rise to a strong claim for vacating an arbitration award based on evident partiality, but such an omission would certainly not be dispositive.").

[97] AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 17 [R-17(a)] (2013), https://adr.org/sites/default/files/CommercialRules_Web-Final.pdf [https://perma.cc/736G-YBD9] [hereinafter AAA RULES].

[98] *Id.*

tect arbitrators from being commercially penalized for making robust disclosures, the AAA Rules expressly provide that "[d]isclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence."[99] Unlike the RUAA and the Code of Ethics, the AAA Rules do not expressly require arbitrators to investigate whether there are potential conflicts of interest.[100] The disclosure standards established by the rules of the other leading TPAs are aligned with those of the AAA.[101]

Thus, as the above discussion reflects, the primary TPA rules are not in perfect alignment with arbitration statutes or ethics codes.[102] This means that an arbitrator presiding over an arbitration administered by AAA filed in New York and involving parties from three different countries potentially would be subject to the differing disclosure standards in the Code of Ethics, the IBA Guidelines, and the AAA Rules.

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99 *Id.* [R-17(c)]; *see also* IBA GUIDELINES, *supra* note 15, at iii [prefatory note] ("It is also essential to reaffirm that the fact of requiring disclosure—or of an arbitrator making disclosures—does not imply the existence of doubts as to the impartiality or independence of the arbitrator.").

100 AAA RULES, *supra* note 97, at 17 [R-17].

101 *See, e.g.*, Rule 15. Arbitrator Selection, Disclosures and Replacement, *supra* note 5 ("The Parties and their representatives shall disclose to JAMS any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process."); INT'L INST. FOR CONFLICT PREVENTION & RESOL., CPR PROCEDURES & CLAUSES: ADMINISTERED ARBITRATION RULES 18, [R-7.3] (Mar. 1, 2019), https://www.cpradr.org/resource-center/rules/arbitration/administered-arbitration-rules-2019/_res/id=Attachments/index=0/2019%20Administered%20Arbitration%20Rules_Domestic_07.25.19_.pdf [https://perma.cc/F588-MY6H] ("Each arbitrator shall disclose in writing to CPR and the parties prior to appointment in accordance with the Rules, and also promptly upon their arising during the course of the arbitration, any circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality. Such circumstances include bias, interest in the result of the arbitration, and past or present relations with a party or its counsel.").

102 *Compare* THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 9, at 4 [Canons II(A)(2), (B)] (establishing a "might reasonably affect impartiality or lack of independence in the eyes of any of the parties" standard and imposing a duty to investigate), *with* IBA GUIDELINES, *supra* note 15, at 5 [General Standard 2(b)] (establishing a "justifiable doubt as to the arbitrator's impartiality or independence" from the perspective of a neutral party standard with a duty to investigate), *and* AAA RULES, *supra* note 97, at 17 [R-17(a)] (establishing a "justifiable doubt" standard with no duty to investigate).

B. *Rules Governing the Vacatur of Arbitral Awards Based on Inadequate Disclosure*

The grounds for vacating an arbitration award are much narrower than the bases for overturning a court decision.[103] One of the few grounds for setting aside an arbitral award is found in section 10(a) of the FAA, which provides that an award may be vacated if there is "evident partiality or corruption in the arbitrators."[104] In the absence of an express disclosure requirement in the FAA, most of the litigation regarding allegedly inadequate arbitral disclosure occurs when courts are called upon to decide motions to vacate awards under section 10(a) of the FAA, based on claims that an arbitrator's failure to adequately disclose a conflict of interest constituted evident partiality. The evident-partiality standard also governs disclosure-based vacatur motions under state law[105] and motions to set aside international arbitration awards rendered in the United States.[106] The party challenging an arbitral award based on allegedly inadequate arbitral disclosure bears the burden of proving evident partiality.[107] As set forth below, the law in this area is murky, both because the Supreme Court has provided minimal guidance on the meaning of "evident partial-

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103 MENKEL-MEADOW ET AL., *supra* note 2, at 407; Platt W. Davis III, *Nondisclosure of Arbitrator Conflicts and the 'Evident Partiality' Standard*, CPA J. (June 2004), at 54; *see also* Andrew M. Campbell, Annotation, *Construction and Application of § 10(a)(1)-(3) of Federal Arbitration Act (9 U.S.C.A. § 10(a)(1)-(3)) Providing for Vacating of Arbitration Awards Where Award Procured by Fraud, Corruption, or Undue Means, Where Arbitrators Evidence Partiality or Corruption and Where Arbitrators Engage in Particular Acts of Misbehavior*, 141 A.L.R. Fed. 1 § 2[a] (1997) (noting that only about ten percent of arbitration awards are overturned on appeal).

104 9 U.S.C. § 10(a)(2).

105 UNIF. ARB. ACT § 12(a)(2) (UNIF. L. COMM'N 2000) (allowing vacatur for evident partiality or misconduct that results in prejudice to a party); REVISED UNIF. ARB. ACT § 23(a)(2) (UNIF. L. COMM'N 2000) (same). Because the language of many state arbitration statutes tracks the language of the FAA with respect to the vacatur of awards for evident partiality and since the FAA often preempts state arbitration acts when there is a conflict between the two, Rossein & Hope, *supra* note 13, at 231–32, this Article focuses primarily on the FAA (and the case law arising under the FAA) with respect to its discussion of the vacatur of arbitral awards based on deficient arbitrator disclosure.

106 Robertson, *supra* note 30, at 114 (noting that "the grounds enumerated in Chapter 1 [of the FAA] for setting aside a domestic arbitration award, including 'evident partiality,' also apply to an international award rendered in the United States").

107 OOGC Am., L.L.C. v. Chesapeake Expl., L.L.C., 975 F.3d 449, 457 (5th Cir. 2020) ("In a dispute over an arbitration award, '[t]he burden of proof is on the party seeking to vacate the award, and any doubts or uncertainties must be resolved in favor of upholding it.'" (citation omitted)); A&G Coal Corp. v. Integrity Coal Sales, Inc., 565 F. App'x 41, 42 (2d Cir. 2014) ("Under the Federal Arbitration Act . . . a party seeking to vacate an arbitration award bears the burden of proof. . . .").

ity" and the lower courts have disagreed about how to interpret that scant guidance.[108]

i. The Supreme Court's Sole Evident Partiality Decision: *Commonwealth Coatings*

The only Supreme Court case to address the FAA's "evident partiality" standard is *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[109] which was decided over fifty years ago.[110] The underlying dispute in *Commonwealth Coatings* involved a claim by a painting company subcontractor, that the sureties on the prime contractor's bond owed it money for a painting job.[111] The applicable contract contained a clause requiring such disputes to be resolved by a three-member arbitration panel.[112] Pursuant to this provision, each side appointed an arbitrator and the two party-appointed arbitrators selected the third arbitrator, a putative neutral, to chair the panel ("panel chair").[113] In addition to his work as an arbitrator, the panel chair worked as an engineering consultant on building construction projects in the same community as the parties to the arbitration.[114] The respondent in the arbitration was one of the panel chair's consulting clients.[115] Although the respondent retained the panel chair at irregular intervals and had not used his services for approximately one year preceding the arbitration, the panel chair had worked on multiple projects for, and earned fees of around, $12,000 from the respondent over a four-to-five-year period.[116] Moreover, some of the consulting work that the panel

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108 *See, e.g.*, Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83 (2d Cir. 1984) (noting that courts faced with a motion to vacate an arbitration award based on evident partiality must render a decision against the "murky backdrop of Supreme Court precedent"); Robertson, *supra* note 30, at 114 ("While the phrase 'evident partiality' is linguistically facile, its application has proven problematic for the courts, particularly when the question involves an arbitrator's failure to disclose a relationship to one of the parties."); Timothy W. Stalker, David J. Rosenberg, & Ryan A. Nolan, *Vacating Arbitration Awards Due to "Evident Partiality" Under the Federal Arbitration Act*, 83 DEF. COUNS. J. 207, 210 (2016) ("At this time there is no clear rule of what information an arbitrator must disclose to avoid future motions regarding partiality.").

109 Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968).

110 While there have been efforts to convince the U.S. Supreme Court to take up a case to amplify and clarify its opinion in *Commonwealth Coatings*, the Court thus far has declined. Dawson, *supra* note 13, at 324.

111 *Commonwealth Coatings Corp.*, 393 U.S. at 145.

112 *Id.* at 146.

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

chair performed for the respondent related to the matters at issue in the arbitration.[117]

The panel chair did not disclose his consulting relationship with the respondent when being considered, or at any point during the arbitration proceeding.[118] The arbitration hearing went forward and the respondent prevailed in a unanimous decision.[119] The painting company (the claimant in the arbitration) learned about the connection between the panel chair and the respondent after the award was rendered.[120] The painting company then moved to vacate the award based on, among other things, the panel chair's failure to disclose his association with the respondent.[121] The district court declined to set aside the award and the court of appeals affirmed.[122]

In an opinion authored by Justice Black, the Supreme Court reversed.[123] While the Court acknowledged that the painting company did not accuse the panel chair of actual fraud or bias,[124] it found that an arbitrator's failure to adequately disclose a connection to one of the parties could still meet the evident partiality standard for vacatur.[125] Justice Black analogized the evident partiality standard applicable to arbitrators to judicial impartiality standards, finding that both "rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but must also avoid even the appearance of bias."[126] While recognizing that it was not fair or realistic to expect arbitrators to sever all their ties with the business world (since most arbitrators derive income from other sources), the Court stressed the importance of safeguarding the impartiality of arbitrators because they are subject to a much more limited version of appellate review than judges.[127] The Court stated that "[w]e can perceive no way in which the effectiveness of the arbitration process will be hampered

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117 *Commonwealth Coatings Corp.*, 393 U.S. at 146.

118 *Id.*

119 *Id.* at 152.

120 *Id.* at 146.

121 *Id.*

122 *Id.*

123 *Commonwealth Coatings Corp.*, 393 U.S. at 150.

124 *Id.* at 147.

125 *Id.* at 147–48.

126 *Id.* at 149–50. Justice Black's opinion further stated that, like judges, arbitrators must avoid actions that "reasonably tend to awaken the suspicion that his social or business relations or friendships . . . constitute an element in influencing his judicial conduct." *Id.* (internal quotation marks omitted).

127 *Id.* at 149.

by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."[128] Justice Black's opinion was joined by Justices Brennan and Douglas, and Chief Justice Warren.[129]

Justice White, joined by Justice Marshall, filed a concurring opinion, joining Justice Black's opinion, but emphasized that it should not be interpreted to hold arbitrators to the same standards as judges.[130] While he agreed that the panel chair violated the FAA's prohibition on evident partiality, Justice White stated that arbitrators "are not automatically disqualified by a business relationship with the parties before them if . . . [the parties] are unaware of the facts [and] the relationship is trivial."[131] He explained: "[A]n arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography."[132] So, while joining an opinion that established an exacting "impression of possible bias" disclosure standard for arbitrators under the FAA, the White concurrence focused on distinguishing trivial connections to the parties (which did not require disclosure) from situations where the arbitrator has a "substantial interest in a firm which has done more than trivial business with a party."[133]

ii. The Uneven Application of the "Evident Partiality" Standard in the Wake of *Commonwealth Coatings*

The lower courts have struggled to divine a uniform standard for "evident partiality" from the split decision in *Commonwealth Coatings*. "Evident-partiality doctrine is currently in disarray, with

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128 393 U.S. at 149. In arriving at the "impression of possible bias" standard for disclosure, Justice Black relied on both Rule 18 of the AAA Rules and the 33rd Canon of Judicial Ethics, although he acknowledged that neither was binding on the Court for purposes of adjudicating an evident-partiality challenge to an award under the FAA. *Id.*

129 *Id.* at 145. Because the concurrence of Justice White (joined by Justice Marshall) arguably conflicts with Justice Black's opinion, with respect to the standard for arbitrator disclosure under the FAA (as discussed *infra*), Black's opinion is considered by many to be a plurality, rather than a majority, opinion as it "only reflect[s] the opinion of four out of nine Justices." Bryn Fuller, *Arbitrary Standards for Arbitrator Conflicts of Interest: Understanding the "Evident Partiality" Standard*, 20 PIABA BAR J. 59, 62 (2013).

130 *Commonwealth Coatings Corp.*, 393 U.S. at 150 (opining that arbitrators should not be held to the "standards of judicial decorum of Article III judges" because they are "men of affairs, not apart from but of the marketplace").

131 *Id.* at 150–52 (finding that some "undisclosed relationships . . . are too insubstantial to warrant vacating an award").

132 *Id.* at 151.

133 *Id.* at 151–52.

courts disagreeing on how to phrase the evident-partiality standard, among many other subsidiary questions."[134] As a result of the contradictions between the opinions of Justice Black and Justice White,[135] and the fact that Justice White's vote was required to reach a majority, the federal courts have used at least two different standards to determine whether an arbitral award should be vacated for evident partiality.[136] Following Justice Black's opinion, some courts vacate awards when they find that an undisclosed potential conflict creates an appearance or impression of possible bias.[137] Other courts, in reliance on Justice White's concurrence, have rejected that broad disclosure standard in favor of a more narrow one, requiring that an arbitrator disclose only those relationships that a reasonable person would conclude compromise the arbitrator's impartiality.[138] It is generally accepted that it is easier to find evident partiality—and, therefore, to vacate arbitral awards—under the "appearance of bias" standard than the "reasonable person" standard.[139]

Even where the federal courts have purported to adopt a similar standard for evident partiality, they have used different tests to determine whether that standard has been satisfied.[140] As a result:

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134 Dawson, *supra* note 13, at 318.

135 *See, e.g.*, Fuller, *supra* note 129 (characterizing Justice Black's opinion and Justice White's opinion as "impossible to reconcile").

136 *See, e.g.*, Rossein & Hope, *supra* note 13, at 212 (finding that "the circuits are split on what constitutes 'evident partiality,' with some following" an "appearance of impression of bias" standard based on "the Supreme Court's plurality in *Commonwealth Coatings*," and some adopting "a more narrow reasonableness standard" under which awards are vacated for evident partiality where an inadequate arbitral disclosure "would lead a reasonable person to conclude that the arbitrator lacked [im]partiality"); Fuller, *supra* note 129 (noting that *Commonwealth Coatings* "created two potential standards that since have been inconsistently applied"); Robertson, *supra* note 30, at 116 ("Due to the inability of the majority of the Justices to agree on anything other than a result, the decision has provided the lower courts of the United States with little guidance, with most courts struggling with the import to be afforded Justice White's concurrence.").

137 *See infra* Part III(B)(i).

138 *See infra* Part III(B)(ii); *see also* Rossein & Hope, *supra* note 13 ("Because it is generally accepted as a plurality opinion, *Commonwealth Coatings* has left courts free to reject 'evident partiality' as the broad 'appearance of bias' standard in favor of (what has been interpreted as) Justice White's more narrow standard requiring disclosure of relationships such that a 'reasonable person would . . . conclude that an arbitrator was partial.").

139 *See, e.g.*, Fuller, *supra* note 129 ("Justice Black's opinion, labeled the 'appearance of bias' standard, creates a low standard and broader base upon which a party may seek vacatur, when compared to White's 'actual bias' standard."); Dawson, *supra* note 13 (discussing the "confusion" arising out of the two opinions in *Commonwealth Coatings*, describing the Justice Black standard as an "exacting standard of disclosure," and noting that the White concurrence "advocated what has been interpreted as . . . requiring not just an appearance of bias, but a reasonable impression of it").

140 Dawson, *supra* note 13.

> [T]he doctrine of evident partiality is inconsistent and divided by multiple splits among courts, which the Supreme Court has not yet resolved or granted certiorari to resolve. The federal circuits have an acknowledged split over how to phrase the basic evident-partiality test, specifically a disagreement about whether evident partiality requires a mere appearance of bias or a more robust reasonableness standard. They also vary on both sides of the split in how they apply the standard. State courts similarly differ with one another, and with federal courts (including sometimes federal courts in the state's own circuit), about what is necessary to show evident partiality.[141]

In the absence of a uniform standard, the standard for evident partiality that has emerged "can best be characterized as a case-by-case objective inquiry into partiality or a reasonable impression of bias standard."[142] This has resulted in inconsistent findings as to when vacatur of an arbitral award is required, based on undisclosed relationships between an arbitrator and a participant in the arbitration.[143]

1. The "Appearance of Bias" (Justice Black) Standard

In the years following the split decision in *Commonwealth Coatings*, some courts have adopted the "appearance of bias" standard, articulated by Justice Black. For example, the Ninth Circuit, in *Schmitz v. Zilveti*, held that, even though Justice White's concurring opinion was inconsistent with Justice Black's opinion in some ways, it did not reject the "appearance of bias" test for determining evident partiality.[144] Accordingly, the court adopted a "reasonable impression of partiality" standard, based on Justice Black's opinion.[145] In *Schmitz*, the arbitrator failed to run a conflicts check on the parent company of one of the parties to the arbitration.[146] A post-award investigation by the losing party revealed that the arbitrator's law firm represented the prevailing party's parent company

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141 *Id.* at 321–22.

142 Robertson, *supra* note 30, at 116.

143 *See* Dawson, *supra* note 13, at 309 ("[C]ourts and theorists are and have long been deeply divided about the content and the application of the doctrine of evident partiality, offering different formulations of the evident-partiality test and reaching conflicting results in similar cases.").

144 Schmitz v. Zilveti, 20 F.3d 1043, 1046 (9th Cir. 1994); Christopher D. Kratovil & Anne M. Johnson, *Evident Partiality*, 65 ADVOC. 52, 54 (2013) ("[T]he Ninth Circuit appears to follow the 'reasonable impression of partiality' standard established by Justice Black in his *Commonwealth Coatings* plurality opinion.").

145 *Zilveti*, 20 F.3d at 1047.

146 *Id.* at 1049.

in at least nineteen cases over thirty-five years.[147] The district court confirmed the award on the ground that arbitrators are bound to disclose only those potential conflicts of which they are actually aware.[148] The Ninth Circuit reversed, finding that "a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it."[149] Applying its "reasonable impression of partiality" standard, the court held that "representation of a parent corporation is likely to affect impartiality or may create an appearance of partiality in the lawyer's representation of or dealing with a subsidiary."[150]

Other courts have expressed a favorable disposition toward the "appearance of bias" standard as well. For example, Judge Patterson opined:

> Because of the increase in international transactions and the corresponding increase in disputes it is crucial that there exist a requirement of an appearance of impartiality in arbitrations conducted in this jurisdiction, and that courts take actions designed to assure foreign entities that arbitrations in the United States are free from the suggestion of partiality.[151]

And the Eleventh Circuit has cited with approval language from Justice Black's opinion in imposing a "reasonable impression of partiality" standard.[152]

2. The "More-Than-Appearance-of Bias" (Justice White) Standard

Based on Justice White's concurrence, which has "grown in influence as courts . . . have become friendlier to arbitration,"[153] a majority of courts require a party seeking to overturn an arbitral award based on evident partiality to show something more than an appearance of bias on the part of the arbitrator.[154] Under this standard, "arbitrators are not automatically disqualified by a business

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147 *Id.* at 1044.

148 *Id.*

149 *See id.* at 1048. The court further observed that while a lack of knowledge of a conflict may preclude a finding of actual bias, "it does not always prohibit a reasonable impression of partiality."

150 *Id.* at 1049.

151 Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., No. 05-CV-10540, 2006 WL 1816383, at *9 (S.D.N.Y. June 28, 2006), *aff'd*, 492 F.3d 132 (2d Cir. 2007).

152 Middlesex Mut. Ins. Co. v. Stuart Levine, 675 F.2d 1197, 1200–02 (11th Cir. 1982).

153 Dawson, *supra* note 13, at 319.

154 Kratovil & Johnson, *supra* note 144 ("The First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits all require more than a 'mere appearance of bias' and thus appear to be more aligned with . . . Justice White's concurring opinion in *Com-*

relationship with the parties before them, if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial."[155] However, there is a lack of consensus as to how much more serious than "trivial" the undisclosed relationships must be, in order to rise to the level of evident partiality in these courts.[156] For example, some courts simply have held that a trivial conflict of interest does not trigger a duty to disclose, even if it might create an appearance of bias on the part of the arbitrator.[157] Other courts have required a more robust showing that the undisclosed information was material. The Third Circuit, for instance, only permits vacatur for evident partiality if a reasonable person would conclude that an arbitrator's partiality toward a party to the arbitration is "ineluctable" and "direct, definite, and capable of demonstration."[158] The Tenth Circuit requires the evidence of the arbitrator's bias to not only be "direct, definite and capable of demonstration," but more than "remote, uncertain, or speculative."[159] Other courts embracing the White concurrence have adopted similar, but not always identical, standards for evident partiality.[160]

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monwealth Coatings. These courts all require that the undisclosed relationship be more than trivial in order to warrant vacatur.").

155 Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968).

156 *See* Rossein & Hope, *supra* note 13 (observing that some courts have indicated that the undisclosed relationship must be "material" or "substantial" to justify vacatur for evident partiality).

157 Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137–38 (2d Cir. 2007) (affirming the district court's vacatur of an arbitration award, but criticizing the lower court's use of an "appearance of partiality" standard); *see also* Montez v. Prudential Sec. Inc., 260 F.3d 980, 983 (8th Cir. 2001) (finding that evident partiality exists when an arbitrator's relationship with one of the parties creates "an impression of possible bias" and the relationship is "more than trivial" (internal quotation marks omitted) (quoting Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 159 (8th Cir. 1995))); Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1264 (7th Cir. 1992) (requiring more than a mere appearance of bias); Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 (6th Cir. 1989) (requiring the same); Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79 (2d Cir. 1984) (defining evident partiality "as requiring a showing of something more than the mere 'appearance of bias' to vacate an arbitration award," yet something less than "proof of actual bias").

158 Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 253 (3d Cir. 2013) (citation omitted).

159 Legacy Trading Co. v. Hoffman, 363 F. App'x 633, 635 (10th Cir. 2010) (quoting Ormsbee Dev. Co. v. Grace, 668 F.2d 1130, 1147 (10th Cir. 1982)).

160 *See, e.g.*, *Applied Indus. Materials Corp.*, 492 F.3d at 137 (holding that the undisclosed relationship between the arbitrator and one of the parties must be "material" to constitute evident partiality but not defining "materiality"); Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 645 (6th Cir. 2005) (requiring the arbitrator's alleged partiality to be "direct, definite, and capable of demonstration" and the party asserting evident partiality to point to "specific

While the materiality threshold varies among the courts purporting to adopt the White concurrence, all of these courts frame the key inquiry as some version of whether "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[161] To answer this question, courts attempt to stand in the shoes of a reasonable third person and conduct a fact-intensive analysis of the information that was not disclosed by the arbitrator and assess its significance from an impartiality perspective.[162] In order to assess the significance of the undisclosed relationship, the Fourth Circuit has suggested that courts should consider: (1) any "personal interest, pecuniary or otherwise, the arbitrator has in the proceeding;" (2) the "directness" of the relationship between the arbitrator and the party toward which she is allegedly biased; (3) the extent to which the undisclosed relation-

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facts that indicate improper motives on the part of the arbitrator" (internal quotation marks omitted)); *Olson*, 51 F.3d at 159–60 (suggesting that the undisclosed relationship must be significant to rise to the level of evident partiality); Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993) (finding that the "alleged partiality must be direct, definite, and capable of demonstration rather than remote, uncertain or speculative" and requiring the party claiming evident partiality to establish "specific facts that indicate improper motives on the part of an arbitrator"); Hammad v. Lewis, 638 F. Supp. 2d 70, 75 (D.D.C. 2009) (holding that the party seeking vacatur "must establish specific facts that indicate improper motives on the part of an arbitrator" (citing Al-Harbi v. Citibank, N.A., 85 F.3d 680, 683 (D.C. Cir. 1996))); *see generally* Dawson, *supra* note 13, at 323 (finding that courts "disagree about what kind of relationship between arbitrator and party or counsel is sufficiently material or significant to show evident partiality.").

161 *Morelite Constr. Corp.*, 748 F.2d at 84; *see also, e.g.*, JCI Commc'ns, Inc. v. Int'l Bd. of Elec. Workers, Local 103, 324 F.3d 42, 51 (1st Cir. 2003) ("[E]vident partiality means a situation in which a reasonable person would have to conclude that an arbitrator was partial to one party to an arbitration." (citation omitted)); Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc., 304 F.3d 1331, 1339 (11th Cir. 2002) (finding that evident partiality can occur "when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists" (internal quotation marks omitted) (quoting Gianelli Money Purchase Plan & Tr. v. ADM Inv. Servs., Inc., 146 F.3d 1309, 1312 (11th Cir. 1998))); Consolidation Coal Co. v. Local 1643, United Mine Workers of Am., 48 F.3d 125, 129 (4th Cir. 1995) ("To demonstrate evident partiality under the FAA, the party seeking vacation has the burden of proving that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration."); Rossein & Hope, *supra* note 13, at 254 ("[W]here there is actual bias or an arbitrator fails to disclose 'information which would lead a reasonable person to believe that a potential conflict exists,' then evident partiality is present." (quoting *Gianelli Money*, 146 F.3d at 1308)).

162 Rossein & Hope, *supra* note 13, at 216 (noting that evident partiality is established "by objective factors requiring a fact-intensive analysis of the information that was not disclosed and its relationship to the parties and the arbitration."); *see, e.g.*, *Applied Indus. Materials Corp.*, 492 F.3d at 137 (requiring a fact-specific inquiry into the undisclosed conflict that "considers all of the circumstances").

ship is connected to the arbitration; and (4) the timing of the arbitrator's previous contacts with the participants in the arbitration.[163]

3. The Inconsistent Imposition of a Duty to Investigate

The evident partiality landscape is further complicated by the courts' collective inability to agree on whether arbitrators have a duty to investigate the existence of relationships with arbitration participants that are subject to disclosure. Just as the arbitration statutes provide inconsistent guidance on the investigative obligations of an arbitrator in the affirmative disclosure context,[164] courts adjudicating evident partiality challenges to arbitral awards have differing views on whether there is a duty to investigate and, if so, the extent of that duty.[165]

In the evident partiality context, the general rule seems to be that there is no affirmative duty to investigate potential conflicts of interest.[166] For example, in *Al-Harbi v. Citibank, N.A.*, the District of Columbia Circuit flatly rejected an attempt to invalidate an arbitral award for evident partiality after the arbitrator failed to inquire into potential conflicts of interest.[167] The court "explicitly h[e]ld that there is no duty on an arbitrator to make any such investigation."[168]

However, there are a few courts, most notably in the Ninth Circuit, that have held that an arbitrator's failure to investigate requires vacatur. In *Schmitz v. Zilveti*, the arbitrator's law firm represented the parent company of a party to the arbitration, but the arbitrator only used the name of the arbitration party (not its parent company) in the conflicts check he conducted of his law firm's

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163 *Consolidation Coal Co.*, 48 F.3d at 130 (citing Hobet Mining, Inc. v. Int'l Union, United Mine Workers of Am., 877 F. Supp. 1011, 1021 (S.D.W. Va. 1994)).

164 *See supra* Part II(A)(i) (noting that the RUAA, but not the FAA or UAA, imposes an affirmative duty on arbitrators to investigate conflicts of interest).

165 *See, e.g.*, Dawson, *supra* note 13, at 322 ("Courts disagree about whether an evident-partiality challenge can be sustained based on facts not known by the arbitrator, and correspondingly whether arbitrators have any duty to search for unknown conflicts such that an award can be vacated if they fail to discover one."); Rossein & Hope, *supra* note 13, at 256 (noting that courts "sometimes" impose a duty to investigate on arbitrators).

166 Rossein & Hope, *supra* note 13, at 227–28 (analyzing evident partiality decisions under the FAA and finding (1) that "[g]enerally, an award will not be vacated for a mere failure to investigate," and (2) that only "a few courts . . . have held that the failure to investigate per se requires vacatur.").

167 *Al-Harbi v. Citibank, N.A.*, 85 F.3d at 683.

168 *Id.*; *see also* Gianelli Money Purchase Plan & Tr. v. ADM Inv. Servs., Inc., 146 F.3d 1309, 1312–13 (11th Cir. 1998) (holding that there is no independent duty to investigate under the FAA where the arbitrator is unaware of the undisclosed facts).

database.[169] The court held that the arbitrator had a duty to investigate his law firm's prior relationship with the parent company of the arbitration party, charged him with constructive knowledge of the conflict of interest arising out of his firm's relationship with the parent company, and vacated the arbitral award for evident partiality based on the undisclosed conflict.[170] The arbitrator "had a duty to investigate the conflict at issue," according to the court, because, while a lack of knowledge may preclude the existence of an actual conflict of interest, "a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it."[171] Other courts in the Ninth Circuit and elsewhere have vacated (or affirmed the vacatur of) arbitration awards based on an arbitrator's failure to investigate potential conflicts of interest.[172]

To further muddy the waters, the Second Circuit follows what could be described as a middle-ground approach, which imposes upon arbitrators a duty to investigate only those potential conflicts of which they are aware.[173] In *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, the court found that the chair of a three-member arbitration panel acted with evident partiality when he failed to inquire further into a business relationship between his company and one of the parties to the arbitration.[174] The panel chair disclosed that he was aware of a potential business

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169 *Zilveti*, 20 F.3d at 1044.

170 *Id.* at 1049.

171 *Id.* at 1048–49. The court applied the reasonable impression of partiality standard derived from *Commonwealth Coatings* to the arbitration rules of the National Association of Securities Dealers (now the Financial Industry Regulatory Authority), which requires an arbitrator to investigate potential conflicts by imposing an affirmative duty to investigate.

172 *See, e.g.*, New Regency Prods. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1111 (9th Cir. 2007) (affirming vacatur where an arbitrator failed to investigate a potential conflict related to the arbitrator's employment with a film group in negotiations with one of the parties to the arbitration); HSMV Corp. v. ADI Ltd., 72 F. Supp. 2d 1122, 1132 (C.D. Cal. 1999) (holding that the arbitrator had a duty to investigate a potential conflict of interest between his law firm and the parties to an arbitration and invalidating an award in favor of a party that was wholly owned by a foreign government represented by the arbitrator's firm, even though the arbitrator did not know at the time of the arbitration about the representation); Mun. Workers Comp. Fund, Inc. v. Morgan Keegan & Co., Inc., 190 So. 3d 895, 923 (Ala. 2015) (finding that "the holding in *Schmitz* is the better view" and holding that the evident partiality standard "may be satisfied even though an arbitrator lacks actual knowledge of the facts giving rise to the conflict of interest when the arbitrator was under a duty to investigate in order to discover possible conflicts and failed to do so").

173 *See* Frisch, *supra* note 67, at 31 ("Thus the Second Circuit articulated a less stringent standard than the Ninth Circuit, namely, that an arbitrator must first be aware of a potential conflict and then fail to investigate for an award to be vacated based on evident partiality.").

174 *Applied Indus. Materials Corp.*, 492 F.3d at 139.

relationship with an arbitration party, but he did not investigate the extent of the relationship or advise the parties that he was not conducting such an inquiry.[175] After the award on liability was issued, counsel for the losing party discovered that the panel chair's company realized approximately $275,000 in revenue as a result of its relationship with the prevailing party.[176] The court held that where an arbitrator knows of a potential conflict, "a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality."[177] Thus, it invalidated the arbitration award.[178] However, the court made clear that it was "*not* creating a free-standing duty to investigate" and emphasized that "[t]he mere failure to investigate is not, by itself, sufficient to vacate an arbitration award."[179]

4. The Variability in Evident Partiality Standards and the Application of Those Standards Yields an Unpredictable Mix of Fact-Specific Outcomes

The bottom line is that the hodgepodge of evident partiality standards and the variability of the application of those standards make it hard to predict the outcomes of challenges to arbitration awards under the FAA for inadequate disclosure of conflicts of interest:

> [W]ith the confused guidance of Commonwealth Coatings as their lodestar, [courts] have struck the balance in different ways. Some emphasize keeping arbitrators honest through searching judicial inquiry into the sufficiency of disclosures, and a rule requiring arbitrators to err on the side of disclosure. Others emphasize preserving finality, recognizing that the losing party has different incentives than prior to the arbitration and will often seize on facts or potential conflicts that seemed (or would have seemed) insignificant pre-arbitration in hopes of overturning the award. There is some agreement at the core, but at the margins (and they are fairly wide margins), courts disagree.[180]

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175 *Id.* at 135.

176 *Id.*

177 *Id.* at 138; *see also* Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire & Marine Ins. Co., 668 F.3d 60, 73 n.17 (2d Cir. 2012) (holding that "where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed under *Commonwealth Coatings*) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate.").

178 *Applied Indus. Materials Corp.*, 492 F.3d at 136.

179 *Id.* at 138.

180 Dawson, *supra* note 13, at 321 (footnote omitted).

Regardless of whether courts purport to follow the Black or White opinions in *Commonwealth Coatings*, they all take a highly fact-intensive, case-specific approach to adjudicating motions to set aside arbitral awards for evident partiality.[181] A survey of evident partiality opinions illustrates that some judges are loath to disturb an arbitration award, even where the arbitrator failed to disclose a potential conflict that might have impacted a party's decision about whether to select that arbitrator. Other courts have vacated awards for the failure to disclose conflicts that seem less significant, and, in some cases, that the arbitrator may not even have known about. The following examples demonstrate the challenges that (1) arbitrators must navigate in deciding the specific potential conflicts to investigate and disclose; and (2) arbitration parties face in interpreting an arbitrator's disclosures or non-disclosures.

Some cases of undisclosed conflicts that have resulted in the vacatur of arbitration awards for evident partiality include:

- the arbitrator provided regular but infrequent consulting services to an arbitration party;[182]

- a business relationship between an arbitration party and the arbitrator's company (the fact, but not the extent, of which was disclosed) generated about $275,000 in revenue for the arbitrator's company (even though the arbitrator unilaterally erected an ethics screen in an effort to shield himself from any conflict);[183]

- the arbitrator's father was the president of a union that was one of the parties to the arbitration;[184]

- the arbitrator's law firm had represented the corporate parent of a party to the arbitration in numerous matters;[185]

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181 *See, e.g.*, Rossein & Hope, *supra* note 13, at 212 (finding, based on a survey of evident partiality decisions, that deciding whether the non-disclosure of a potential conflict of interest constitutes evident partiality is "a very fact-intensive inquiry").

182 *Commonwealth Coatings Corp.*, 393 U.S. at 146.

183 *Applied Indus. Materials Corp.*, 492 F.3d at 135–36.

184 *Morelite Constr. Corp.*, 748 F.2d at 81. The court held that despite a "traditional reluctance to inquire into the merits of an arbitrator's award," such an intimate and undisclosed relationship, where both were involved in the arbitration, would lead "a reasonable person . . . to conclude that an arbitrator was partial to one party to the arbitration." *Id.* at 81, 84. The court noted, however, that family relationships do not, per se, constitute evident partiality. *Id.* at 85.

185 *Zilveti*, 20 F.3d at 1044–49.

- during the arbitration proceeding, the arbitrator accepted a position as an executive officer of a film group that was negotiating to finance a film developed by an arbitration party (even though the arbitrator did not have actual knowledge of the negotiations);[186]

- the arbitrator and counsel for one of the arbitration parties had a fifteen-year history of infrequent social and business interactions, including exchanging Christmas cards, greeting each other in the hallway when they randomly crossed paths in the building that they both worked in fifteen years prior to the arbitration, and dining together five years before the arbitration;[187]

- the arbitrator "regularly went to lunch with one of the [party's] attorneys" and was provided with free use of conference rooms and free legal research by the attorneys for that party;[188]

- the arbitrator had an ongoing legal dispute with a party to the arbitration;[189]

- the arbitrator's law firm represented a party to the arbitration in other, unrelated matters;[190] and

- the law firm representing one of the parties to the arbitration was representing the arbitrator in an unrelated matter.[191]

Some instances of undisclosed conflicts that did not result in a finding of evident partiality include:

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186 New Regency Prods. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1107 (9th Cir. 2007).

187 Karlseng v. Cooke, 346 S.W.3d 85, 87–91 (Tex. App. 2011) (decided under TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(2)(A) (West 2011)). At least one commentator has characterized the undisclosed contacts between the arbitrator and counsel in this case as "relatively modest." Alcott, *supra* note 51, at 11.

188 *In re* First Quality Realty, LLC., No. 02-14758, 2006 Bankr. LEXIS 479, at *6–7, *20 (Bankr. S.D.N.Y. Feb. 17, 2006).

189 *Middlesex Mut. Ins. Co.*, 675 F.2d at 1199–1202.

190 Close v. Motorists Mut. Ins. Co., 486 N.E.2d 1275, 127779 (Ohio Ct. App. 1985) (decided under the Ohio Arbitration Act).

191 Beebe Med. Ctr., Inc. v. InSight Health Servs. Corp., 751 A.2d 426, 431–32 (Del. Ch. 1999) (decided under the Delaware Arbitration Act).

- counsel for one of the parties made a campaign contribution to, and was Facebook friends with, the arbitrator;[192]
- the arbitrator was a member of the board of directors of a company with $2 billion in passive investments in a consortium that was the respondent in the arbitration;[193]
- the National Association of Securities Dealers disciplined the arbitrator over a decade before the arbitration;[194]
- the arbitrator's brother worked for the union that was a respondent in the arbitration;[195]
- the arbitrator formerly represented the parent company of the respondent in the arbitration;[196]
- the parent company of a party to the arbitration contributed to the arbitrator's campaign for a seat on a state supreme court;[197]
- the arbitrator's former law firm had represented one of the respondents to the arbitration on unrelated matters;[198]
- the arbitrator's disclosure to the parties failed to indicate that one of the corporations for which he did consulting work was a subsidiary of a party to the arbitration;[199]
- eighteen months prior to the arbitration proceeding, the arbitrator had a scheduling dispute with an attorney from the firm representing one of the arbitration parties;[200]

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192 Sebastian v. Wilkerson, No. 09-18-00223-CV, 2019 Tex. App. LEXIS 880, at *5, *10–12 (Tex. App. Feb. 7, 2019) (decided under the Texas Arbitration Act); *see also* Prell v. Bowman, No. 05-17-00369-CV, 2018 Tex. App. LEXIS 3970, at *21 (June 4, 2018) (holding under Texas Arbitration Act that a Facebook friendship between the arbitrator and prevailing party did not constitute evident partiality).

193 Republic of Arg. v. AWG Grp. LTD., 894 F.3d 327, 337 (D.C. Cir. 2018).

194 Remmey v. PaineWebber, Inc., 32 F.3d 143, 147–48 (4th Cir. 1994).

195 *Consolidation Coal Co.*, 48 F.3d at 129.

196 Evans Indus., Inc. v. Lexington Ins. Co., No. 2:01-CV-01546, 2001 U.S. Dist. LEXIS 10419, at *13–16 (E.D. La. July 12, 2001).

197 *Freeman*, 709 F.3d at 245.

198 *Al-Harbi v. Citibank, N.A.*, 85 F.3d at 682.

199 Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 1149–51 (10th Cir. 1982) (decided under the New Mexico Arbitration Act).

200 Lifecare Int'l, Inc. v. CD Med., Inc., 68 F.3d 429, 434 (11th Cir. 1995).

- the arbitrator and counsel for the prevailing party in the arbitration were co-counsel for Intel in a large dispute involving six different lawsuits, in which at least seven law firms and thirty-four lawyers represented Intel;[201]

- the arbitrator and an expert witness who testified for one of the parties in the arbitration were limited partners in a partnership that owned an apartment complex;[202]

- the arbitrator held stock in a company whose subsidiary owned a small portion of an arbitration party's parent company;[203] and

- fourteen years prior to the arbitration proceeding, the president of a party to the arbitration (and a key witness in the case) served as the arbitrator's supervisor.[204]

III. There is a Pressing Need for Guidance on the Disclosure of Social Media Activity by Arbitrators

Although arbitrators, like all users of social media, have used social networks for well over a decade to make connections and build relationships in the professional and personal arenas,[205] there is a dearth of guidance regarding whether and to what extent they should disclose these virtual relationships to the participants in an arbitration. As discussed in Part II(A) *supra*, the laws and provider rules that govern arbitral disclosures in the United States do not provide specific guidance on social media disclosures. The gen-

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201 Positive Software Sols., Inc. v. New Century Mort. Corp., 476 F.3d 278, 280 (5th Cir. 2007). Although their names appeared together in court filings in the Intel litigation, the court found that the arbitrator and counsel for the arbitration party never spoke to each other or attended the same meetings, hearings, or other proceedings together. *Id.* at 284.

202 Apusento Garden, Inc. v. Superior Ct., 94 F.3d 1346, 1352 (9th Cir. 1996).

203 Transit Cas. Co. v. Trenwick Reinsurance Co., 659 F. Supp. 1346, 1350–53 (S.D.N.Y. 1987).

204 Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 676–83 (7th Cir. 1983).

205 *See, e.g.*, *Social Media Usage: 2005–2015*, Pew Rsch. Ctr. (Oct. 8, 2015), https://www.pewresearch.org/internet/2015/10/08/social-networking-usage-2005-2015/ [https://perma.cc/G46W-PB3J] ("Nearly two-thirds of American adults (65%) use social networking sites, up from 5% when Pew Research Center began systematically tracking social media usage in 2005."); Allison Shields, *2016 Social Media and Blogging*, Am. Bar Ass'n (Dec. 1, 2016) https://www.americanbar.org/groups/law_practice/publications/techreport/2016/social_media_blogging/ [https://perma.cc/KYS6-WYCF] (discussing ABA social media usage statistics dating back to 2013).

eral disclosure standards contained in these authorities are not easy to apply to social media activity, as social media and its reach were not contemplated when many of the standards were adopted. There is also a paucity of case law on the topic.[206] And while a few scholars have identified social media activity as an emerging topic to consider from a disclosure perspective, none have proposed concrete guidelines to promote the transparent and consistent sharing of information about arbitrators' social media activity.

A. *The Sparse Case Law Addressing the Adequacy of Social Media Disclosures by Arbitrators Does Not Provide Meaningful Guidance*

To date, there appear to be only three reported decisions in the United States—one from California and two from Texas—that address the impact of an arbitrator's failure to disclose social media

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206 The only cases that specifically address the adequacy of arbitral disclosures relating to social media activity are discussed in this Part of the Article. *See* Sebastian v. Wilkerson, No. 09-18-00223-CV, 2019 Tex. App. LEXIS 880, at *2 (Feb. 7, 2019); Morris v. O'Neill, No. B258467, 2015 Cal. App. Unpub. LEXIS 4464, at *2–3 (June 22, 2015). This thin precedent is likely attributable to the high bar for overturning arbitral decisions based on alleged disclosure deficiencies (which deters many losing parties from challenging an award), the difficulties inherent in independently ascertaining an arbitrator's social media connections, the evolving nature of arbitrators' familiarity with—and use of—social media platforms, and the lack of any clear standards in this area. *See supra* Part II; *see also* Campbell, *supra* note 103, at § 2[a] ("The grounds on which a federal district court may vacate an arbitration award are . . . much narrower than the grounds on which an appellate court can overturn the decision of a federal district court, and the courts have, correspondingly, shown little inclination to vacate arbitration awards on any ground, vacating awards in approximately 10% of the instances in which they have been challenged under the Act."); Davis, *supra* note 103, at 54 ("No matter how successful a challenger is in meeting these requirements, the timing of judicial review and the prevailing interpretation effectively ensure rejection of bias challenges in all but the most egregious cases."); Larry P. Schiffer, *Vacating an Arbitration Award for Evident Partiality Just Got Harder*, NAT'L L. REV. (June 8, 2018), https://www.natlawreview.com/article/vacating-arbitration-award-evident-partiality-just-got-harder [https://perma.cc/4U85-3NED] (discussing the "clear and convincing evidence" standard for demonstrating evident partiality on the part of a party-appointed arbitrator); *Control Who Can See What You Share*, FACEBOOK HELP CTR., https://www.facebook.com/help/1297502253597210 [https://perma.cc/8ECE-MDSA] (last visited Dec. 25, 2021) (allowing Facebook users to control who can view information they post online). As discussed throughout this Article, the reasons for adopting a clear, consistent framework for disclosure of arbitral social media activity go well beyond avoiding reversal of an arbitral award. Standardizing the approach to social media disclosure is also necessary to ensure a level playing field in the marketplace for arbitrator services (so that some arbitrators do not get unfairly penalized for making more fulsome social media disclosures than others) and to protect the credibility and integrity of the arbitral process in an era when its use as a dispute resolution mechanism is on the rise.

relationships on the validity of an arbitration award.[207] All three cases involved motions to vacate an award under a state law equivalent of the FAA's evident partiality standard. While the courts denied the motions to vacate in each case, their opinions do not provide arbitrators or arbitration parties with meaningful guidance in navigating the challenge of social media disclosure. In fact, as discussed below, there are strong arguments that the Texas cases were wrongly decided.

i. Morris v. O'Neill

Morris v. O'Neill,[208] a 2015 California Court of Appeals decision, appears to be the first judicial opinion to squarely consider the adequacy of an arbitrator's disclosures pertaining to his social media activity. *Morris* involved the alleged breach of a construction contract to remodel a home.[209] Morris alleged that O'Neill did poor work and failed to complete necessary remodeling tasks.[210] The parties reached an impasse when Morris withheld payment of O'Neill's invoice unless O'Neill guaranteed that Morris' concerns were addressed and remedied to her satisfaction.[211] Morris then filed a complaint with the California Contractors State License Board ("CSLB"), and the parties agreed to arbitrate their dispute through the CSLB's volunteer arbitration program.[212] The arbitrator, Thomas Craigo, was selected by the parties after they reviewed

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[207] While an exhaustive survey of decisions by foreign courts regarding the adequacy of arbitral social media disclosures is beyond the scope of this Article, we note that at least one decision by a French court also touches on this issue. *See* Suar Sanubari, *Arbitrator's Conduct on Social Media*, 8 J. INT'L DISP. SETTLEMENT 483, 485 (2017) (stating that *EURL Tesco v. Neoelectra SAS Group*, decided by Cour d'appel de Lyon in 2012, is "[o]ne of the first known cases involving a challenge based on a social media relationship"). However, that case was decided on other grounds and did not end up reaching the issue of whether the social media connections at issue (a Facebook friendship and a "like" of a Facebook page) should have been disclosed; *see also* Divij Jain, *Changing Paradigm of the Arbitrator's Duty to Remain Impartial in the Social Media Age?*, KLUWER ARB. BLOG (July 5, 2021), http://arbitrationblog.kluwerarbitration.com/2021/07/05/changing-paradigm-of-the-arbitrators-duty-to-remain-impartial-in-the-social-media-age/ [https://perma.cc/N9YJ-V64T] (discussing a recent Swiss case in which an arbitrator was found to have a conflict of interest because of the arbitrator's racist comments about Chinese nationals on social media).

[208] Morris v. O'Neill, 2015 Cal. App. Unpub. LEXIS 4464 (June 22, 2015).

[209] *Id.* at *2–3.

[210] *Id.*

[211] *Id.*

[212] *Id.* at *3–4. The CSLB regulates and licenses construction contractors in California. *About Us*, DEP'T CONSUMER AFFS. CONTRACTORS STATE LICENSE BD., https://www.cslb.ca.gov/About_Us/ [https://perma.cc/6FFR-GDG6] (last visited Nov. 15, 2021). Among other things, the CLSB allows consumers to file complaints against California contractors. *Filing a Construction Complaint*, DEP'T CONSUMER AFFS. CONTRACTORS STATE LICENSE BD., https://

the resumes of three potential arbitrator candidates.[213] Craigo's resume listed CNA, the insurance company that provided O'Neill's construction bond for the remodeling project, as a previous employer, but did not disclose that he inserted a link to his CNA employment in his LinkedIn profile.[214]

After Craigo entered an award in favor of O'Neill, Morris petitioned to vacate the award on multiple grounds under the California Arbitration Act ("CAA").[215] In addition to alleging that her contract with O'Neill violated public policy and that O'Neill coerced the award by undue means,[216] Morris alleged that Craigo failed to disclose that his prior employment relationship with CNA was featured on Craigo's LinkedIn profile page.[217] As Morris asserted in her petition, "On [Craigo's] site at LinkedIn, the arbitrator boldly displays the CNA logo next to his name. Clicking onto the logo links the person to the CNA Insurance website," which apparently represented Craigo's CNA experience.[218] Morris further asserted that this link was a "probable source of business for the arbitrator."[219] Morris presumably contended that she would not have selected Craigo had she known about his connection to CNA because it compromised his impartiality.[220]

The court found that Craigo adequately disclosed his previous employment by CNA in the resume the parties reviewed during the arbitrator selection process.[221] The court held that Craigo's failure to disclose the fact that his LinkedIn profile page connected to the CNA website did not violate the CAA's requirement that he disclose "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial."[222] According to the unanimous court, "unquestionably the arbitrator disclosed both his past employment relationship with CNA and his extensive professional his-

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www.cslb.ca.gov/Consumers/Filing_A_Complaint/ [https://perma.cc/TWF3-FCRY] (last visited Nov. 15, 2021).

213 *Morris*, 2015 Cal. App. Unpub. LEXIS 4464, at *5.

214 *Id.* at *25–26.

215 *Id.* at *7.

216 *Id.* at *1. Morris also asserted that the award was biased, that her consent to arbitrate was uninformed due to material misrepresentations by the entity administering the arbitration, and that Craigo exceeded his authority in granting an award to O'Neill. *Id.* at *28–30.

217 *Id.* at *25.

218 *Morris*, 2015 Cal. App. Unpub. LEXIS 4464, at *25–26.

219 *Id.* at *25.

220 *Id.* at *29.

221 *Id.* at *26–27.

222 *Id.* at *21, 27–28 (quoting CAL. CIV. PROC. CODE § 1281.9(a)).

tory as a claims professional with the insurance industry."[223] Craigo's inclusion of CNA in the experience section of his LinkedIn profile was not "competent evidence . . . that Craigo had any current or ongoing professional relationship with CNA or that he had engaged in discussions regarding prospective employment or service as a dispute resolution neutral with CNA or any other insurance company that required disclosure."[224] The court's ultimate conclusion was that "Morris's unsworn speculation regarding the CNA icon or logo next to Craigo's listing of his employment history on a LinkedIn page is an entirely inadequate basis upon which to vacate the arbitration award."[225]

ii. The Texas Facebook Cases

1. Prell v. Bowman

The next published decision to wrestle with the consequences of an arbitrator's alleged failure to disclose a social media connection was the Texas Court of Appeals' opinion in *Prell v. Bowman*.[226] This case involved a dispute between two competing realtors, Mike Bowman and John Prell, over who should receive credit for the sale of a property.[227] The dispute was arbitrated before a three-arbitrator panel, which found in favor of Bowman.[228] Prell and his realty company moved to vacate the award for evident partiality under the Texas Arbitration Act ("TAA") because one of the arbitrators, Bob Baker, failed to disclose his Facebook "friendship" with Bowman.[229] Baker claimed in his deposition that he did not have personal relationships with all of his Facebook friends, but rather added as a friend pretty much anyone whose name he recognized from the real estate business.[230]

The district court rejected Prell's evident partiality claim and confirmed the arbitral award.[231] On appeal, the Texas Court of

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223 *Id.* at *27.

224 *Morris*, 2015 Cal. App. Unpub. LEXIS 4464, at *27.

225 *Id.* at *27–28.

226 Prell v. Bowman, No. 05-17-00369-CV, 2018 Tex. App. LEXIS 3970 (Tex. App. June 4, 2018).

227 *Id.* at *1.

228 *Id.* at *2.

229 *Id.* at *1, 7. Prell also alleged that Baker was evidently partial because of his membership in a Facebook group, although no arbitration participant belonged to the same group. *Id.* at *7–8. Prell also sought vacatur on the grounds that the panel exceeded its powers and committed other errors. *Id.* at *1. Bowman moved to confirm the award. *Id.* at *1.

230 *Prell*, 2018 Tex. App. LEXIS 3970 at *8. Baker also stated in his deposition that he did not know any of Bowman's family members and had not been to any event with Bowman. *Id.*

231 *Id.* at *1.

Appeals found that no objective observer would find that the non-disclosure of the Facebook friendship between Baker and Bowman gave rise to a "reasonable impression" of evident partiality.[232] The Court of Appeals concluded: "[A] Facebook friendship 'provides no insight into the nature of the relationship.' . . . Some Facebook 'friends' have meaningful social relationships, some are bare acquaintances, and some have never even met."[233] The court found "no significant social relationship"[234] between Baker and Bowman and affirmed the lower court's confirmation of the award.[235]

2. Sebastian v. Wilkerson

Sebastian v. Wilkerson,[236] decided by the Texas Court of Appeals in 2019, also considered the failure of an arbitrator to disclose a Facebook connection to an arbitration participant.[237] The Sebastians contracted with Bliss Builders Inc. ("Bliss"), whose president was Weston Lee Wilkerson, for a residential property construction project.[238] The Sebastians filed suit against Bliss and Wilkerson, asserting fraud and other claims after allegedly discovering construction defects.[239] After the trial court granted the defendants' motion to compel arbitration,[240] the parties chose retired Texas District Court Judge Suzanne Stovall[241] to arbitrate their dispute.[242] Stovall entered an award in favor of the Sebastians in the amount of $191,047, plus interest.[243]

Wilkerson moved to vacate the award under the TAA on the grounds that Stovall did not disclose evidence of her partiality toward the Sebastians, including her Facebook friendship with counsel for the Sebastians.[244] The district court vacated the award

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232 *Id.* at *21. The court also did not find Baker's Facebook group membership to constitute evident partiality. *Id.* at *24.

233 *Id.* at *21 (quoting Youkers v. State, 400 S.W.3d 200, 206 (Tex. App. 2013)).

234 *Prell*, 2018 Tex. App. LEXIS 3970 at *21.

235 *Id.* at *32.

236 Sebastian v. Wilkerson, No. 09-18-00223-CV, 2019 Tex. App. LEXIS 880 (Tex. App. Feb. 7, 2019).

237 *Id.* at *6.

238 *Id.* at *1.

239 *Id.* at *1–2.

240 *Id.* at *2.

241 *Honorable Suzanne Stovall*, MONTGOMERY CNTY., TEX., https://cms1files.revize.com/montgomerycountytx/Stovall__Suzanne.pdf [https://perma.cc/27YA-J32U] (last visited Dec. 17, 2021).

242 *Sebastian*, 2019 Tex. App. LEXIS 880 at *2.

243 *Id.* at *3.

244 *Id.* at *5. Additionally, Wilkerson asserted that Stovall failed to disclose (1) campaign contributions she received from counsel for the Sebastians and her law firm; (2) purchases

based on its finding that an undisclosed Facebook friendship between an arbitrator and counsel for a party appearing before that arbitrator constitutes evident partiality.[245] The district court found that evident partiality was "established from the nondisclosure itself and [did] not require evidence of actual bias."[246]

The Texas Court of Appeals reversed, finding that the Facebook friendship would not "to an objective observer, create a reasonable impression of Stovall's partiality if not disclosed by Stovall."[247] The court added that "a Facebook friendship does not show the degree or intensity of a judge's relationship with a person, and thus, standing alone, provides no insight into the nature of a relationship."[248] The bottom line, according to the court, was that the existence of a Facebook friendship was not "substantial enough to require disclosure."[249]

B. *While Commentators Have Flagged Social Media Disclosures as an Emerging Issue, They Have Yet to Provide Meaningful Guidance in This Area Either*

i. 2012: Spotting the Issue

Almost a decade ago, Ruth Glick and Laura Stipanowich astutely predicted that the advent of social media would present disclosure challenges for arbitrators. In 2012, Glick and Stipanowich

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Stovall made from the Sebastians' business approximately fifteen years prior to the arbitration; and (3) Stovall's business relationships with an individual and entity who allegedly were connected to the underlying dispute. *Id.* at *5–6.

245 *Id.* at *6. The court did not provide any additional information about the timing, duration, or extent of the Facebook friendship, or any information about how Stovall used Facebook or social media in general. *Id.* at *5.

246 *Sebastian*, 2019 Tex. App. LEXIS 880 at *6.

247 *Id.* at *11.

248 *Id.* at *10–11 (*citing Youkers*, 400 S.W.3d at 206).

249 *Id.* at *11. The holdings in *Prell* and *Sebastian* are dubious for at least three reasons. First, while it is true that the existence of a Facebook friendship, standing alone, does not show the degree or intensity of a relationship, it does indicate the existence of at least some relationship and suggests a stronger connection than the arbitrator has with parties and counsel who are not her Facebook friends. Second, the failure to disclose the existence of a Facebook friendship precludes the parties and counsel from inquiring about the degree or intensity of the relationship—which is a fair inquiry in an arbitrator selection process. The arbitrators in these matters were, of course, free to explain to the parties why they thought their virtual friendships with arbitration participants were not significant from an impartiality perspective. Third, the disclosure standard arising out of the Code of Ethics and *Commonwealth Coatings* focuses not on the actual degree or intensity of a relationship, but the impression of bias it creates. *See supra* Part II.

surveyed the disclosure standards articulated in the FAA, UAA, RUAA, CAA, Code of Ethics, AAA Commercial Rules, and *Commonwealth Coatings*—and found none that provided concrete guidance to arbitrators on social media disclosures.[250] As discussed in Part II of this Article, these disclosure provisions have not been revised to address arbitral social media usage in the years since Glick and Stipanowich examined them.

In the absence of guidance on social media disclosures in the alternative dispute resolution arena, Glick and Stipanowich turned to state judicial ethics opinions involving social media activity by judges as a way to provide at least some potential guidance to arbitrators.[251] But that exercise did not bear fruit either, both because the issue was still somewhat nascent in the world of judicial ethics and because there was no consensus among the ethicists about how judges should engage with social media. Judicial ethics opinions in some states, including New York and California, allowed judges to "friend" lawyers under certain circumstances.[252] Opinions from other states, such as Florida and Oklahoma, recommended judges not "friend" lawyers to avoid the appearance of bias or impropriety.[253] Even had the universe of ethics opinions on judicial social media activity been more robust and consistent, it seems unlikely that it would have provided meaningful guidance to arbitrators making decisions regarding what to disclose about their social media activity.[254]

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250 Glick & Stipanowich, *supra* note 23.

251 *Id.* at 25–26.

252 *Id.* ("In New York, the State Judicial Advisory Committee on Judicial Ethics concluded that judges are not prohibited from joining a social network, but it cautioned them to use their good judgment to determine what they do on these networks."). The ethics opinions equate "friending" with connecting with other users on any social media platform. *See* Cal. Judges Ass'n Jud. Ethics Comm., Op. 66 (2010); N.Y. Advisory Comm. On Jud. Ethics, Op. 08-176 (2009).

253 Glick & Stipanowich, *supra* note 23, at 25 ("An ethics opinion by the Florida Supreme Court Judicial Advisory Committee criticized the practice of judges "friending" lawyers, concluding that doing so violated the Code of Judicial Conduct."). The Florida ethics opinion primarily considers the issue of "friending" in the context of Facebook but includes general terms such as "social network." Fla. Sup. Ct. Jud. Ethics Advisory Comm., Op. 2010-06 (2010). An Oklahoma ethics opinion treats "friending" broadly to include any "social accounts." Okla. Jud. Ethics Advisory Panel, Jud. Op. 2011-3 (2011).

254 The judicial ethics opinions did not primarily address the issue of disclosure of social media activity, but rather whether—and, if so, how—judges should use social media to make connections and build relationships in the first place. *See, e.g.*, Cal. Judges Ass'n Jud. Ethics Comm., Op. 66 (2010). Moreover, there are many reasons why arbitrators are differently situated than judges for purposes of deciding what to disclose to the parties and counsel that appear before them. First, parties and their counsel typically choose their arbitrators, whereas they are usually assigned to a judge without any input. *See* MENKEL-MEADOW ET AL., *supra* note 2. Therefore, disclosures by arbitral candidates during the selection process are a critical feature of an arbitra-

Since Glick and Stipanowich did not have the benefit of any judicial decisions addressing alleged deficiencies in arbitrators' social media disclosures, they looked to case law involving (1) traditional social connections between arbitrators and the parties and lawyers who appeared before them; and (2) the vacatur of arbitral awards based on post-award Internet searches.[255] The authors hypothesized that non-lawyer arbitrators were likely to have more social relationships and social media connections within their field of expertise than lawyer arbitrators, but opined that social media disclosure obligations should be applied uniformly to all arbitrators, regardless of whether they were attorneys.[256] Unable to extract concrete guidance from the sources they consulted, Glick and Stipanowich recommended that arbitrators monitor and disclose

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tion that is typically absent from a judicial proceeding. Second, while judges may occasionally make voluntary disclosures in the course of deciding whether to recuse themselves from a case in which they have an actual or apparent conflict of interest, unlike arbitrators, they typically are not required to make any disclosures prior to the commencement of a proceeding. *See* ABA Comm. On Ethics & Pro. Resp., Formal Op. 488 (2019) (describing factors that might cause a judge to recuse herself from a case). Third, the standards for disqualifying arbitrators and overturning their awards based on conflicts of interest are different than those applicable to judges. *Compare supra* Part II, *with* MODEL CODE OF JUD. CONDUCT r. 2.11 (AM. BAR ASS'N 2020) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[sic][.]"). Fourth, many arbitrators must compete for business from lawyers and disputants while judges do not. *See* Helm, *supra* note 20 at 667. Fifth, while being a judge is typically a full-time job, many arbitrators maintain law practices or other professional activities alongside their work in the alternative dispute resolution field. *Compare* MODEL CODE OF JUD. CONDUCT r. 3.10 (AM. BAR ASS'N 2020) (forbidding a judge from practicing law), *with* AM. ARB. ASS'N, QUALIFICATION CRITERIA FOR ADMITTANCE TO THE AAA NATIONAL ROSTER OF ARBITRATORS, https://www.adr.org/sites/default/files/document_repository/Qualification_Criteria_for_Admittance_to_the_AAA_National_Roster_of_Arbitrators.pdf [https://perma.cc/5HHV-VG4E] (last visited Dec. 17, 2021) (requiring prospective arbitrators to commit time when selected as an arbitrator, but not requiring arbitrators to discontinue their law practices). Thus, arbitrators have a greater need to engage with social media for professional reasons than judges do.

255 Glick & Stipanowich, *supra* note 23, at 26–29. For example, the authors discussed a Texas case in which the court vacated an award because the arbitrator failed to disclose that he and an attorney who appeared before him in an arbitration were friends who had taken family trips together. *Id.* at 26–27 (discussing Karlseng v. Cooke, 286 S.W.3d 51 (Tex. App. 2009)). Successful motions to vacate awards because of undisclosed information discovered through post-award Internet searches included challenges to an arbitrator's failure to disclose his legal practice focus (Benjamin, Weill & Mazer v. Kors, 195 Cal. App. 4th 40 (2011)), and an undisclosed change in the arbitrator's law firm employment (Amoco D.T. Co. v. Occidental Petroleum Corp., 343 S.W.3d 837, 842 (Tex. App. 2011)). Courts decided against vacatur in cases involving non-disclosure of the arbitrator's German-Jewish heritage (Rebmann v. Rohde, 196 Cal. App. 4th 1283 (2011)), previous sexually suggestive remarks (Haworth v. Superior Ct., 235 P.3d 152 (Cal. 2010)), and involvement in an ethics controversy a decade before the arbitration proceeding (Lagstein v. Certain Underwriters at Lloyd's, 607 F.3d 634 (9th Cir. 2010)).

256 Glick & Stipanowich, *supra* note 23, at 28.

their social media connections to avoid the appearance of a conflict of interest, and in view of the likelihood that losing parties would conduct post-award Internet searches in an effort to discover evidence of impropriety.[257] They also proposed generally that "[a]rbitrators should make disclosure of both professional and personal online activity that has any substantial connection to the arbitration or its participants."[258] Glick and Stipanowich further recommended that arbitrators separate their personal and professional relationships between social media platforms.[259]

ii. 2012–Present: A Trickle of Additional General Advice

In the years following this initial foray into the impact of social media activity on arbitral disclosures, a handful of other commentators have acknowledged the same challenges identified by Glick and Stipanowich and have offered similarly general advice to arbitrators. As a prominent construction law treatise recognizes, the capacity of social media to "create unknown or unanticipated contacts or relationships" complicates the arbitral disclosure equation.[260] The treatise recommends that arbitrators disclose any known social media connections to parties and counsel and refrain from violating their confidentiality responsibilities on social media platforms.[261] It also suggests providing a "general disclosure statement" describing the arbitrator's participation in social media platforms to the parties during the arbitral selection process.[262] In a similar vein, the *Texas Construction Law Manual* suggests that arbitrators include in arbitration clauses a waiver that would preclude a party from objecting to the arbitrator based on her social media participation.[263]

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257 *Id.* at 29.

258 *Id.* at 25. For example, "[i]f a party to a pending case (or its counsel) were linked to an arbitrator via a professional networking site (e.g., LinkedIn, or industry e-mail mailing lists, or blogs), and the arbitrator was aware of the connection, disclosure would be required if a person aware of the facts could reasonably conclude that the party (or its counsel) was in a position to influence the arbitrator." *Id.* at 27.

259 *Id.* at 26.

260 3 CONSTRUCTION LAW ¶ 12.05 (Steven G.M. Stein ed., 2020).

261 *Id.* (identifying Facebook, Twitter, LinkedIn, and LISTSERVs as examples of where social media connections may arise).

262 *Id.*

263 JOE F. CANTERBURY, JR. & ROBERT J. SHAPIRO, TEXAS CONSTRUCTION LAW MANUAL § 13:21 (3d ed. 2019). The proposed waiver provision would provide, in pertinent part, "that the arbitrator shall not be objected to or disqualified solely based on participation in . . . social media, nor shall such grounds be available for attempting to vacate the award." *Id.*

A few other organizations have also weighed in, but again, not in a way that adds much clarity or predictability to the social media disclosure dilemma. As discussed above, the IBA took the curious position in 2014 that social media relationships between arbitrators and arbitration parties do not need to be disclosed, regardless of their nature or intensity.[264] In 2014, the College of Commercial Arbitrators ("CCA") published a Guidance Note regarding the impact of social media on arbitration practices. [265] In recognition of the fact that little guidance exists outside of judicial ethics opinions, this Guidance Note proposes best practices for arbitrators facing new issues created by social media.[266] The CCA's general advice is that arbitrators who choose to engage with social media must do so in accordance with their duties as neutrals, which include the duties to be impartial and independent.[267] Although joining and connecting to others on social media platforms does not in itself violate any arbitral duties, the Guidance Note (contrary to the IBA Guidelines) makes clear that social media relationships could create ethical risks and trigger disclosure obligations.[268] With respect to the disclosure of social media activity, the Guidance Note does not suggest that arbitrators should disclose facts about their general engagement with social media, such as the particular platforms they use and the specific content they post.[269] Rather, the CCA offers the basic advice that arbitrators should disclose "any use of social media that might give rise to justifiable doubt concerning the neutral's independence or impartiality."[270] Importantly, the Guidance Note recognizes that the scope of disclosure should include not only social media relationships of which the arbitrator is already aware, but also those she can identify with "reasonable investiga-

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264 IBA GUIDELINES, *supra* note 15, at 25 (The IBA Guidelines do not provide any explanation or rationale for this recommendation.).

265 JAMES M. GAITIS ET AL., THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 613 (4th ed. 2017).

266 *Id.* at 613–14 (The Guidance Note defines social media as "Internet-based electronic virtual communities, networks, and websites used by participants to create and share information, which sometimes require an individual to affirmatively join and accept or reject connection with particular individuals or groups."); *Id.* at 616 (The CCA includes Facebook, Twitter, LinkedIn, photo sharing sites, and listservs with certain capacities as examples of social media.).

267 *Id.* at 616.

268 *Id.* at 618–19 (As an example, the Guidance Note recommends that, when considering the risks of social media engagement, arbitrators should consider how the platform uses information and how they can (or cannot) control access to their postings or personal information.).

269 *Id.* at 620.

270 GAITIS ET AL., *supra* note 265, at 619.

tion."[271] It further suggests that the use of a social media disclaimer, like those discussed above,[272] does not obviate the need for an arbitrator to disclose a social media relationship that could be viewed as impacting impartiality when the arbitrator has actual or constructive knowledge of the relationship.[273] Finally, the Guidance Note recognizes that the ongoing nature of an arbitrator's duty of disclosure could require her to disclose social media activity that occurs during the arbitration.[274]

A few years later, in 2017, the CCA revised the Guidance Note's advice on social media's "new species of preclusive relationships."[275] With respect to general social media usage, the CCA modified the advice it offered in the 2014 Guidance Note by recommending that arbitrators routinely disclose the particular social media platforms they use, the nature of that use, and any information regarding their usage of the platform that may influence their partiality.[276] As to specific social media connections, the CCA continued to advise arbitrators to be guided by their assessment of the nature of the relationship behind each social media connection.[277] The CCA suggested that arbitrators should disclose social media connections that "would have given rise to an obligation of disclosure if it had not arisen on social media."[278] And the CCA continued to advise arbitrators that they may be required to conduct a

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271 *Id.* (A "reasonable investigation" is required "if the relationship was a relationship that would have given rise to an obligation of disclosure if it were not on social media and if the applicable laws or rules impose upon the neutral the obligation to make a reasonable investigation under the circumstances.").

272 *See* 3 CONSTRUCTION LAW ¶ 12.05 (Ruth Glick presented the following example of a general social media disclaimer at the 2015 American Bar Association Dispute Resolution Conference: "I use a number of online professional networks such as LinkedIn and group email systems. I generally accept requests from other professionals to be added to my LinkedIn profile, but I do not maintain a database of all these professional contacts and their connections, which now number over 500. LinkedIn also features endorsements, which I do not seek and have no control over who may endorse me for different skills. The existence of such links or endorsements does not indicate any depth of relationship other than an online professional connection, similar to connections in other professional organizations."); Joan D. Hogarth, *So Yesterday: Reconciling the Arbitrator Code of Ethics with a Seemingly Amorphous Social Media Environment*, 66 FED. LAW. 12, 13 (2019), https://www.fedbar.org/wp-content/uploads/2019/01/Resolution-Resources-pdf-1.pdf [https://perma.cc/8H8V-8WSH].

273 GAITIS ET AL., *supra* note 265, at 620–21.

274 *Id.* at 621–22 (For example, an arbitrator should disclose any social media communications or connection attempts by parties, counsel, or witnesses involved in an arbitration during the arbitration proceeding.).

275 *Id.* at 30.

276 *Id.* at 31.

277 *Id.*

278 *Id.*

reasonable investigation of their social media connections to comply with their disclosure obligations, but did not suggest what that investigation should entail.[279]

Also in 2017, Suar Sanubari proposed a basic framework for arbitrator social media disclosures centered on the putative distinction between personal and professional social networking platforms.[280] He treated social networks that focus primarily on creating conversations and communications between users, like Facebook and Twitter, as "personal" social networks.[281] He considered social networks that place greater importance on functions such as building identity through the creation of a robust user profile, liked LinkedIn, to be "professional" social networks.[282] Sanubari's proposal would essentially exempt professional social networking connections from disclosure and require arbitrators only to disclose personal social networking connections.[283] Sanubari hypothesized:

> Doubts on independence and impartiality are more likely to arise if there is an online relationship on a general social network site, since it may reflect personal nuance albeit the relationship could be of professional nature. However, if the connection is on a professional social network site, the nuance is strictly professional.[284]

The application of this framework would not require disclosure of LinkedIn connections but would require an arbitrator to disclose if a Facebook friend was a participant in the arbitration or if the arbitrator and an arbitration participant follow each other on

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279 *Id.*

280 Sanubari, *supra* note 207, at 493.

281 *Id.* at 489–91 (Sanubari relied on an earlier functional analysis of social media platforms to inform his decisions about how to define and populate the personal and professional categories.); *see also*, Jan H. Kietzmann et al., *Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media*, 54 BUS. HORIZONS 241 (2011), https://www.researchgate.net/publication/227413605_Social_Media_Get_Serious_Understanding_the_Functional_Building_Blocks_of_Social_Media [https://perma.cc/MP4PU-VHLB].

282 Sanubari, *supra* note 207, at 493 (One of the flaws in Sanubari's analysis is that the functionality of social media platforms is not static. As an example, Sanubari described LinkedIn as not having an "instant messaging feature," although LinkedIn does (at least in 2021) allow for synchronous messaging communications.); *see also LinkedIn Messaging – Overview*, LINKEDIN HELP, https://www.linkedin.com/help/linkedin/answer/61106 [https://perma.cc/M32S-9ZPS] (last visited Nov. 15, 2021).

283 Sanubari, *supra* note 207, at 493 (Sanubari couched his proposal in the framework of the IBA Guidelines, recommending that personal social networking connections be placed on the Orange List and professional social networking connections on the Green List.); *see supra* notes 79–85 and accompanying text (discussing the IBA Guidelines' Red, Orange, and Green Lists).

284 Sanubari, *supra* note 207, at 493.

Twitter.[285] It does not appear that Sanubari's proposal has been adopted or cited with approval.[286]

IV. An Analysis of the Social Media Landscape From the Arbitral Disclosure Perspective

The disclosure guidelines set forth in this Article are informed by two lines of research regarding social media. First, in order to ensure that the guidelines are comprehensive and durable, we consider research that catalogs social media platforms and sorts them into categories. Rather than make recommendations on a platform-by-platform basis, the guidelines align with research organizing social media platforms into groups based on their fundamental characteristics and purposes. This ensures that the guidelines will

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[285] *Id.* ("Twitter is more delicate since it is a micro-blogging platform with social network features. A Twitter connection is based on a 'follow'. It is possible that a user follows another user without a reciprocal follower and interact only by 'replies', 'mentions' and 'retweets.' However, when two users follow each other, they can engage in private conversations via a 'direct message' feature that also represents the 'conversations' functional building block. It is also reasonable to assume that two users that do not follow each other would not have frequent interactions. Therefore, disclosure would only need to be made if an arbitrator and a party or a counsel 'follow' each other.").

[286] *Id.* Sanubari's proposal is flawed for several reasons. First, trying to draw a distinction between personal and professional social media platforms for disclosure purposes is at odds with the authorities that expressly require arbitrators to disclose personal and professional connections to the arbitration participants. *See, e.g.*, The Code of Ethics for Arbitrators in Commercial Disputes, *supra* note 9, at 4 [Canon II(A)(2)], (requiring arbitrators to disclose "[a]ny known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties"). Second, the lines between personal and professional social media usage are too blurry to definitively categorize most social media platforms. For example, many Facebook and Twitter users engage with those platforms for professional purposes and there is a personal/social aspect to many LinkedIn relationships. Third, in the world of arbitration, which largely takes place in a private commercial marketplace, professional connections (which can result in repeat business and revenue to the arbitrator) may be just as, if not more, important to an arbitrator than personal connections. And fourth, it is risky to prescribe disclosure rules based on the functionality of social media platforms because their functionality is constantly changing and evolving; *see* Mark R. Joelson, *A Critique of the 2014 International Bar Association Guidelines on Conflicts of Interest in International Arbitration*, 26 Am. Rev. Int'l Arb. 483, 490 (2015), https://www.cailaw.org/media/files/ITA/ConferenceMaterial/2017/itawkshp/joelson-critique.pdf [https://perma.cc/USK5-UXGJ] (arguing that it is a "thorny matter" to disentangle social media friendships and business associations and, therefore, that both types of relationships should be disclosed to arbitration parties "for their consideration and evaluation"); *see infra* Part V (While we agree with a few of Sanubari's suggestions—namely that Facebook friendships and certain Twitter connections with the participants in an arbitration should be disclosed—we do not believe that the personal/professional distinction is useful because the parties to an arbitration justifiably would want to be informed about both personal and professional connections.).

remain viable as individual platforms come and go, and existing platforms enhance or otherwise alter their functionality. Second, based on studies examining patterns of social media usage, the guidelines focus on social media categories that are most likely to be used by arbitrators.

A. *Categorizing Social Media Platforms*

While there is no single, commonly accepted meaning of "social media,"[287] social media are generally defined to include the various ways users can connect, create, and share content on the Internet.[288] Social media encompass all "web-based applications and interactive platforms that facilitate the creation, discussion, modification, and exchange of user-generated content."[289] A social media platform is "a web-based technology that enables the development, deployment and management of social media solutions and services."[290] A social media platform "provides the ability to

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[287] *See, e.g.*, Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 61 (2010), https://www.researchgate.net/publication/222403703_Users_of_the_World_Unite_The_Challenges_and_Opportunities_of_Social_Media [https://perma.cc/EB77-4CHD] ("[T]here seems to be confusion among managers and academic researchers alike as to what exactly should be included under this term."); Jonathan A. Obar & Steve Wildman, *Social Media Definition and the Governance Challenge: An Introduction to the Special Issue*, 39 TELECOMMS. POL'Y 745, 746 (2015), https://www.researchgate.net/publication/315455917_Social_Media_Definition_and_the_Governance_Challenge_An_Introduction_to_the_Special_Issue [https://perma.cc/Q3YF-XCMG] (describing the challenges of defining social media in a dynamic climate); Mariam El Ouirdi et al., *Social Media Conceptualization and Taxonomy: A Lasswellian Framework*, 9 J. CREATIVE COMMC'NS 107, 107 (2014), https://www.academia.edu/25699804/Social_Media_Conceptualization_and_Taxonomy_A_Lasswellian_Framework [https://perma.cc/R47N-GGTM] (compiling various social media definitions used in academic papers).

[288] *Social Media*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[289] Thomas Aichner & Frank Jacob, *Measuring the Degree of Corporate Social Media Use*, 57 INT'L J. MKT. RSCH. 257, 259–60 (2015), https://www.researchgate.net/publication/283073224_Measuring_the_Degree_of_Corporate_Social_Media_Use [https://perma.cc/3KU2-QKMR] (citing Kaplan & Haenlein, *supra* note 287, at 59–68).

[290] *Social Platform*, TECHOPEDIA (Apr. 26, 2017), https://www.techopedia.com/definition/23759/social-platform [https://perma.cc/7643-6JVG]; *see also* Kaplan & Haenlein, *supra* note 287, at 60–61 ("Web 2.0 is a term that was first used in 2004 to describe a new way in which software developers and end-users started to utilize the World Wide Web; that is, as a platform whereby content and applications are no longer created and published by individuals, but instead are continuously modified by all users in a participatory and collaborative fashion.").

create social media websites and services."[291] The Internet hosts a variety of social media platforms.[292]

Although Facebook is ensconced as an anchor in the current social media landscape,[293] the environment is fluid.[294] As developers create and update social media platforms, users follow suit by joining new platforms and abandoning old ones.[295] To help organize this evolving space, scholars have sorted the social media platforms into categories—based on their functionality, purpose, and core characteristics—that are sufficiently flexible to accommodate the modification of existing platforms and the entry of new ones.[296] Using this model, social media platforms can be grouped into at least the following nine buckets: (1) social networks; (2) business networks; (3) blogs; (4) microblogs; (5) forums; (6) review platforms; (7) social bookmarking platforms; (8) photo-sharing platforms; and (9) video-sharing platforms.[297] This classification scheme informs the disclosure guidelines proposed in this Article.

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291 *Social Platform*, *supra* note 290.

292 *See* Obar & Wildman, *supra* note 287, at 746 ("Social media technologies include a wide range of PC and mobile-based platforms that continue to be developed, launched, re-launched, abandoned and ignored every day in countries throughout the world and at varying levels of public awareness.").

293 Statista Research Department, *Facebook: Number of Monthly Active Users Worldwide 2008-2021*, STATISTA (Nov. 1, 2021), https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide [https://perma.cc/9SCM-MJ9A] ("With roughly 2.89 billion monthly active users as of the second quarter of 2021, Facebook is the biggest social network worldwide. In the third quarter of 2012, the number of active Facebook users surpassed one billion, making it the first social network ever to do so. Active users are those who have logged into Facebook during the past 30 days.").

294 *See, e.g.*, Obar & Wildman, *supra* note 287, at 746 (discussing how social media platforms are updated, changed, and abandoned).

295 *Id.*; *see also, e.g.*, Jack Brewster, *As Twitter Labels Trump Tweets, Some Republicans Flock to New Social Media Site*, FORBES (June 26, 2020, 11:29 AM), https://www.forbes.com/sites/jackbrewster/2020/06/25/as-twitter-labels-trump-tweets-some-republicans-flock-to-new-social-media-site [https://perma.cc/E24S-XWG3]; John Herrman, *How TikTok Is Rewriting the World*, N.Y. TIMES (Mar. 10, 2019), https://www.nytimes.com/2019/03/10/style/what-is-tik-tok.html [https://perma.cc/H2DF-6MTN] ("'Fear of missing out' is a common way to describe how social media can make people feel like everyone else is part of something—a concert, a secret beach, a brunch—that they're not. A new wrinkle in this concept is that sometimes that 'something' is a social media platform itself.").

296 Kaplan & Haenlein, *supra* note 287, at 61 ("[I]t is important that any classification scheme takes into account applications which may be forthcoming.").

297 Aichner & Jacob, *supra* note 289, at 259. This Article is limited to consideration of these nine social media categories because they are most relevant to the arbitral disclosure issue. *See infra* Part IV(B). Professors Aichner & Jacob identify still other social media categories that are beyond the scope of this Article. Aichner & Jacob, *supra* note 289, at 259 (discussing collaborative online content-sharing sites like Wikipedia). While other classification schemes exist, such as the schemes used by Sanubari (Sanubari, *supra* note 207, at 488–89), and Kaplan, and Haenlein

Social networks are social media platforms, like Facebook, where individuals create profiles to share content and connect with others.[298] Facebook users can "friend" other users,[299] "like" or "follow" pages of businesses or public figures,[300] share photos of themselves and their friends,[301] and generally share information about themselves on their pages.[302] The now-defunct Google+[303] and Myspace[304] are other examples of social networks. Social networks allow users to stay connected to others and remain abreast of the latest news in the circles they create and join.[305] Users of social networks, like Facebook, often can choose to allow anyone to view their content or to limit the users of the platform with whom they share information.[306] Some currently popular social networks, like WhatsApp and Snapchat, focus primarily on individual or group messaging and do not (at least currently) offer users the ability to develop detailed profiles.[307]

(Kaplan & Haenlein, *supra* note 287, at 62–64), we believe that the Aichner/Jacob framework is the most useful for purposes of the disclosure guidelines proposed in this Article.

298 Aichner & Jacob, *supra* note 289, at 259. Social networks can also be defined as "web-based services that allow individuals to: (1) construct a public or semi-public profile within a bounded system; (2) articulate a list of other users with whom they share a connection; and (3) view and traverse their list of connections and those made by others within the system." Sanubari, *supra* note 207, at 489 (citing Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUT. MEDIATED COMMC'N 210, 211 (2007)).

299 *Friending*, FACEBOOK HELP CTR., https://www.facebook.com/help/1540345696275090 [https://perma.cc/V9E7-DKQF] (last visited Sept. 27, 2021).

300 *Pages*, FACEBOOK HELP CTR., https://www.facebook.com/help/282489752085908 [https://perma.cc/6M5N-VYFV] (last visited Sept. 27, 2021).

301 *Your Photos and Videos*, FACEBOOK HELP CTR., https://www.facebook.com/help/1069521513115444 [https://perma.cc/W835-XVYV] (last visited Sept. 27, 2021).

302 Ashwini Nadkarni & Stefan G. Hofmann, *Why Do People Use Facebook?*, 52 PERSONALITY & INDIVIDUAL DIFFERENCES 243, 243 (2012) ("Users can add basic facts about themselves, such as home town, add contact information, personal interests, job information and a descriptive photograph.").

303 Chris Welch, *Google Begins Shutting Down Its Failed Google+ Social Network*, VERGE (Apr. 2, 2019, 1:23 PM), https://www.theverge.com/2019/4/2/18290637/google-plus-shutdown-consumer-personal-account-delete [https://perma.cc/5HNR-GX9G]; *see also* Aichner & Jacob, *supra* note 289, at 259 (listing Google+ as a social network).

304 Niraj Chokshi, *Myspace, Once the King of Social Networks, Lost Years of Data from Its Heyday*, N.Y. TIMES (Mar. 19, 2019), https://www.nytimes.com/2019/03/19/business/myspace-user-data.html [https://perma.cc/A9G7-8E9G].

305 Daniel Nations, *Why Should You Use Facebook?*, LIFEWIRE (Feb. 28, 2020), https://www.lifewire.com/why-facebook-3486520 [https://perma.cc/UDS5-96S8].

306 *See Control Who Can See What You Share*, *supra* note 206 (informing users how to change privacy settings).

307 *About WhatsApp*, WHATSAPP, https://www.whatsapp.com/about [https://perma.cc/TDV5-UPCF] (last visited Dec. 17, 2021); *About Profiles*, SNAPCHAT SUPPORT, https://support.snapchat.com/en-US/a/about-profiles [https://perma.cc/8MEG-4CLV] (last visited Dec. 17, 2021).

Business networks, such as LinkedIn, allow individual users to connect with professionals, search for employment, recruit employees, and share information geared towards building a professional brand.[308] Examples of other business networks include Plaxo,[309] now discontinued, and Xing,[310] a German platform. Business network users build individual profiles, which include their employment history,[311] and grow their business contacts within their areas of interest and expertise, such as the legal field.[312]

Blogs allow individuals or organizations to publish reflections or other content and other users to comment on those posts.[313] Blogs can be hosted on a website like a WordPress site[314] or a platform like Medium.[315] Once considered "the cheapest, fasting publishing tool ever invented,"[316] blogs are fighting to stay relevant in today's social media landscape, in large part because of the popu-

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308 *See* Aichner & Jacob, *supra* note 289, at 259 ("Individuals use business networks to establish and maintain professional contacts."); *see also* Sarah Rycraft, *7 Benefits of Using LinkedIn*, LINKEDIN (May 24, 2018), https://www.linkedin.com/pulse/7-benefits-using-linkedin-sarah-rycraft [https://perma.cc/FR72-27CX] ("A professionally written LinkedIn profile allows you to create an online professional brand which can help open doors to opportunities and networks that you may not have been aware of without the help of social media.").

309 Todd Spangler, *Comcast Is Shutting Down Plaxo, an Early Social Network*, VARIETY (Dec. 4, 2017, 7:17 AM), https://variety.com/2017/digital/news/comcast-plaxo-shutting-down-social-network-1202629580 [https://perma.cc/TEP7-FFZ5].

310 Aichner & Jacob, *supra* note 289, at 259; Ingrid Lunden, *German LinkedIn Rival Xing Is Rebranding as 'New Work,' Acquires Recruitment Platform Honeypot for Up to $64M*, TECHCRUNCH (Apr. 1, 2019, 11:17 AM), https://techcrunch.com/2019/04/01/german-linkedin-rival-xing-is-rebranding-as-new-work-acquires-recruitment-platform-honeypot-for-up-to-64m [https://perma.cc/QH2F-6883].

311 *Manage Your Work Experience Section*, LINKEDIN HELP CTR., https://www.linkedin.com/help/linkedin/answer/1646/add-edit-or-remove-a-position-in-your-profile-s-experience-section [https://perma.cc/PFG6-ZKHR] (last visited Dec. 17, 2021).

312 *See* Allison Shields, *2017 Social Media and Blogging*, AM. BAR ASS'N (Dec. 1, 2017), https://www.americanbar.org/groups/law_practice/publications/techreport/2017/social_media_blogging [https://perma.cc/979V-9YEU] ("Close to half of attorneys in firms of less than 50 lawyers report that their firms use LinkedIn, and firms of 100+ continue to have the largest firm presence on LinkedIn, between 63–73%.").

313 Aichner & Jacob, *supra* note 289, at 259; *see also* KATHRYN OSSIAN, SOCIAL MEDIA AND THE LAW 1–4 (6th ed. 2019).

314 *Create a Blog and Share Your Voice in Minutes*, WORDPRESS, https://wordpress.com/create-blog [https://perma.cc/BK6L-XDKF] (last visited Dec. 17, 2021).

315 Alexis C. Madrigal, *What Is Medium?*, ATLANTIC (Aug. 23, 2013), https://www.theatlantic.com/technology/archive/2013/08/what-is-medium/278965 [https://perma.cc/J5QF-QDNR].

316 Jenna Wortham, *After 10 Years of Blogs, the Future's Brighter Than Ever*, WIRED (Dec. 17, 2007, 7:45 PM), https://www.wired.com/2007/12/after-10-years-of-blogs-the-futures-brighter-than-ever [https://perma.cc/26ZZ-EB9A] (quoting Jeff Jarvis, professor at the City University of New York's Graduate School of Journalism).

larity of the microblog.[317] Microblog platforms, like Twitter, often limit the character count in posts on the platform.[318] Twitter is commonly used for both personal and professional purposes.[319]

Forums enable social media users to communicate with other individuals about specific topics in public conversation threads.[320] Reddit[321] and Quora[322] are popular social media forums. Social media review platforms allow users to write and read reviews about professional services or products.[323] Lawyers and clients may use platforms like Martindale or Avvo to review or research providers of legal services.[324]

Social bookmarking platforms such as Pinterest and Delicious (now defunct) allow users to save links and photos from the Internet, in order to compile them for personal use and share with others.[325] Pinterest users are able to create their own "pins" from a website link or a photo and share them with other users through "boards" organized around various topics.[326] Other users can then add those pins to their boards.[327]

Photo-sharing and video-sharing platforms have similar features, namely allowing users to upload photos or videos onto the platform, where other users can then view the uploaded content

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317 *See, e.g.*, Farah Mohammed, *The Rise and Fall of the Blog*, JSTOR DAILY (Dec. 27, 2017), https://daily.jstor.org/the-rise-and-fall-of-the-blog [https://perma.cc/39AA-3Q4E] ("Blogs are still important to those invested in their specific subjects, but not to a more general audience, who are more likely to turn to Twitter or Facebook for a quick news fix or take on current events.").

318 Aichner & Jacob, *supra* note 289, at 259–60.

319 Matt Reed, *Why Tweet?*, INSIDE HIGHER ED. (Mar. 28, 2018), https://www.insidehighered.com/blogs/confessions-community-college-dean/why-tweet [https://perma.cc/2VWA-MCBC] (discussing professional uses of Twitter).

320 Aichner & Jacob, *supra* note 289, at 260.

321 *See* Mike Isaac, *Reddit Issues First Transparency Report*, N.Y. TIMES: BITS (Jan. 29, 2015, 1:00 PM), https://bits.blogs.nytimes.com/2015/01/29/reddits-issues-first-transparency-report [https://perma.cc/H9G4-KX7C] (describing Reddit as a "hugely popular Internet message board").

322 *See* Quentin Hardy, *Quora and the Search for Truth*, N.Y. TIMES: BITS (Feb. 9, 2014, 7:45 AM), https://bits.blogs.nytimes.com/2014/02/09/quora-and-the-search-for-truth [https://perma.cc/XZV5-RQ3H] (referring to Quora as a "question-and-answer website" that "organiz[es] knowledge into categories about which people can have discussions").

323 Aichner & Jacob, *supra* note 289, at 260.

324 *See* Shields, *supra* note 312 (discussing survey results of lawyer and law firm social media usage including usage of Martindale and Avvo).

325 Aichner & Jacob, *supra* note 289, at 259–60.

326 *Create and Edit*, PINTEREST HELP CTR., https://help.pinterest.com/en/topics/create-and-edit [https://perma.cc/2KBS-5JRS] (last visited Nov. 15, 2021).

327 *Id.*

and comment on the photo or video.[328] Photographers can use the photo-sharing platform Flickr to post and store their photos.[329] YouTube is an example of a video-sharing platform, where users upload video content to share with other users on channels.[330] For example, Crash Course is a YouTube channel offering educational videos on topics such as history and chemistry.[331] The hugely popular (and politically controversial) TikTok is also a video-sharing platform.[332]

Not all social media platforms fit neatly into a single bucket. The multi-faceted functionality of some of the more successful social media platforms could place them in multiple categories, depending on how they are being used. For example, Facebook is a social network that also allows users to upload and stream videos to share with others.[333] Instagram is most commonly categorized as a photo-sharing platform,[334] but it has further functionality, including the ability to connect with friends and businesses by following and messaging.[335] As discussed in Part V, the guidelines proposed in this Article account for this overlap by considering not only the fundamental nature of the social media platforms, but the ways in which they are most frequently used.

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328 Aichner & Jacob, *supra* note 289, at 260.

329 *Get Started with Flickr*, FLICKR HELP, https://help.flickr.com/en_us/get-started-with-flickr-r1oh3miJX [https://perma.cc/YVA7-NWXL] (last visited Sept. 21, 2021).

330 Aichner & Jacob, *supra* note 289, at 268.

331 Jeffrey R. Young, *How YouTube Star John Green Thinks About His Educational Videos*, EDSURGE (Apr. 28, 2020), https://www.edsurge.com/news/2020-04-28-how-youtube-star-john-green-thinks-about-his-educational-videos [https://perma.cc/G9QW-WJ9P].

332 *See, e.g.*, Greg Roumeliotis et al., *Exclusive: Trump Gives Microsoft 45 Days to Clinch TikTok Deal*, REUTERS (Aug. 2, 2020, 8:00 PM), https://www.reuters.com/article/us-usa-tiktok-trump-exclusive/exclusive-trump-gives-microsoft-45-days-to-clinch-tiktok-deal-idUSKBN24Y0UD [https://perma.cc/44PM-SLK7].

333 *See, e.g.*, Jordan Novet, *Microsoft Will End Its Video Game Streaming Service, Tells Everyone to Use Facebook Instead*, CNBC (June 22, 2020, 3:26 PM), https://www.cnbc.com/2020/06/22/microsoft-to-discontinue-video-game-streaming-service-mixer-in-july.html [https://perma.cc/UNW6-47K5] (reporting that Microsoft is rerouting users of its game streaming platform to Facebook).

334 *See, e.g.*, Kurt Wagner, *Here's Why Facebook's $1 Billion Instagram Acquisition Was Such a Great Deal*, VOX (Apr. 9, 2017, 3:16 PM), https://www.vox.com/2017/4/9/15235940/facebook-instagram-acquisition-anniversary [https://perma.cc/T8VD-7MGS] (describing Instagram as a photo-sharing app).

335 *Syncing Contacts and Finding People To* Follow, INSTAGRAM HELP CTR., https://help.instagram.com/1128997980474717/?helpref=HC_fnav&bc[0]=instagram%20Help&bc[1]=using%20Instagram&bc[2]=signing%20Up%20and%20Getting%20Started [https://perma.cc/QB5Z-EF2C] (last visited Sept. 21, 2021).

B. *Identifying the Social Media Platforms Most Likely Used by Arbitrators*

The time is right to propose concrete social media disclosure guidelines for arbitrators, in part because of the increasingly robust data that has been collected on social media usage. These data help identify the social media platforms—and categories of social media platforms—that are likely to be most frequently used by arbitrators and the parties and counsel who select them. As set forth in Part V, the proposed guidelines target the categories of social media platforms that, according to the statistics, arbitrators and arbitration participants interact with the most.

Social media use is pervasive throughout the United States. Early social media platforms like Myspace and Facebook, which arose out of early Internet blogs,[336] first arrived on the scene in 2003 and 2004, respectively.[337] According to a long-term study by the Pew Research Center, only five percent of U.S. adults used at least one social media platform in 2005.[338] That figure had grown to seventy-two percent by 2019.[339]

While we are not aware of studies focused specifically on how arbitrators use social media, the data that has been collected on social media usage by adults, with further stratification by level of education, is instructive.[340] In 2019, sixty-nine percent of U.S. adults used Facebook—the leading social network in the world.[341] Twenty-seven percent of U.S. adults used LinkedIn, the top online business network.[342] Further, in 2019, seventy-three percent of U.S. adults used YouTube (a video-sharing platform), thirty-seven

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336 Kaplan & Haenlein, *supra* note 287, at 60.

337 *Id.*

338 *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/#social-media-use-over-time [https://perma.cc/8T5V-QXJV].

339 *Id.*

340 While there is generally no requirement that arbitrators have a law degree—or even a college degree—to be qualified to decide a dispute, the vast majority of arbitrators are lawyers. *See* Thomas Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators*, 25 AM. REV. INT'L ARB. 395, 401–05 (2014) ("The CCA/Straus Institute Survey portrays a group of experienced arbitrators who by and large are 'elders.' They are virtually all members of the legal profession—an apparent reflection of the dominance of lawyers in arbitration and the growing legal orientation of arbitration.").

341 Andrew Perrin & Monica Anderson, *Share of U.S. Adults Using Social Media, Including Facebook, Is Mostly Unchanged Since 2018*, PEW RSCH. CTR. (Apr. 10, 2019), https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018 [https://perma.cc/Q429-9YK8].

342 *Id.*

percent used Instagram (a hybrid photo-sharing, video-sharing, and social network platform), twenty-eight percent used Pinterest (a social bookmarking platform), twenty-four percent used Snapchat (a social network), twenty-two percent used Twitter (a microblog), twenty percent used WhatsApp (a social network), and eleven percent used Reddit (a forum).[343]

While the usage rates of both social and business networks are higher among college graduates than the general adult population, the impact of higher education on the usage of business networks is profound. In fact, the usage rate of LinkedIn nearly doubled—to fifty-one percent—when the user population is confined to college graduates.[344] And nearly three-fourths of all college graduates reported using Facebook.[345] In addition, in 2019, eighty percent of U.S. college graduates used YouTube, forty-three percent used Instagram, thirty-eight percent used Pinterest, twenty percent used Snapchat, thirty-two percent used Twitter, twenty-eight percent used WhatsApp, and fifteen percent used Reddit.[346]

A recent survey conducted by the American Bar Association ("ABA") provides a window into the social media behavior of lawyers—who, as set forth above, constitute the vast majority of arbitrators.[347] The survey collected data not only on how lawyers and law firms use social media for professional purposes, but lawyers'

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343 *Id.*; Another study conducted in 2020 found that of 24,000 respondents from the United Kingdom, United States, Germany, France, Spain, Italy, Ireland, Denmark, Finland, Japan, Australia, and Brazil, sixty-three percent used Facebook, sixty-one percent used YouTube, forty-eight percent used WhatsApp, thirty-eight percent used Facebook Messenger, thirty-six percent used Instagram, twenty-three percent used Twitter, and thirteen percent used Snapchat, when asked if they used the platform for any purpose within the last week. Statista Research Department, *Global Active Usage Penetration of Leading Social Networks as of February 2020*, STATISTA (Jan. 28, 2021), https://www.statista.com/statistics/274773/global-penetration-of-selected-social-media-sites [https://perma.cc/E2BJ-85FT]. Our World in Data reported in 2019 that "with 2.3 billion users, Facebook is the most popular social media platform today. YouTube, Instagram, and WeChat follow, with more than a billion users. Tumblr and TikTok come next, with over half a billion users." Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD DATA (Apr. 30, 2020), https://ourworldindata.org/rise-of-social-media [https://perma.cc/BGR3-AGKD].

344 Perrin & Anderson, *supra* note 341.

345 *Id.* (finding that seventy-four percent of the U.S. adult population uses Facebook).

346 *Id.* In 2018, seventy-seven percent of U.S. college graduates used Facebook, fifty percent used LinkedIn, eighty-five percent used YouTube, forty-two percent used Instagram, forty percent used Pinterest, twenty-six percent used Snapchat, thirty-two percent used Twitter, and twenty-nine percent used WhatsApp. Aaron Smith & Monica Anderson, *Social Media Use in 2018, Appendix A: Detailed Table*, PEW RSCH. CTR. (Mar. 1, 2018), https://www.pewresearch.org/internet/2018/03/01/social-media-use-2018-appendix-a-detailed-table [https://perma.cc/CSV7-CWJ3].

347 Shields, *supra* note 312.

personal usage, as well.[348] The survey reflects that lawyers and law firms use business networks at an even higher rate than other college-educated adults: seventy-two percent of attorneys and more than half of the law firms surveyed use LinkedIn for professional purposes.[349] The use of social networks for professional legal purposes was lower, although still meaningful, as close to forty percent of the law firms and over one-third of the lawyers surveyed made use of Facebook for business purposes.[350] When personal as well as professional purposes are taken into account, the ABA survey reflects that lawyers are even bigger users of social networks than other college-educated adults, as a whopping eighty-two percent of attorneys reported using Facebook.[351] Fewer law firms and lawyers used Twitter professionally.[352] Lawyers also use legal-specific review platforms, but at lower rates than LinkedIn, Facebook, or Twitter.[353]

V. Proposed Guidelines for Social Media Disclosures

Our proposed guidelines for arbitral disclosure of social media activity ("Guidelines") are premised on three core principles:

The Guidelines should align with existing disclosure rules. The first principle underlying the Guidelines is that they should promote compliance with the most rigorous potentially applicable disclosure standards. Arbitrators who follow the Guidelines should have a high degree of confidence that they are meeting all ethical requirements and insulating their awards against vacatur. Thus, the Guidelines identify and recommend disclosure of social media relationships that (1) "might create an appearance of partiality"[354]

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348 *Id.*

349 *Id.* (finding that fifty-three percent of law firms use LinkedIn for professional purposes). Almost one-third of the survey respondents indicated that they used LinkedIn for personal purposes. *Id.*

350 *Id.* ("Overall, 34% of respondents reported personally using Facebook for professional purposes.").

351 *Id.*

352 Shields, *supra* note 312 (finding that nineteen percent of law firms and twenty-six percent of lawyers used Twitter for business purposes and that twenty-seven percent of attorneys used Twitter for personal purposes).

353 *Id.* (finding that seventeen percent of lawyers used legal-review sites Martindale and Avvo).

354 The Code of Ethics for Arbitrators in Commercial Disputes, *supra* note 9, at 4 [Canon II(A)].

or (2) give rise to an "impression of possible bias."[355] These two disclosure standards—which arise out of the Code of Ethics and Justice Black's opinion in *Commonwealth Coatings*—are the most exacting requirements imposed upon arbitrators. Adherence to the Guidelines should ensure that these and other more forgiving disclosure standards, like the reasonableness standard some federal courts use to evaluate vacatur motions premised on nondisclosure,[356] are satisfied.[357]

Ongoing mutual social media relationships that arose out of affirmative conduct by the arbitrator should be disclosed. As discussed above, social media connections may be unilateral or mutual. A social media user may "connect" with an arbitrator on social media by, among other things, following her microblog, commenting on her posts, or liking her photos. But these connections involve no affirmative action on the part of the arbitrator to associate with that social media user. The Guidelines distinguish between these types of passive social media connections—which need not be disclosed—and those that are the product of affirmative conduct on the part of the arbitrator. The second principle underlying the Guidelines is that a mutual ongoing relationship on social media, such as a Facebook friendship or LinkedIn connection, between an arbitrator and participant in the arbitration may create an appearance of partiality.[358] The Guidelines recommend that these connections be disclosed. While some arbitrators may attach little significance to their social media relationships, the fact that an arbitrator has taken affirmative action to connect and stay connected with an arbitration participant creates at least an appearance of partiality from the perspective of the parties, which is what matters

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355 Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149 (1968).

356 *See supra* Part III(B).

357 Of course, this is not to suggest that every failure to follow the Guidelines constitutes grounds for vacatur of an arbitral award. As discussed above, many courts use a more forgiving standard to adjudicate vacatur motions than the more exacting standards that the Guidelines are designed to satisfy. *See supra* Part II(B).

358 It does not appear that there is a meaningful difference between the "might create an appearance of partiality" standard contained in the Code of Ethics and the "impression of possible bias" standard articulated in Justice Black's opinion in *Commonwealth Coatings*. Both have a similar threshold for disclosure. Thus, for ease of reference, we refer to the two standards collectively throughout this Part of the Article by using the language from the Code of Ethics, which, unlike the "impression of possible bias" standard, is applicable to all arbitrations in the United States. Any disclosure that complies with that standard should also satisfy the "impression of possible bias" standard in the jurisdictions where that standard is also applicable.

under the "appearance of partiality" standard.[359] It seems obvious that a party would want to know if an arbitrator had taken action to connect with an opposing party or lawyer, or a witness whose credibility the arbitrator would be asked to evaluate, before deciding whether to select that arbitrator to decide the dispute. Even if an arbitrator takes a big-tent approach to social networking, the fact that she has taken steps to form a relationship with a participant in an arbitration suggests that there is at least something different about that relationship than the arbitrator's relationships with the other participants in the arbitration, with whom she did not connect on social media. Of course, arbitrators are free to explain their general approach to social media engagement.

The research obligations imposed on arbitrators by the Guidelines should be practicable. The Guidelines should not impose unrealistic or unreasonable burdens on arbitrators. [360] Accordingly, the Guidelines do not recommend disclosure of social media connections that are not known to the arbitrator or are discoverable through a reasonable search of the applicable social media platform. All social media searches contemplated by the Guidelines are technologically feasible, simple to execute, and not overly time consuming.

With these guiding principles in mind, we now set forth the Guidelines containing disclosure recommendations for each of the major social media categories, which the data suggest are likely to be relevant to arbitral disclosure.[361] This Part concludes with a chart summarizing the Guidelines.

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359 THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 9, at 4 [Canon II(A)(2)] (requiring disclosure of current or past relationships that might reasonably affect impartiality or independence "in the eyes if any of the parties").

360 This approach is consistent with the Code of Ethics, which the founding joint committee "intended to be applied realistically so that the burden of detailed disclosure does not become so great that it is impractical for persons in the business world to be arbitrators, thereby depriving parties of the services of those who might be best informed and qualified to decide particular types of cases." Howard M. Holtzmann, *The First Code of Ethics for Arbitrators in Commercial Disputes*, 33 BUS. LAW. 309, 313–14 (1977).

361 The Guidelines expressly address six of the nine social media categories discussed in Part IV(A) of this Article, *supra*. The Guidelines do not make any specific recommendations with respect to the disclosure of arbitrator activity on review platforms, forums, and social bookmarking sites. *See supra* notes 320–27 and accompanying text. These platforms do not promote the same level of connectivity as the platforms expressly covered by the Guidelines, and based on existing data, are unlikely to be anything other than a *de minimis* component of an arbitrator's social media activity. However, as discussed below, the catch-all provision of the Guidelines would require an arbitrator to disclose any known or reasonably discoverable ongoing relationships with arbitration participants on these platforms if they arose out of affirmative conduct of the arbitrator. *See infra* Part V(E).

A. *Social Networks*

Arbitrators should disclose whether they are Facebook friends—or the equivalent on other social networks—with any of the participants in an arbitration because it takes affirmative action on the part of the arbitrator to form such an ongoing relationship. A social network user must either send or accept a "friend" request to become connected to another user in this way.[362] Although two Texas state court decisions have suggested otherwise,[363] it is hard to argue that such a mutual, voluntary, lasting association does not create at least an appearance of partiality. Parties to an arbitration have a right to know if an arbitral candidate has taken steps to make a participant in the arbitration part of her social network before deciding whether to select that arbitrator. Arbitrators also should disclose if they "follow" the pages of any arbitration participants. This is an activity that requires affirmative conduct by an arbitrator and might create an appearance of partiality. It seems safe to say that followers of people and organizations on social networking platforms either view them positively or have some greater level of interest in them than people and organizations they do not follow. This is suggestive of some level of partiality. Accordingly, the parties to an arbitration should be apprised of these connections.

While certain social networking relationships are superficial—and may only be the product of a brief, one-time, online interaction—others clearly are more meaningful. Because the parties cannot discern one from the other in an informational vacuum, and because the more rigorous disclosure standards assume the perspective of the parties to the arbitration, it follows that the parties should be provided with the information outlined above to enable them to explore the arbitrator's social networking relationships if they desire to do so. As long as some ongoing social networking relationships have significance from an impartiality perspective—and some clearly do—then all ongoing social networking relationships involving affirmative arbitrator conduct might create an appearance of partiality from the perspective of the parties. If an arbitrator has a disclosable social media relationship that she

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362 *See Adding Friends*, FACEBOOK HELP CTR., https://www.facebook.com/help/246750422356731 [https://perma.cc/5HUY-U8PZ] (last visited Oct. 3, 2021) (explaining how to send a friend request).

363 *See supra* Part III(A)(ii) (discussing and critiquing *Prell v. Bowman* and *Sebastian v. Wilkerson*).

thinks would not affect her ability to remain impartial, she is free to offer that explanation in conjunction with her disclosure.

To ensure that they identify all disclosable social networking relationships, arbitrators should conduct a search of Facebook and any other applicable social networking platforms to determine whether (1) any of the arbitration participants are their friends (or the equivalent on other social networking platforms); and (2) the arbitrator follows any of the arbitration participants. For example, an arbitrator can determine whether she is "friends" with an arbitration participant by clicking into the "Friends" section of her profile page.[364] Within the "Friends" section, arbitrators can conduct a simple search to determine whether an arbitration participant is a "friend" by using the "Friends" section search bar.[365] If an arbitration participant is a "friend," the search will yield a link to her profile.[366] The search will yield no results if the arbitration participant is not a "friend." Arbitrators can also use this search tool to identify people or pages they follow.[367]

The remainder of an arbitrator's social networking activity does not require disclosure under the Guidelines. Based on the current functionality of Facebook and other social networking platforms, it does not appear that there are other ways (at least that are commonly used) that users affirmatively establish lasting relationships with other users. For example, arbitrators should not have to disclose if any of the participants in an arbitration follow them or like their posts on a social network. These types of connections require no affirmative conduct by the arbitrator targeted at the participant in the arbitration. And while it requires affirmative arbitrator conduct to "like" content posted by an arbitration participant, that conduct does not result in a lasting relationship that might create an impression of partiality. "Liking" a post or a page is the equivalent of a one-time comment that does not give rise to the type of ongoing relationship that is disclosable outside

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364 *See Control Who Can See What You Share*, *supra* note 206 (describing the "Friends" section of a user's profile). Citations to guidance provided by social media platforms refer to the platform's website, rather than its mobile applications.

365 *See How Do I Unfriend or Remove a Friend on Facebook?*, FACEBOOK HELP CTR., https://www.facebook.com/help/172936839431357 [https://perma.cc/QDG9-2VKB] (last visited Oct. 3, 2021) (demonstrating how to search for "friends" in a user's profile).

366 *Id.*

367 *See How Do I Follow a Profile or Page on Facebook?*, FACEBOOK HELP CTR., https://www.facebook.com/help/276458109035418 [https://perma.cc/C8YT-ZV22] (last visited Oct. 3, 2021) (providing instructions on how to "see who you're following").

the social media realm.[368] Thus, it need not be disclosed under the Guidelines. Similarly, an arbitrator should not have to investigate and disclose whether a participant in an arbitration belongs to a Facebook or other social networking group to which the arbitrator also belongs. As long as the arbitrator has not taken the affirmative step of "friending" or following that individual, mere common membership in a social networking group does not create an appearance of partiality.[369]

B. *Business Networks*

In a similar vein, arbitrators should disclose (1) whether they are connected on LinkedIn or other business networks to any of the participants in an arbitration; and (2) whether they follow any of the arbitration participants on a business network. For an arbitrator to connect with another LinkedIn (or other business network) member, the arbitrator needs to either send or accept an invitation to connect.[370] This is the type of affirmative action that, as discussed above, might create an appearance of partiality. While certain business network connections are less meaningful than others—some simply reflect a desire to indiscriminately accumulate contacts—some of these contacts arise out of actual past or present professional interactions. Thus, like the disclosable social networking relationships identified above, these business networking relationships might create an appearance of partiality from the perspective of the parties and should be disclosed. Arbitrators also should disclose if they follow any of the participants in an arbitration on LinkedIn or another business network. For the reasons set

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368 The fact that users cannot readily search social media platforms for "likes" or retweets further supports not requiring such episodic interactions to be disclosed. *See How Do I Use My Activity Log to Find Specific Things on Facebook?*, FACEBOOK HELP CTR., https://www.facebook.com/help/170480839698876 [https://perma.cc/R83D-N2VZ] (last visited Oct. 3, 2021) (explaining how a user must scroll through the Activity Log to view their "likes" chronologically).

369 Of course, if an arbitrator actually knows an individual in her social networking group, she would likely be required to disclose that fact, as well as the nature of the relationship, separate and apart from the existence of the group on social media. The Guidelines simply take the view that common membership in a social networking group, standing alone, is not a social media connection that needs to be disclosed.

370 *Your Network and Degrees of Connection*, LINKEDIN HELP, https://www.linkedin.com/help/linkedin/answer/110 [https://perma.cc/4YBU-YHK4] (last visited Jan. 8, 2022) ("You can build your network by sending invitations to connect with other LinkedIn members and your contacts you've imported or by accepting invites from others.").

forth above, this affirmative conduct by the arbitrator also might create an appearance of partiality. If an arbitrator has a disclosable business networking relationship that she thinks would not affect her ability to remain impartial, she is free to offer that explanation in conjunction with her disclosure.

To ensure that they identify all disclosable business networking connections, arbitrators should conduct a search of LinkedIn and any other applicable business networks to determine whether (1) they are connected with any of the participants in the arbitration;[371] and (2) they follow any of the arbitration participants. Like Facebook, LinkedIn allows users to search their connections. By accessing "My Network" and then "Connections" within "Manage my network," an arbitrator can search her connections using a search bar to determine if she is connected to any of the arbitration participants.[372] Arbitrators can also use LinkedIn's search bar, which is located at the top of all LinkedIn webpages.[373] When an arbitrator searches for an organization—like a company or a law firm involved in an arbitration—a button will read "Unfollow," if the arbitrator follows that organization, or "Follow," if the arbitrator does not follow the organization's page.[374] Arbitrators can search for individuals they follow by entering the person's profile and clicking on the ellipses button, which allows arbitrators to "follow" individuals they have yet to follow and "unfollow" individuals they do follow.[375]

Other activity on LinkedIn and other business networks does not qualify for disclosure under the Guidelines. For example, arbitrators should not have to disclose if any of the participants in an arbitration follows them or their law firm on LinkedIn or another business network. As discussed above, this type of connection requires no affirmative conduct by the arbitrator targeted at the participant in the arbitration.

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371 *Id.* (Connection is the LinkedIn equivalent of a "Friend.").

372 *See Viewing Your Connections*, LINKEDIN HELP, https://www.linkedin.com/help/linkedin/topics/6096/6108/53657 [https://perma.cc/SA27-HZML] (last visited Oct. 3, 2021) (describing how to search within connections).

373 *See LinkedIn Homepage – FAQs*, LINKEDIN HELP, https://www.linkedin.com/help/linkedin/suggested/76305 [https://perma.cc/6ESC-95WK] (last visited Oct. 3, 2021) (describing how to search generally on LinkedIn).

374 *See Follow and Unfollow an Organization on LinkedIn*, LINKEDIN HELP, https://www.linkedin.com/help/linkedin/answer/3539 [https://perma.cc/P23P-X5K5] (last visited Oct. 3, 2021) ("You can follow or unfollow an organization from its LinkedIn Page or through search.").

375 *See Follow, Unfollow or Mute People*, LINKEDIN HELP, https://www.linkedin.com/help/linkedin/answer/72150 [https://perma.cc/3XZ6-4BAE] (last visited Oct. 3, 2021) (explaining how to follow and unfollow people).

C. *Blogs and Microblogs*

Arbitrators also should disclose whether they follow the blogs or microblogs of any of the participants in an arbitration. It obviously requires affirmative action to follow someone's posts;[376] that is not a relationship that can be created without the willing participation of the arbitrator. As set forth above, when an arbitrator follows on Twitter (or another blog or microblog) a participant in an arbitration, it might create an appearance of partiality because the arbitrator has affirmatively chosen to receive a feed of content posted by that participant. If an arbitrator believes that the relationship would not affect her ability to remain impartial in the proceeding, she should offer that explanation in conjunction with her disclosure. Conversely, as set forth above, an arbitrator need not disclose if an arbitration participant follows her blog or microblog, unless the arbitrator's privacy settings require her to approve follower requests.[377] Such a one-sided relationship does not reflect any affirmative action by the arbitrator to connect with that individual and, therefore, does not create an appearance of partiality. An arbitrator also is not required by the Guidelines to disclose every time she likes, comments on, or shares (by "retweeting" or otherwise) the posts of arbitration participants. While these are affirmative actions on the part of the arbitrator, they do not result in the type of ongoing relationship that is analogous to a disclosable relationship outside the social media space.[378]

To comply with the Guidelines, arbitrators who are sufficiently active in the blog/microblog arena, to the point that they cannot recall all of the people and organizations they follow,[379] should conduct a search of Twitter and any other applicable platforms to

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376 *See Following FAQs*, TWITTER HELP CTR., https://help.twitter.com/en/using-twitter/following-faqs [https://perma.cc/AC6R-98KX] (last visited Oct. 3, 2021) ("Following someone on Twitter means: You are subscribing to their Tweets as a follower.").

377 *See How To Approve or Deny Follower Requests*, TWITTER HELP CTR., https://help.twitter.com/en/using-twitter/follow-requests [https://perma.cc/HHM2-6RXF] (last visited Oct. 3, 2021) (explaining how to respond to follower requests).

378 Similar to "likes" on social networks (*see How Do I Use My Activity Log to Find Specific Things on Facebook?*, *supra* note 368), there is no apparent way to search for retweets on Twitter. *See How to Like a Tweet*, TWITTER HELP CTR., https://help.twitter.com/en/using-twitter/liking-tweets-and-moments [https://perma.cc/QW27-LXUQ] (last visited Oct. 3, 2021) (providing no indication that a user can search for "likes"); *Retweet FAQs*, TWITTER HELP CTR., https://help.twitter.com/en/using-twitter/retweet-faqs [https://perma.cc/VWG3-237P] (last visited Oct. 3, 2021) (making no mention of the ability to search for retweets).

379 Presumably, an arbitrator who is not especially active in the blog/microblog space will recall which accounts she follows without needing to conduct an investigation of any kind.

determine whether they follow any of participants involved in the arbitration. Twitter's search bar, on the top of the webpage, allows arbitrators to search for all participants in an arbitration. [380] The button to the right of the search result will read "Following" if the arbitrator follows the arbitration participant;[381] it will read "Follow" if the arbitrator does not.[382] Since some users who post content on Twitter and other microblog platforms have account names that are different from their real names, an arbitrator may not be able to identify every account linked to a participant in an arbitration by means of a reasonable search. It is not reasonable to expect an arbitrator to do more than conduct a search of the accounts she follows using the actual names of the arbitration participants that are disclosed to her. An arbitrator should disclose the fact that she follows the blog or microblog of a participant in an arbitration if she (1) recalls it from memory; or (2) discovers it based on a search using the actual names of the participants. An arbitrator would not violate the Guidelines if it turns out that she unknowingly follows a participant whose Twitter (or other) handle does not contain her real name, and, therefore, is not discoverable through a name-based search of the platform.

D. *Photo- and Video-Sharing Platforms*

The approach of the Guidelines to the identification and disclosure of connections on photo- and video-sharing social media platforms tracks its approach to the other social media categories discussed above. If an arbitrator follows or subscribes to an account associated with a participant in an arbitration, she should disclose these connections. These connections all require affirmative conduct by the arbitrator and give rise to lasting connections. Thus, they might create an appearance of partiality. Photo- and video-sharing platforms enable users to conduct searches to identify the usernames of the accounts on the platform that they follow

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380 *See How to Use Twitter Search*, TWITTER HELP CTR., https://help.twitter.com/en/using-twitter/twitter-search [https://perma.cc/CVC7-PYR9] (last visited Oct. 3, 2021) (explaining how to use Twitter's search function).

381 *See How to Unfollow People on Twitter*, TWITTER HELP CTR., https://help.twitter.com/en/using-twitter/how-to-unfollow-on-twitter [https://perma.cc/W2JT-78M2] (last visited Oct. 3, 2021) (describing the functionality of the Following button).

382 *See How to Follow People on Twitter*, TWITTER HELP CTR., https://help.twitter.com/en/using-twitter/how-to-follow-someone-on-twitter [https://perma.cc/K5EW-KU8W] (last visited Oct. 3, 2021) (discussing the purpose and use of the Follow button).

and the accounts to which they subscribe.[383] Arbitrators should conduct a search of Instagram, YouTube, and any other applicable platforms using the actual names of the arbitration participants to determine whether they follow any of participants involved in the arbitration.

On the other hand, merely liking or commenting on photos and videos posted on a photo- or video-sharing platform is not within the scope of disclosure because such conduct does not create a forward-looking relationship that might create an appearance of partiality. An arbitrator also should not have to disclose whether a participant in an arbitration has engaged in unilateral conduct to follow or view content she has posted on Instagram, YouTube, or another photo or video-sharing platform because such one-sided conduct also does not create an appearance of partiality on the part of the arbitrator.

E. *The Catch-All Provision*

While the Guidelines attempt to provide thorough coverage of the current social media landscape, we recognize that the environment is highly dynamic.[384] Thus, to account for scenarios and social media categories not specifically addressed by the Guidelines and to anticipate new social media categories that have not yet arrived on the scene, we add a catch-all provision. In the event that an arbitrator must decide whether to disclose social media connections with participants in an arbitration that are not expressly addressed in the Guidelines, she should disclose any known or

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383 Using the search bar on a video- or photo-sharing platform website, arbitrators can search usernames to determine if they follow or subscribe to a user's profile or channel. *See Find Your Way Around YouTube*, YOUTUBE HELP, https://support.google.com/youtube/answer/2398242 [https://perma.cc/N9VC-NW6U] (last visited Oct. 3, 2021); *How Do I Search on Instagram*, INSTAGRAM HELP CTR., https://help.instagram.com/1482378711987121 [https://perma.cc/RYD9-K5BX] (last visited Oct. 3, 2021). YouTube searches return search queries with a button reading "Subscribed" or "Subscribe." *Subscribe to Channels*, YOUTUBE HELP, https://support.google.com/youtube/answer/4489286 [https://perma.cc/U75P-3RM9] (last visited Oct. 3, 2021). Instagram searches require the user to click into a profile to determine whether the user "follows" the profile. WikiHow Staff, *How To Follow Someone on Instagram*, WIKIHOW (June 29, 2021), https://www.wikihow.com/Follow-Someone-on-Instagram [https://perma.cc/W9RR-QPTP]. On the Instagram mobile app, if the user follows another user's profile, then a button below the profile name will read "Following." *Managing Your Followers*, INSTAGRAM HELP CTR., https://help.instagram.com/269765046710559 [https://perma.cc/9V5X-8W7K] (last visited Oct. 3, 2021). If the user does not follow the profile, the button will read "Follow." How To Follow Someone on Instagram, *supra*.

384 *See supra* Part IV(A).

reasonably discoverable ongoing relationships—as opposed to episodic interactions that do not result in ongoing connectivity—arising out of her own affirmative conduct. This hews to the core principles of the Guidelines by focusing on relationships created, at least in part, by the affirmative action of the arbitrator—which, as set forth above, are the contacts that might create an appearance of partiality—that are either known to the arbitrator or discoverable through a reasonable search.

VI. Conclusion

There is a glaring void in the statutes, rules, and cases addressing the disclosure of conflicts of interest by arbitrators. Those authorities do not provide meaningful guidance on how to handle the disclosure of arbitrators' social media activity. This chasm jeopardizes the durability of arbitral awards—which will increasingly be challenged based on undisclosed social media activity—and threatens, over time, to undermine the integrity of the arbitrator selection process. It also pollutes the marketplace for arbitral services, where arbitrator social media disclosures are uneven and difficult to interpret by parties and their counsel. The problem will be solved if arbitrators simply follow the Guidelines, which yield clear, consistent disclosure decisions regarding social media activities that are the subject of inconsistent treatment today. For example, the four hypothetical scenarios introduced at the outset of this Article, which would be difficult to navigate in the current rudderless disclosure environment, have clear outcomes under the Guidelines:

- Absent a disclosable relationship outside of social media, Arbitrator A is not required to disclose her "likes" of social media content posted by attorneys and law firms involved in an arbitration. These likes do not give rise to a lasting relationship that might create an appearance of partiality.

- Arbitrator B is required to disclose the fact that she is connected on LinkedIn with a lawyer involved in the arbitration. That connection is the product of Arbitrator B's affirmative conduct and results in an ongoing relationship. Arbitrator B can explain her liberal approach to social networking in her disclosure.

- Absent a disclosable relationship outside of social media, Arbitrator C does not have to disclose the fact that an arbitration participant has retweeted her Twitter posts for two reasons: (1) Arbitrator C did not engage in any affirmative conduct to connect with the lawyer who retweeted her posts; and (2) a retweet does not give rise to an ongoing relationship that might create an appearance of partiality.

- Arbitrator D does not have to disclose that she belongs to the same Facebook group as a party representative in an arbitration because Arbitrator D did not take any affirmative action to connect with that arbitration participant.

Although social media is a fluid environment, the Guidelines and their undergirding principles are sufficiently flexible to provide arbitrators with disclosure guidance that will be applicable to future updates and platforms not yet in existence. The clarity provided by the Guidelines should be beneficial to arbitrators, arbitration participants, TPAs, and the integrity of the arbitration process as a whole.

Conduct	**Affirmative Conduct?**	**Ongoing Relationship?**	**Disclosure Required?**[385]	**Social Media Category**[386]
Friendship, connection, or other bilateral relationship between arbitrator and participant	Yes	Yes	Yes	Social Networks, Business Networks, Blogs & Microblogs[387]
Arbitrator follows, likes, or subscribes to participant's account[388]	Yes	Yes	Yes	Social Networks, Business Networks, Blogs & Microblogs, Photo/Video Sharing Sites
Participant follows, likes, or subscribes to arbitrator's account	No	Yes	No	Social Networks, Business Networks, Blogs & Microblogs, Photo/Video Sharing Sites

[385] Disclosure is required when social media conduct by an arbitrator (1) involves affirmative conduct that (2) results in an ongoing relationship that might create an appearance of partiality.

[386] Not all platforms within a social media category will allow the same conduct. Social media categories are included in this column if at least one current platform within the category permits the conduct at issue.

[387] Although public blog/microblog users do not require the approval of "follow" requests, private accounts may require an arbitrator to expressly approve a follower request.

[388] Following, liking, or subscribing to a user's social media account or profile page reflects an affirmative choice by the arbitrator to receive that user's shared content indefinitely until the arbitrator unfollows, un-likes, or unsubscribes from the user. This is in contrast to merely liking a user's post, which is the equivalent of a one-time comment and does not create an ongoing relationship.

Conduct	**Affirmative Conduct?**	**Ongoing Relationship?**	**Disclosure Required?**	**Social Media Category**
Arbitrator likes, shares, or comments on participant's post	Yes	No	No	Social Networks, Business Networks, Blogs & Microblogs, Photo/Video Sharing Sites
Participant likes, shares, or comments on arbitrator's post	No	No	No	Social Networks, Business Networks, Blogs & Microblogs, Photo/Video Sharing Sites
Arbitrator messages participant	Yes	No[389]	No	Social Networks, Business Networks, Blogs & Microblogs, Photo/Video Sharing Sites
Participant messages arbitrator	No	No	No	Social Networks, Business Networks, Blogs & Microblogs, Photo/Video Sharing Sites
Common group membership	No	Yes	No	Social Networks, Business Networks

[389] The exchange of a message on social media—like a passing comment on the street—does not, standing alone, indicate the existence of an ongoing relationship. However, if messaging is sufficiently frequent, it might suggest the existence of a disclosable relationship outside of social media.

THE IMPENDING BATTLE FOR THE SOUL OF ODR: EVOLVING TECHNOLOGIES AND ETHICAL FACTORS INFLUENCING THE FIELD

*Oladeji M. Tiamiyu**

ABSTRACT

Legal professionals and disputants are increasingly recognizing the value of online dispute resolution ("ODR"). While the coronavirus pandemic forced many to resolve disputes exclusively online, potentially resulting in long-term changed preferences for different stakeholders, the pre-pandemic trend has involved a dramatic increase in technological tools that can be used for resolving disputes, particularly with facilitative technologies, artificial intelligence, and blockchains. Though this has the added benefit of increasing optionality in the dispute resolution process, these novel technologies come with their own limitations and also raise challenging ethical considerations for how ODR should be designed and implemented. In considering whether the pandemic's tectonic shifts will have a permanent impact, this piece has important implications for the future of the legal profession, as greater reliance on ODR technologies may change what it means to be a judge, lawyer, and disputant. The impending battle for the soul of ODR raises important considerations for fairness, access to justice, and effective dispute resolution—principles that will continue to be ever-present in the field.

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I. INTRODUCTION

Technology and dispute resolution are intertwined. Technological innovations have contributed to the emergence of online dispute resolution ("ODR"), and ODR processes are increasingly influencing the broader dispute resolution industry. Combining experimentation in ODR with technological innovation has led to a dramatic increase in optionality for disputants seeking to avoid adversarial litigation. Though ODR remains youthful, there have been noteworthy evolutions in the types of technology being incorporated into ODR's system design. Consequently, these technologies have presented novel considerations about ethical factors that must be considered in how ODR is conceived and implemented. Symbolically, perhaps the first ODR opportunity came on the heels of Y2K when eResolution managed a domain name dispute based on rules the Internet Corporation for Assigned Names and Numbers ("ICANN") prescribed.[1] Much has changed since this moment, yet understanding ODR and the Internet's history will be particularly valuable for scrutinizing the impending battle for ODR's soul. Section II of this article provides an abbreviated overview to the history of ODR, a history that is closely connected with technology and the dispute resolution field. Section III explores how the three main branches of ODR—Artificial Intelligence ODR ("AI ODR"), Blockchain ODR, and Facilitative ODR—each present unique benefits and trade-offs. This section also recognizes that these branches are not mutually exclusive, as some ODR processes incorporate more than one branch. Section IV explores the contours of ODR and proposes a new framework for the industry: a greater emphasis may need to be placed on ODR's capabilities to resolve online exclusive disputes to differentiate them from other dispute systems that are increasingly using information communication technology ("ICT"), and to be responsive to the dramatic rise in interactions and disputes that occur exclusively online with limited connection to the physical world. Section V explores the uniqueness of ODR's soul with respect to the broader dispute resolution industry. Section V proposes a framework that prioritizes greater flexibility to core ethical tenets in a manner that focuses on the needs of disputants and requires some degree of divergence from alternative dispute resolution ("ADR"), ODR's highly influential older sibling. Section VI con-

[1] Karim Benyekhlef & Fabien Gélinas, *Online Dispute Resolution*, 10 LEX ELECTRONICA 1 (Summer 2005).

siders that a corrupted soul is one incapable of promoting justice, and notes ways that ODR can, in fact, promote access to justice when certain factors are satisfied. Section VII emphasizes the important role the pandemic has played in increasing the adoption of ODR processes while also blurring lines between ODR and the broader dispute resolution industry. Rather than remaining static, ODR is constantly adapting to changing circumstances in a manner that promotes efficiency, yet the wider range of disputes being addressed through these processes will require a greater focus on access to justice, fairness, and ethics.

II. Origin Story: An Abbreviated History of Online Dispute Resolution

ODR's origin story can be traced to the 1990s, a time when the Internet became more accessible to the general public. The Internet had previously been a closed system, accessible predominantly for military usage, particularly in enhancing communication networks during the Cold War.[2] While restricted for military use with the Advanced Research Projects Agency Network ("ARPANET") in the 1960s,[3] the Internet would evolve and gain recognition as a vehicle to promote resource sharing while facilitating relatively efficient communication with parties in the network. An increase in access to the Internet would come when the U.S. National Science Foundation ("NSF") helped create the Computer Science Network ("CSNET"). Though the Internet remained a permissioned system, CSNET would allow computer scientists to gain access to the Internet, increasing the number of nodes in the network from 2,000 in 1985 to more than 1.7 million in 1993.[4] Despite this growth, the Internet's permissioned nature would reveal inequities from the earliest moments, as only those with access to the technology would be able to build novel platforms and have access to new communication methods. The inequitable nature of the Internet, empowering those with access while overlooking those without access, continues to be a concern to the extent ODR

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[2] *See* John Naughton, *The Evolution of the Internet: From Military Experiment to General Purpose Technology*, 1 J. Cyber Pol'y 5 (2016).

[3] The Advanced Research Projects Agency would invent ARPANET under a broad Department of Defense directive to ensure that technological surprise would never be repeated, but rather that the government agency would do the surprising through innovation. *See* Stephen J. Lukasik, *Why the Arpanet Was Built*, 33 IEEE Annals Hist. Computing 4, 9–14 (2011).

[4] Naughton, *supra* note 2, at 11.

can promote access to justice, a concern that will be addressed in-depth in Section VI. With limited access and restrictions on the Internet's commercial use, ODR was in low demand during the Internet's early era. Two monumental changes would occur respectively in 1991 and 1993, with the passage of the High-Performance Computing Act[5] ("HPCA") and the NSF's privatization of the Internet. The HPCA would promote the creation of a nationwide infrastructure—including high-speed telecommunications and training for use of new telecommunication technology—to allow wider adoption of the Internet.[6] Meanwhile, the Internet's privatization incentivized commercial use of the Internet in a manner not previously seen with the military's control of ARPNET.[7] The Internet would transition from a permissioned system with restrictions into a permissionless, widely accessible network for the general public. Dial-up connections allowed a larger number of individuals to access the Internet. Meanwhile Tim Berners-Lee's invention of the World Wide Web presented a significant incentive for individuals to *want* access to the Internet, both to build and use new applications. Despite user growth, the early years of the Internet were peaceful with limited disputes. Early users have been described as people valuing "collective work and the communal aspects of public communications[,] . . . people who discuss and debate topics in a constructive manner[,] . . . [and] especially not people who come online for individual gain or profit."[8] Though not a commonly held view at the time, Internet users and scholars in the mid-1990s would identify elements that would soon require ODR's intervention, including how individuals' identities and interests changed when they used the Internet.[9]

This level of peace and absence of commercial transactions on the Internet would change as new use cases were introduced and more users joined the network. Individuals recognized they could manipulate space and time: rather than being restricted to a physi-

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5 High-Performance Computing Act of 1991, Pub. L. No. 102-194, 105 Stat. 1594.

6 *See* Donald A.B. Lindberg, MD & Betsy L. Humphreys, MLS, *The High-Performance Computing and Communications Program, the National Information Infrastructure, and Health Care*, 2 J. AM. MED. INFORMATICS ASS'N 156 (May/June 1995).

7 *See* SHANE GREENSTEIN, HOW THE INTERNET BECAME COMMERCIAL: INNOVATION, PRIVATIZATION, AND THE BIRTH OF A NEW NETWORK 135–36 (2015).

8 MICHAEL HAUBEN & RONDA HAUBEN, NETIZENS: ON THE HISTORY AND IMPACT OF USENET AND THE INTERNET, (Wiley-IEEE Computer Society Pr, 1st ed. 1997).

9 *See, e.g.*, SHERRY TURKLE, LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET 26 (1995) ("Computers don't just do things for us, they do things to us, including our ways of thinking about ourselves and other people.").

cal location or by time, cyberspace[10] allowed individuals to communicate and transact without regard to geography and political borders, whenever they wanted. In 1996, John Perry Barlow, founder of the Electronic Frontier Foundation, eloquently captured this early Internet era: "Ours is a world that is both everywhere and nowhere, but it is not where bodies live."[11] These new possibilities drove the creation of e-commerce, where merchants and buyers could transcend physical space. EBay would be among the earliest platforms facilitating e-commerce transactions, increasing net revenues from $41 million in 1997 to $748 million by 2001.[12] While eBay served as a general-purpose e-commerce platform, Amazon would initially specialize in e-commerce transactions for books, selling the first book, *Fluid Concepts and Creative Analogies*, in April 1995.[13] Amazon would experience comparable exponential growth, reaching an annual revenue of $15.7 million in 1996 and $147.8 million in 1997[14] predominantly from book sales.[15]

The development of dispute resolution systems on the Internet reflects a historical trend. Indeed, commerce and dispute resolution have a long history of being intertwined, as transacting parties benefit from having clear rules and procedures for managing situations that were previously not contemplated when entering into a transaction. Moreover, transacting parties benefit from having clear and reliable enforcement mechanism for addressing unsatisfied expectations from pre-existing agreements. Clarity as to how to manage these disputes has created an important enforcement role for the State and judiciary. When international commerce was

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10 William Gibson's seminal science fiction novel *Neuromancer* included one of the earliest uses of this term, in 1984. Lawrence Lessig would provide greater clarity for the term, as, in contrast to the Internet merely making life easier, cyberspace "is about making life different, or perhaps better" and a place where code regulates how individuals relate to one another. LAWRENCE LESSIG, CODE VERSION 2.0 83–84 (2006).

11 John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://www.eff.org/cyberspace-independence [https://perma.cc/F7JN-NU7E].

12 EBay Inc., *Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, SEC. & EXCH. COMM'N (Mar. 1, 2002), https://www.sec.gov/Archives/edgar/data/1065088/000089161802001364/f79949e10-k.htm [https://perma.cc/EL9K-WJKR].

13 BRAD STONE, THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON 36 (2013).

14 Amazon.com, Inc., *Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, SEC. & EXCH. COMM'N (Mar. 13, 1998), https://www.sec.gov/Archives/edgar/data/1018724/0000891020-98-000448.txt [https://perma.cc/N9A4-Y26G].

15 *See* Alex Wilhelm, *A Look Back in IPO: Amazon's 1997 Move*, TECHCRUNCH (June 28, 2017, 1:30 PM), https://techcrunch.com/2017/06/28/a-look-back-at-amazons-1997-ipo/?guccounter=1 [http://tcrn.ch/2tYUBNI].

emerging during the medieval era, however, the State became less reliable at enforcing contract breaches, as parties struggled to determine which sovereign had jurisdiction over a particular transaction. This would create a similar dynamic seen centuries later through e-commerce. Reduced reliability of State enforcement during the medieval era contributed to the growth of *lex mercatoria*, where medieval merchants established dispute resolution practices that were not restricted to one kingdom's laws.[16] As commerce became more cross-jurisdictional, merchants merged multiple different jurisdictional laws with non-State customs to have dispute resolution systems that provided the certainty and predictability that one State's laws could not provide.[17] Prior to Western Europe's exploitation of Africa, the continent had extensive inter-ethnic trading networks that shared characteristics of medieval *lex mercatoria* through the ability to transcend one kingdom's laws. For instance, while originating in the ancient Mali and Songhai kingdoms, the Wangara Trading Network would develop into an inter-ethnic trading route transcending multiple kingdoms in modern-day West Africa with merchant-specific dispute resolution systems.[18] Principles of *lex mercatoria* in these regions illustrate how innovations in groups transacting with one another often require new dispute resolution systems to match the particularities of commerce.

Just as growth in international trade led to the historical innovation of *lex mercatoria*, e-commerce has also required innovation. As eBay and Amazon were driving exponential growth in e-commerce, these platforms[19] also recognized that they were birthing new types of disputes that posed unique challenges for traditional dispute resolution systems: low-value, cross-jurisdictional disputes,

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16 Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 CHI. J. INT'L L. 39, 52 (2004) ("Merchant courts certainly did exist, but they do not appear to have preceded the lord or town's grant of jurisdiction.").

17 *See* Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOB. LEGAL STUD. 447, 454 (2007) ("Lex mercatoria was not non-state law—it was an amalgam of state and non-state rules and procedures, kept together by its subject: the merchants.").

18 *See* MOSES E. OCHONU, THE WANGARA TRADING NETWORK IN PRECOLONIAL WEST AFRICA: AN EARLY EXAMPLE OF AFRICANS INVESTING IN AFRICA (Terence McNamee et al. eds., 2015).

19 These two e-commerce platforms were not working in silos. From the beginning, both were well aware of each other, and eBay's broader sales strategy led a young Jeff Bezos to seek to invest hundreds of millions of dollars into his competitor. *See* STONE, *supra* note 13, at 78.

where parties had a preference for fast resolution.[20] Indeed, early Internet-based disputes led to problematic jurisdictional questions for courts while the Internet was gaining greater adoption.[21] E-commerce companies recognized that, although there was plenty of attention being given to their respective platforms, sustained growth and mass adoption could not be achieved without promoting user trust in their platforms.[22] This was even more critical, as early users of the Internet viewed cyberspace as beyond the purview of government regulation.[23] Just as historical merchants pioneering international trade recognized the complexities in relying entirely on the State to resolve their disputes, these e-commerce platforms and their users also recognized the complexities of using State enforcement to resolve their disputes. The added challenge in e-commerce was that all interactions took place digitally, meaning there would be uncertainties in physically finding the defendant to initiate the dispute resolution process. Moreover, the costs of litigation compared with the low monetary value of the online dispute often meant that online disputants could not engage with the court system in a financially realistic manner. A system was needed to match the unique characteristics of the digital world; platforms independently sought to develop clear procedures for how to manage and resolve disputes occurring on the platform in order to address user trust concerns. For eBay, this meant creating a Trust and Safety Department that had three main objectives: (1) developing a digital reputation system for users; (2) investigating fraud; and (3) developing a framework to resolve disputes.[24] This illustrates that from the very beginning, ODR was about more than merely resolving disputes—ODR also focused on developing systems to promote clarity and to prevent the likelihood that a dispute would occur. By using a multi-faceted approach to promote clarity, these early ODR systems were implicitly reflecting the early Internet's aspiration for a dispute-free environment. Given that

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[20] *See e.g.*, Louis F. Del Duca et al., *eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers*, 6 Y.B. Arb. & Mediation 204, 205–06 (2014).

[21] *See* Ethan Katsh, *ODR: A Look at History*, Online Disp. Resol. Theory and Prac. 21, 24, https://www.mediate.com/pdf/katsh.pdf [https://perma.cc/3FYN-9PNJ].

[22] *See* Amy J. Schmitz & Colin Rule, The New Handshake: Online Dispute Resolution and the Future of Consumer Protection 33 (2017).

[23] *See, e.g.*, Lessig, *supra* note 10, at 3 ("[T]he bond between freedom and the absence of the state was said to be even stronger than in post-Communist Europe. The claim for cyberspace was not just that government would not regulate cyberspace—it was that government could not regulate cyberspace.").

[24] Schmitz & Rule, *supra* note 22.

the majority of interactions occurred digitally, eBay now had the digital footprint (i.e., user data) to create novel approaches to reduce the likelihood of disputes, a variable lacking a parallel in a physical dispute context.

Though ODR's initial use case was tied to e-commerce, much of ODR's ideological underpinnings and system design was inseparable from ADR, ODR's older sibling. ADR has an extensive history throughout much of the world, from arbitration in Ancient Greece during the eighth century BCE,[25] to the use of *al-Wasata* from the dawn of Islamic Law,[26] and the precolonial *Panchayat* system in India.[27] The establishment of America as a colonial settlement also saw significant use of voluntary arbitration, with early settlers recognizing that "survival depended on cooperation" rather than potentially damaging their relationships through litigation.[28] Religious and utopian commitments would lead several settler-communities in colonial America to "reject[ ] the courts in favor of community-based dispute resolution."[29]

Decades later, ADR would gain greater prominence in part due to the substantial backlog of court cases, which made the already expensive court process even more time-consuming.[30] Unifying principles of many ADR processes include impartiality, the absence of a conflict of interest, confidentiality, and procedural fairness for individuals.[31] These principles would prove useful as legitimating factors for why disputants should seek justice and re-

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25 Kaja Harter-Uibopuu, *Ancient Greek Approaches Toward Alternative Dispute Resolution*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 47 (2002).

26 Michael Palmer, *ADR Missionaries*, 12 DISP. RESOL. MAG. 13, 14 (Spring 2006).

27 Anil Xavier, *Mediation: Its Origin & Growth in India*, 27 HAMLINE J. PUB. L. & POL'Y 275 (2006).

28 *See* Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 449 (1984).

29 Andrew B. Mamo, *Three Ways of Looking at Dispute Resolution*, 54 WAKE FOREST L. REV. 1399, 1405–06 (2019).

30 In an address before the American Bar Association in 1906, Roscoe Pound, who would later become Dean of Harvard Law School, described "delay and expense [to] have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business [person] in the community." Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, Address Before the American Bar Association (Aug. 29, 1906), *in* REP. TWENTY-NINTH ANN. MEETING A.B.A, pt. 1, at 408.

31 *See, e.g.*, American Bar Association, *Model Standards of Conduct for Mediators*, AM. BAR ASS'N (Sept. 2005), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf [https://perma.cc/VA9A-8XLS]; American Bar Association, *The Code of Ethics for Arbitrators in Commercial Disputes* 3, 7, 9, AM. BAR ASS'N (Feb. 9, 2004), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/commercial_disputes.pdf [https://perma.cc/LRC3-FRN6]; International Ombudsman Association, *IOA Code of Ethics*, INT'L OMBUDSMAN ASS'N (Jan.

solve their disputes without engaging in litigation. Indeed, while providing a certain amount of formality, these unifying principles can also be found in court-based adjudication—so disputing parties could trust ADR systems to a similar extent as courts. Leading system design thinkers from ADR would migrate to ODR, bringing a continuation for how non-court disputes should be managed. Indeed, early pilot projects were described as Online ADR, where an ADR practitioner used what today can be called limited-purpose Facilitative ODR—such as email—to resolve digital disputes.[32]

Further uniting ADR and ODR would be the recognition of the need to "fit the forum to the fuss," as envisioned when U.S. courts experienced significant case backlogs and delays in the mid-20th century.[33] This approach emphasizes a bottom-up system design structure, where a recognition for the unique interests and needs of disputants drives how the dispute resolution system is designed. This continues to be in sharp contrast to court-based dispute resolution, with a top-down system design structure requiring disputants to conform to procedural and substantive design elements. Top-down procedural examples include the scope of a court's jurisdiction[34] and requirements to submit briefs to the judiciary, while substantive design examples include the precedential and the preclusive[35] nature of court decisions. By incorporating technology into the system design, ODR has developed new capabilities unparalleled in the physical dispute resolution context. Through a stakeholder-driven system design approach, ODR continues to use technology to address new types of fusses that were being created in cyberspace—most significantly through e-commerce—while also identifying ways to resolve disputes that may

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2007), https://www.ombudsassociation.org/assets/IOA%20Code%20of%20Ethics.pdf [https://perma.cc/2EVC-325L].

32 *See, e.g.*, Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. Rev. 329, 329–30 (2016).

33 Frank E.A. Sander, Address Before the National Conference on the Causes of Dissatisfaction with the Administration of Justice: Varieties of Dispute Processing (Apr. 7–9, 1976), *in* Addresses Delivered Nat'l Conf. on Causes Dissatisfaction with Admin. Just., 70 F.R.D. 79, 111–13 (1976).

34 Ranging from subject matter jurisdiction, quasi in rem jurisdiction, and personal jurisdiction, there are a host of different jurisdictional requirements that can narrow the scope of cases that the judiciary can hear, even if all disputants consent to appear before a particular court and forum.

35 Here, too, we see the top-down structure of the judiciary; where, even in a rare instance, where all disputants were to consent to re-litigating a case, preclusive court decisions restrict re-litigation.

have been previously overlooked in an in-person context, thus promoting access to justice for the under-justiced. Entrepreneurial ODR practitioners would adapt different technological tools to suit the particular needs and circumstances of disputants, increasing optionality for disputants and expanding access to justice for communities previously overlooked by court systems.

III. The Three Branches of ODR

Due to ADR professionals incorporating information communication technology ("ICT") in their practices, and because of the expansion of a variety of complex technological tools, ODR has evolved dramatically from its creation era. Today, there are three main technological categories through which ODR is being implemented. First is AI ODR, where algorithms, written by "Fifth Party"[36] programmers, analyze and aggregate data to support the work of a third-party neutral or to independently provide a proposed resolution for disputants. The second, more nascent,[37] branch is Blockchain ODR, where nodes in a blockchain system harness cryptography to crowdsource decision-making to an arbitral panel, akin to juries, for resolving disputes. The third, old-guard, branch is Facilitative ODR, where ICT tools serve to bring disputing parties together so that a third-party neutral can facilitate the dispute predominantly or exclusively through a digital forum. These three branches are not mutually exclusive: dispute resolution systems are capable of using more than one branch in managing disputes. For instance, this can be seen with China's *Smart Courts*, which mix facilitative technologies and blockchain-based tools to promote evidentiary security, or with ODR platforms that mix facilitative technologies with limited-purpose AI. These branches relate to traditional dispute resolution systems in vastly different ways, including in their ability to complement or disrupt pre-existing dispute resolution systems. Rather than an adversarial, zero-sum battle for ODR's soul, these three branches—and future different branches—will provide greater optionality for disputants to

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[36] While the third party is typically associated with a dispute resolution practitioner and the fourth party with the technology underpinning an ODR platform, the developers writing the code for an ODR platform can have an important influence in how disputants interact with one another and the technology.

[37] Two of the largest Blockchain ODR platforms are Kleros and Jur.io, created in 2019 and 2018, respectively.

efficiently reach resolutions based on the particularities of their disputes.

When thinking about the three branches, sophistication and speed are two noteworthy factors that will impact the decision as to which branch is best suited for a given dispute. This is because the need for faster resolution often requires an ODR platform that is less complex, with fewer steps needed for a resolution to be reached. AI and Blockchain ODR will likely continue to be faster than Facilitative ODR, as these processes are more streamlined. However, Facilitative ODR will have an important role to play for more complex disputes, such as those where a third-party neutral's active listening and ability to understand disputing parties' interests play a vital role in reaching a resolution.[38] In keeping with ADR's aspiration for letting the forum fit the fuss, there will be more forums from which disputants can choose. In addition, no branch of ODR is perfect and each has unique benefits and tradeoffs, which are factors that disputants and entrepreneurial ODR practitioners will need to consider.

A. *AI ODR*

AI-driven ODR pushes the limits of our conception of the "Fourth Party"[39] due to AI's ability to provide support to traditional third parties during the dispute resolution process. AI has a comparative advantage in quickly analyzing large pools of data and recognizing patterns when compared to human counterparts.[40] Meanwhile, the third-party neutral can focus on using their comparative advantage, such as a rich amount of emotional intelligence through active listening and recognizing social nuances, to engage with disputing parties and generate proposed resolutions in collaboration with AI's data analysis. This collaboration between third-party neutrals and AI should be unsurprising as AI struggles most with creative and flexible thinking while humans, especially those trained in ADR, have great comfort in this form of thinking.[41] Ad-

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38 *See, e.g.*, Mamo, *supra* note 29, at 1420.

39 Ethan Katsh coined this term, recognizing that technology can provide support to third-party neutrals. Ethan Katsh, Digital Justice: Technology and the Internet of Disputes 37 (2017).

40 *See, e.g.*, Daniel E. O'Leary, *Artificial Intelligence and Big Data*, 28 IEEE Intelligent Sys. 96, 99 (Mar./Apr. 2013).

41 *See generally* Jay W. Richards, The Human Advantage: The Future of American Work in an Age of Smart Machines (2018).

ditionally, the underlying algorithms benefit from the network effects[42] of the platform as a larger pool of users, and their accompanying disputes, leads to smarter AI analysis. In seeking to fit the forum to the fuss, those disputes that operate under significant time constraints will benefit from the speed and efficiency with which AI operates when there is a reduced need for emotional intelligence from a human third party. Even when the need for a human third party is valuable, AI can serve as a fourth party and give flexibility to the third party to focus on their comparative advantage.

While integrated with Facilitative ODR, there are some ODR platforms that use limited-purpose AI during the dispute resolution process. As will be discussed in the Facilitative ODR section, family law disputes are particularly well-suited for ODR's management of the process. These are often pre-existing, emotionally-driven disputes that benefit from technology's intervention to reduce the likelihood of escalated tension. OurFamilyWizard, for instance, uses limited-purpose AI in their proprietary ToneMeter so that negative messages sent between parents are flagged if they are considered detrimental to a collaborative process.[43] CoParenter, another ODR platform that manages family law disputes, uses a similar system called Intelligent Dispute Resolution to avoid negative exchanges between parties.[44] AI has also been used to provide guidance relating to the equitable distribution of marital property.[45] The use of AI for family law disputes is still novel and limited. As datasets grow, AI will be able to recognize greater nuances in communication and a broader breadth of words that are likely to be detrimental to a collaborative process. AI further illustrates the benefits of a fourth party because a third party would have greater difficulty in monitoring exchanges between parents. This can free the third party to focus on more difficult disputes, where harmful communication is less of the problem.

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42 Under Metcalfe's law, the value of a network is proportional to the square of the number of nodes in the system.

43 *Analyze Your Tone with ToneMeter™*, OUR FAM. WIZARD, https://www.ourfamilywizard.com/knowledge-center/tips-tricks/parents-mobile/tonemeter [https://perma.cc/AC22-6NS2] (last visited June 22, 2021).

44 *Communicate, Manage, and Organize Everyday coParenting Responsibilities*, COPARENTER, https://coparenter.com/features/mediation-coaching/ [https://perma.cc/JMJ9-B8ZY] (last visited June 22, 2021).

45 John Zeleznikow, *Using Artificial Intelligence to Provide Intelligent Dispute Resolution Support*, 30 GRP. DECISION & NEGOT. 789, 793 (2021).

The recently established Shanghai AI Assistive System for Criminal Cases has used AI to examine evidence from criminal cases to reduce the likelihood that innocent defendants are improperly charged with crimes, promoting greater reliability in judicial decision-making.[46] In Britain, the University of Sheffield also produced an AI system that can support managing disputes and predicting results with nearly an 80% success rate, according to self-reporting.[47] China's State Council issued an order for the development of *Smart Courts*, focusing on applying AI for "evidence collection, case analysis, and legal document reading and analysis . . . [to] [a]chieve the intelligentization of courts and trial systems."[48] Over the years, a variety of Chinese courts have used different AI skillsets in judicial proceedings. AI-use cases cover a broad range, from the efficient processing of legal documents, to the use of intelligent voice conversion to transcribe statements during judicial proceedings.[49] Interestingly, AI has been used to verify evidentiary information and provide data-driven references for judicial decision-making.[50] Illustrating the role of ODR to prevent disputes, *Smart Courts* have used AI-driven chatbots to provide informal legal advice, to reduce the likelihood of disputes, and to promote legal clarity.[51] Shanghai's Intermediate People's Court has also been used to reduce judgment differences between similarly situated cases, thus promoting greater equity.[52]

There is a maximalist version of AI ODR where AI moves closer to tasks normally reserved for third-party neutrals, such as generating a proposed resolution agreement and facilitating conversations between disputing parties in the absence of a third party. In family law, this can be seen through AI-generated child visitation schedules, based on preferences parents have shared with the platform and historical datasets describing what similarly situated parents prefer for scheduling. Under this approach, AI would reduce the need for a mediator or judge to be heavily involved in the

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46 YADONG CUI, ARTIFICIAL INTELLIGENCE AND JUDICIAL MODERNIZATION 22 (Springer 2020).

47 *Id.* at 23.

48 Graham Webster et al., *Full Translation: China's 'New Generation Artificial Intelligence Development Plan' (2017)*, NEW AM. (Aug. 1, 2017), https://www.newamerica.org/cybersecurity-initiative/digichina/blog/full-translation-chinas-new-generation-artificial-intelligence-development-plan-2017/ [https://perma.cc/KV8A-PFMN].

49 CUI, *supra* note 46, at 25.

50 *Id.* at 25–26.

51 *Id.*

52 Nu Wang, "*Black Box Justice": Robot Judges and AI-based Judgment Processes in China's Court System*, 2020 IEEE INT'L SYMP. TECH. SOC'Y 58, 59 (2020).

process. Some even anticipate that AI will be able to efficiently identify factors contributing to a family law dispute so as to create more time for the ADR practitioners and spouses to think creatively about ways of resolving the dispute.[53] Using deductive reasoning, AI can evaluate established legal precedent and other authoritative sources relevant to a particular circumstance (i.e., inputs), in order to generate a proposed resolution (i.e., an output). The maximalist would also argue that it is misplaced to believe ADR professionals have a comparative advantage in using emotional intelligence.[54] Elements of maximalist AI ODR are seen with Modria—a platform covering a variety of categories of legal disputes—where AI explores underlying interests motivating disputing parties while helping disputing parties generate agreements. Additionally, SmartSettle has used AI to serve as an intermediary between groups experiencing hostility in supporting and opposing Brexit.[55] The maximalist version of AI ODR's ability to gain wider adoption will depend on the extent AI can foster trust with parties. A recent study found that AI can increase trust between parties, and when misunderstandings do develop, the attribution of blame assigned to human counterparts decreased, leading to greater peer-to-peer collaboration.[56]

The role of AI in art helps to provide a framework for the possibilities of AI in ODR. Generative AI is defined as "a computational system . . . taking on particular responsibilities, exhibit[ing] behaviours that unbiased observers would deem . . . creative."[57] These systems use previous human-created art as inputs in order to identify themes between different art pieces and create a distinct piece of art. Google's DeepDream system uses an artificial network to detect patterns between images and create something

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53 Darren Gingras & Joshua Morrison, *Artificial Intelligence and Family ODR*, 59 FAM. CT. REV. 227, 229 (2021).

54 *See* Wu Youyou, Michal Kosinski, & David Stillwell, *Computer-based Personality Judgments Are More Accurate than Those Made by Humans*, 112 PROC. NAT'L ACAD. OF SCI. 1036, 1039 (2015) (presenting a series of studies that illustrate how computer judgments are more accurate than humans in assessing social situations, including political beliefs and substance use).

55 *See* Charlie Irvine, *Brexit Negotiated? Online Dispute Resolution Will be More Than an Alternative*, KLUWER MEDIATION BLOG (Dec. 16, 2018), http://mediationblog.kluwerarbitration.com/2018/12/16/odr-will-be-more-than-an-alternative/?doing_wp_cron=1592377477.8860759735107421875000 [https://perma.cc/54XV-8CRF].

56 Jess Hohenstein & Malte Jung, *AI as a Moral Crumple Zone: The Effects of AI-mediated Communication on Attribution and Trust*, 106 COMPUT. HUM. BEHAV. 1 (2020).

57 *See* Jessica Fjeld & Mason Kortz, *A Legal Anatomy of AI-generated Art: Part I*, HARV. J. ON L. & TECH. DIG. (Nov. 21, 2017), https://jolt.law.harvard.edu/digest/a-legal-anatomy-of-ai-generated-art-part-i [https://perma.cc/35A8-22BT].

somewhat distinct.[58] Meanwhile, Amazon's DeepComposer converts a short melody an individual provides into a complete song by using some degree of creativity.[59] These examples are far from the high standards humans expect from one another. Yet, AI is still a new technology. Future breakthroughs could allow AI to make proposals with some degree of creativity and to resolve a dispute using historical datasets. The key questions are whether disputants would place a sufficient degree of trust in machine learning to abdicate greater decision-making to an AI system, and whether this is an acceptable outcome for the dispute resolution field.

i. AI ODR Trade-Offs & Complications

Despite these benefits, AI has some shortcomings that should be considered for ODR system design. AI is highly reliant on quality information being used as inputs, so flawed or incomplete information can generate problematic outputs. This has been described as the "garbage in, garbage out" conundrum, where algorithms experience difficulty in distinguishing useful information from problematic information for the purposes of generating a reasonable output.[60] When AI uses inductive reasoning—where multiple examples are used to infer a rule—the "garbage in, garbage out" problem is further accentuated, as AI may use unrepresentative or incomplete information to infer outputs and rules. As seen with Tay, Microsoft's AI bot that became explicitly racist and sexist, AI that insufficiently filters out bad data can lead to problematic outcomes.[61] To be sure, this is not a one-off problem; there have been other instances where AI generates problematic outputs, due to insufficient filtering of inputs used in the system.[62] In fact, an extensive survey conducted through Harvard's Berkman Klein Center found that considerations of fairness and non-discrimination was the most consistent theme, appearing in all of the AI ethics reports

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58 *Id.*

59 *See* Ben Rogerson, *Amazon AWS DeepComposer is "The World's First Machine Learning-Enabled Musical Keyboard"*, MUSICRADAR (Dec. 3, 2019), https://www.musicradar.com/news/amazon-aws-deepcomposer-is-the-worlds-first-machine-learning-enabled-musical-keyboard [https://perma.cc/R56R-87DV].

60 *See* CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 150 (Crown, 2016).

61 *See* James Vincent, *Twitter Taught Microsoft's AI Chatbot to be a Racist Asshole in Less Than a Day*, VERGE (Mar. 24, 2016, 6:43 AM), https://www.theverge.com/2016/3/24/11297050/tay-microsoft-chatbot-racist [https://perma.cc/9HBM-KYTH].

62 *See generally* Cade Metz, *We Teach A.I. Systems Everything, Including Our Biases*, N.Y. TIMES (Nov. 11, 2019), https://www.nytimes.com/2019/11/11/technology/artificial-intelligence-bias.html [https://perma.cc/FV5R-XL72].

included in the survey.[63] Stated eloquently from the German government, "individuals can only determine if an automated decision is biased or discriminatory if they can 'examine the basis— the criteria, objectives, logic— upon which the decision was made.'"[64] As such, considerations for AI governance will be critical to promoting trust among a variety of different stakeholders.

When used to resolve disputes, an AI system that insufficiently filters bad data raises the concern of inconsistent or harmful outcomes, based on a disputant's group or information provided. Moreover, although addressing bias from human third-party neutrals is an oft-mentioned concern,[65] developers write the algorithms that define the parameters for AI. As ODR seeks to resolve disputes that are global in nature, the demographics of programmers writing the algorithms in AI are limited and may result in unrepresentative algorithms. For instance, fewer than 25% of employees at large tech companies are female, and fewer than 10% are Black and Latinx.[66] As such, problematic biases from the programmers can seep into the constructed algorithm. Cathy O'Neil, an acclaimed author and data scientist, eloquently recognized that "algorithms are simply opinions embedded in code."[67] In reality, the lived experiences of programmers may not be representative of their global user population. Bias in AI ODR is also problematic because AI ODR is far more scalable when compared to a human third party. Unlike a single human third party, bound by space and time, AI ODR has fewer constraints, so any bias would be externalized on a larger scale.

The AI maximalists, believing AI will have the capability of resolving disputes in the absence of a third-party neutral, face the

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63 Jessica Fjeld et al., *Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-Based Approaches to Principles for AI*, BERKMAN KLEIN CTR., 5 (2020), https://dash.harvard.edu/bitstream/handle/1/42160420/HLS%20White%20Paper%20Final_v3.pdf?sequence=1&isAllowed=Y [https://perma.cc/TE9E-X8NU].

64 *Id.* at 42.

65 *See* Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. UNIV. J. L. & POL'Y 71, 102 (2010) (addressing studies where ADR professionals express explicit and implicit biases).

66 *See* Sarah Myers West, *Discriminating Systems: Gender, Race, and Power in AI*, AI NOW INST. 11 (Apr. 2019), https://ainowinstitute.org/discriminatingsystems.pdf [https://perma.cc/VB9E-3LM7].

67 Cathy O'Neil, Ted Talks, *The Era of Blind Faith in Big Data Must End*, YOUTUBE (Sept. 7, 2017) https://www.youtube.com/watch?v=_2u_eHHzRto [https://perma.cc/JMZ2-MMFX]; *see also* CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 3 (Crown, 2016) (algorithms "encode human prejudice, misunderstanding, and bias").

challenge of AI being able to understand the moral context of a given dispute. Societal morals are ever evolving, and legal history reveals that what one society currently views as moral could have been perceived as immoral in prior generations. Ranging from same sex marriage, [68] interracial schooling,[69] and classification of an entire ethnicity as a suspect class,[70] morals reflected through laws are constantly changing and an AI system presented with historical data may struggle to understand the moral context in the absence of a third party's support. Moreover, ODR platforms have the capability of operating on a global level, and the moral differences[71] between countries may require AI to exhibit comparable flexibility in certain contexts. Although the global perspective may not be relevant for AI's application to local family law disputes, the need for a broader perspective increases the more disputants have access to the platform, as is evinced with cross-jurisdictional e-commerce transactions. The temptation may be for human developers to feed the AI cases, statutes, and other legal material throughout history to provide the full extent of a society's morals, as reflected in the law. For this to apply, AI would need to be able to better understand contextual circumstances than what it is currently able to do.[72] Theoretically, programmers would provide AI with established rules using authoritative sources, disputants would provide information about their particular circumstances, and the system would develop a hypothesis to explain the relationship between authoritative sources and the disputants' information. At present, humans engage in abductive reasoning much more seamlessly than AI does, because abduction requires experimenting with different scenarios and determining which is most relevant to the particular context of a dispute.[73] As the large amount of data reflecting prior generations' morals can crowd-out the present generation's moral expectations, this could lead to an AI system generating outputs with outdated information or outputs that are not applicable to a given context. Developers

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68 Obergefell v. Hodges, 576 U.S. 644 (2015); *cf.* Baker v. Nelson, 409 U.S. 810 (1972).

69 Brown v. Board of Educ., 349 U.S. 294 (1955); *cf.* Plessy v. Ferguson, 163 U.S. 537 (1896).

70 Korematsu v. United States, 323 U.S. 214 (1944); *cf.* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

71 Within North America alone, what is considered a drug is treated differently on a federal level.

72 *See generally* JAMES A. CROWDER, JOHN CARBONE & SHELLI FRIESS, ARTIFICIAL PSYCHOLOGY 51–62 (Springer Nature Switzerland AG, 2020).

73 *See, e.g.*, William Littlefield II, *The Human Skills AI Can't Replace*, QUILLETTE (Sept. 25, 2019), https://quillette.com/2019/09/25/the-human-skills-ai-cant-replace/ [https://perma.cc/7EYS-XKS7].

could also choose to only feed the AI legal material from the present generation, in order to produce a more responsive system to present disputes. Even with a narrower data set, it is unlikely that AI would conduct abduction as quickly as a third-party neutral.

The AI maximalist vision in ODR is further complicated by the nuanced success of using AI in medicine. The maximalist's aspiration for AI to supplant tasks typically reserved for doctors is similar to the aspiration for AI to supplant ADR practitioners: Using natural-language processing ("NLP") to assess a broad range of information—whether relevant statutes, medical or law review journals, and data about the disputants or patient circumstances—AI could generate a medical diagnosis or a proposed resolution that is suitable to the interests and needs of disputants. In response to the National Academies of Sciences, Engineering, and Medicine statement, that improving medical diagnoses was a "moral, professional, and public health imperative,"[74] IBM created Watson Health to use AI in the medical diagnosis process. However, while Ginni Rometty, IBM's former CEO and AI maximalist, predicted in 2016 that by 2021 every important decision would be made with IBM Watson's help,[75] IBM would actively seek the sale of Watson Health in 2021 due to unsatisfied commercial expectations.[76] In part, these unsatisfied expectations are due to the current limitations in NLP to strengthen AI's abductive reasoning, in order to generate reliable outputs/diagnoses from data that involves nuances.[77] Although future improvements can be made,[78] Watson

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74 ERIN P. BALOGH, BRYAN T. MILLER & JOHN R. BALL, IMPROVING DIAGNOSIS IN HEALTH CARE (National Academies Press, 2015).

75 *See* Sharon Gaudin, *IBM: In 5 Years, Watson A.I. Will be Behind Your Every Decision*, COMPUTERWORLD (Oct. 27, 2016, 4:30 AM), https://www.computerworld.com/article/3135852/ibm-in-5-years-watson-ai-will-be-behind-your-every-decision.html [https://perma.cc/43VU-W2BP]; *see also* Lauren F. Friedman, *The CEO of IBM Just Made a Bold Prediction About the Future of Artificial Intelligence*, BUS. INSIDER (May 14, 2015, 2:49 PM), https://www.businessinsider.com/ginni-rometty-on-ibm-watson-and-ai-2015-5 [https://perma.cc/93M3-G6K6].

76 *See* Laura Cooper & Cara Lombardo, *IBM Explores Sale of IBM Watson Health*, WALL ST. J. (Feb. 18, 2021, 8:21 PM), https://www.wsj.com/articles/ibm-explores-sale-of-ibm-watson-health-11613696770 [https://perma.cc/A2Z7-S7A4].

77 *See* ROBERT M. WACHTER, THE DIGITAL DOCTOR: HOPE, HYPE, AND HARM AT THE DAWN OF MEDICINE'S COMPUTER AGE (McGraw Hill Education, 2015).

78 In May 2021, Google and HCA Healthcare, a national hospital chain, entered into an arrangement to create algorithms using patient healthcare records to help improve operating efficiency, monitor patients, and guide doctors' decisions. Such a development will need to recognize the challenges that IBM Watson Health has experienced over the years. *See* Melanie Evans, *Google Strikes Deal with Hospital Chain to Develop Healthcare Algorithms*, WALL ST. J. (May 26, 2021, 4:34 PM), https://www.wsj.com/articles/google-strikes-deal-with-hospital-chain-to-develop-healthcare-algorithms-11622030401 [https://perma.cc/ZZ7T-C2JY].

Health's use of NLP struggled to understand words with double-meaning and phrases with negation and was limited in drawing distinctions based on when a health-related event occurred.[79] While the maximalist's vision currently remains impractical, the synergistic relationship between physicians and AI, as with ADR practitioners and AI, continues to demonstrate effectiveness. For instance, digital health applications (where patients record data that AI will process and assess) and omics-based tests (where machine learning analyzes a population pool to find correlations) allow physicians to provide more personalized treatments to patients using AI.[80] This illustrates that the current state of AI is most effective when serving to complement, rather than supplant, the skills of an ADR practitioner.

A potential resolution to some of the shortcomings of AI ODR, particularly in fostering greater user trust, is for the algorithm's code to be open source. Open-source technology can allow users and the general public to analyze the code to see biases that may exist within the system or disparities the code can create. As this is the open-source generation,[81] where programmers increasingly share their code with others to collaborate, gain legitimacy, or to educate, ODR platform creators can similarly disseminate their computer code to a broader segment of the public. It is critical to recognize that in managing disputes and promoting justice, ODR platforms are engaging in responsibilities that have historically been the prerogative of the State. Additionally, in democratic societies, there is often an expectation of government transparency. As such, the use of AI with ODR may require greater transparency than in other use cases, such as where AI is not engaging in a quasi-State function. In arguing for greater open-source code, academic and political activist Lawrence Lessig identified that "where transparency of government action matters, so too should the kind of code it uses."[82] As AI ODR relies heavily on algorithms to support quasi-State actions, and the programmer's method for developing the AI system can have important implications for outcomes and disparities between groups, having transparency with the code can be critical—not just for promoting trust, but also from a public policy perspective. Yet, making an

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79 WACHTER, *supra* note 77.

80 ADAM BOHR & KAVEH MEMARZADEH, ARTIFICIAL INTELLIGENCE IN HEALTHCARE 28–29 (2020).

81 *See generally* Josh Lerner & Jean Tirole, *The Economics of Technology Sharing: Open Source and Beyond*, 19 J. ECON. PERSP. 99 (2005).

82 LESSIG, *supra* note 10, at 141.

algorithm open source comes with intellectual property considerations, as investments into creating the algorithm would be freely accessible to the public and even competitors. A potential compromise could include making the code accessible only to users of the platform and, perhaps, creating a non-disclosure framework restricting the ability of disputants to share this information with the general public. Greater access for potential disputants can provide informed consent so that disputants can better understand how a specific AI system could impact the dispute resolution process.

B. *Blockchain ODR*

"Whereas most technologies tend to automate workers on the periphery doing menial tasks, blockchains automate away the center. Instead of putting the taxi driver out of a job, blockchain puts Uber out of a job and lets the taxi drivers work with the customer."[83]

—Vitalik Buterin, Co-Founder of Ethereum

Use of blockchains is a recent development that has grown quickly as an additional technological mechanism for parties to resolve disputes.[84] Finance can serve as a valuable point of departure, as this is the largest use case for blockchains through cryptocurrencies.[85] Relying on what has become known as Nakamoto Consensus, Bitcoin—the largest cryptocurrency by market capitalization—allows for peer-to-peer transactions where nodes on the blockchain transact based on cryptographic proofs, rather than trust.[86] Bitcoin was created shortly after the 2008 financial crisis, during a period of heightened global distrust[87] of

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[83] *See* DON TAPSCOTT & ALEX TAPSCOTT, BLOCKCHAIN REVOLUTION: HOW THE TECHNOLOGY BEHIND BITCOIN IS CHANGING MONEY, BUSINESS, AND THE WORLD 280 (2016).

[84] Currently, there are only a handful of companies using blockchains in ODR. *See, e.g.*, Orna Rabinovich-Einy & Ethan Katsh, *Blockchain and the Inevitability of Disputes: The Role for Online Dispute Resolution*, 2019 J. DISP. RESOL. 47, 59–73 (2019).

[85] Considering that an important feature of blockchain is the distributed ledger technology, blockchain adoption into finance should not be surprising.

[86] *See generally* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN (2008), https://bitcoin.org/bitcoin.pdf [https://perma.cc/7WHM-M73N].

[87] *See generally* Ed Saiedi et al., *Distrust in Banks and Fintech Participation: The Case of Peer-to-Peer Lending*, ENTREPRENEURSHIP THEORY & PRAC. 1 (2020), https://journals.sagepub.com/doi/pdf/10.1177/1042258720958020 [https://perma.cc/TA4C-N6DC]; *see also* Felix Roth, *The Effect of the Financial Crisis on Systemic Trust*, 44 INTERECONOMICS 203, 203–08 (July/Aug. 2009), https://www.intereconomics.eu/contents/year/2009/number/4/article/the-effect-of-the-financial-crisis-on-systemic-trust.html [https://perma.cc/HB9G-68XQ].

centralized intermediaries and their role in causing this crisis.[88] Directly related with the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994,[89] finance has seen increased market concentration and rent-seeking that is externalized onto customers and retail investors, resulting in the ten largest banks controlling more than half of America's total banking assets.[90] The rise of cryptocurrencies using permissionless blockchains provides an alternative to the traditional banking model, so that individuals can avoid high banking transaction costs, including rent-seeking.[91] As recognized in the Coase Theorem, economic activity that involves high transaction costs results in involvement from centralized entities, rather than relying on "the price mechanism" and private negotiations.[92]

While finance has used blockchain technology to promote lower transaction costs and greater decentralization, in dispute resolution, blockchains are valuable for their ability to crowdsource decisions in a manner not limited by space and time. As will be discussed in Section V(A), trust of peers and distrust of centralized decision-making are the leading underlying motivations for disputants choosing Blockchain ODR. Blockchain ODR seeks to address some of the costs of centralization in the judicial system, particularly in the context of cross-jurisdictional disputes, low-monetary value disputes, or disputes in need of fast resolution.

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88 Over the years, Bitcoin and other cryptocurrencies have altered from existing in the absence of centralized intermediaries to becoming increasingly connected for these intermediaries to facilitate transactions, particularly through hosted wallets. *See* Andrew Kang, *Bitcoin's Growing Pains: Intermediation and the Need for an Effective Loss Allocation Mechanism*, 6 MICH. BUS. & ENTREPRENEURIAL L. REV. 263, 274 (2017), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1061&context=mbelr [https://perma.cc/77DR-XCBD].

89 Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (1994), https://www.govinfo.gov/content/pkg/STATUTE-108/pdf/STATUTE-108-Pg2338.pdf [https://perma.cc/SG4R-FQ3A]. This statute was in response to the National Bank Act of 1863 that, interpreted by the Comptroller of the Currency, sought to prohibit national banks. Riegle-Neal would dramatically reduce geographic restrictions on interstate banking. *See* Grant E. Buerstetta & David E. Runck, *Developments in Banking Law: 1994*, 14 ANN. REV. BANKING L. 1, 2 (1995).

90 *See* Jeffery Y. Zhang, *The Rise of Market Concentration and Rent Seeking in the Financial Sector*, HARV. JOHN M. OLIN CTR. L., ECON., & BUS. 1, 2 (2017), http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Zhang_72.pdf [https://perma.cc/B3C4-J3GM] (discussing the increased concentration of banking assets from 1980 to 2017).

91 Sinclair Davidson, Primavera de Filippi, & Jason Potts, *Economics of Blockchain*, PUB. CHOICE CONF. 1, 5 (May 2016), https://hal.archives-ouvertes.fr/hal-01382002/document [https://perma.cc/E5PY-GU83] (discussing how complex systems evolve from centralization to decentralization when the costs of centralized systems through inflation, corruption, and rent-seeking exceed the benefits of centralized creating, establishing, and enforcing rules).

92 Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390–92 (Nov. 1937).

Blockchain technology is a new tool being incorporated into dispute resolution systems, yet the ideological underpinning that relates to trust of the community has a rich history in the dispute resolution field.[93] Prior to the adoption of interest-based ADR, communities had a greater role in managing and resolving disputes. This historical approach of dispute resolution places a value preference on empowering the community and a disputant's peers to manage disputes, as opposed to having an expert third party with limited community connections manage a dispute.[94] This community motif relates closely with Blockchain ODR—except rather than a community being defined based on geographic identities, this branch of ODR uses communities based on shared interests between nodes in a system, as is often the case with the Internet. Within this branch, conferring decision-making to a peer holds considerable sway while abdicating decision-making to AI, despite its efficiencies, or to a single third party raises concerns. This communitarian ethos means that Blockchain ODR prioritizes the role of the community in managing disputes that impact the interest-based community.

In addition, just as the Internet and e-commerce have demonstrated, new technologies can lead to new forms of disputes, so the use of blockchain and smart contracts[95] can create new types of disputes that are ill-suited for traditional dispute systems. Blockchain ODR has an indispensable role for disputes that arise on blockchains, particularly with smart contracts. Without this branch of ODR, other dispute resolution systems would struggle to address the preferences of disputants using smart contracts where pseudonymity is prioritized and transactions are finalized in a matter of moments, thus threatening access to justice for a class of disputants. Pseudonymity may seem trivial when parties define themselves solely within the bounds of the physical world. Yet, with blockchains, where physical conditions are deprioritized in favor of a digital context, pseudonymity is critical for parties to fo-

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93 Blockchain ODR's use of crowdsourced decision-making is inspired from community trust, even as the use of cryptography—for instance, through asymmetric cryptography—reduces the reliance on orthodox systems of trust.

94 *See* Mamo, *supra* note 29, at 1426 ("Community-based dispute resolution held the promise of strengthening local self-government and empowering laypeople to directly address disputes with their fellow community members rather than having disputes managed by professionals.").

95 Smart Contracts Alliance & Deloitte, *Smart Contracts: 12 Use Cases for Business & Beyond*, CHAMBER DIGIT. COM. 1, 40 (Dec. 2016), http://digitalchamber.org/assets/smart-contracts-12-use-cases-for-business-and-beyond.pdf [https://perma.cc/GV83-4WMB] (providing an overview of smart contracts and their business proposition in a variety of different sectors, ranging from real estate to financial markets).

cus on the interests that bring them together, as opposed to physical identification that can create distractions for community-based interests.

Cryptocurrencies use cryptoeconomics[96] to address the Byzantine General's Problem,[97] so that parties can transact with one another in the absence of trust. With Blockchain ODR, cryptoeconomics seeks to align users' monetary incentives to reach the appropriate outcome for disputants, without relying on trusted intermediaries. This concept is built on Schelling points, where certain incentives can allow parties to act consistently with one another in the absence of communication.[98] While AI can struggle to understand nuances and can, from a certain perspective, disempower individual decision-making, blockchains allow nodes[99] in a network to review the dispute and identify nuances, in order to reach a just outcome. Using cryptoeconomics, blockchain nodes are specifically incentivized to reach an outcome that would be fair, based on the circumstances. Cryptoeconomics can impose financial penalties for "bad-actors" who seek an unfair or unjust outcome, while also filtering out those nodes that do not do enough due diligence in analyzing the dispute when these groups vote inconsistently with the majority.[100] So long as a majority of nodes in a dispute have monetary incentives to reach a fair outcome, incentives that are greater than the incentives of undermining the process in bad faith, the expectation is that a fair outcome would be reached. This is because nodes are financially rewarded for voting in a consistent manner with other nodes, while voting inconsistently with the majority results in financial loss. An underlying assumption is that arbitrators with some degree of knowledge in a

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96 Josh Stark, *Making Sense of Cryptoeconomics*, CoinDesk (Sept. 13, 2021, 2:50 AM), https://www.coindesk.com/making-sense-cryptoeconomics [https://perma.cc/UG67-2C92] (Narrowly defined, cryptoeconomics is the use of incentives and cryptography to design systems, applications, and networks.).

97 Leslie Lamport, Robert Shostak, & Marshall Pease, *The Byzantine Generals Problem*, ACM Transactions Programming Languages Sys. 382, 384 (1982), http://pages.cs.wisc.edu/~bart/739/papers/byzantine.pdf [https://perma.cc/N6C2-TZZH] (describing a framework for building consensus and reaching decisions, even when there are bad actors seeking to undermine the system's integrity).

98 Thomas C. Schelling, The Strategy of Conflict 5 (Harvard University Press, 1960), http://elcenia.com/iamapirate/schelling.pdf [https://perma.cc/V2BG-WQDT].

99 Human users typically have some degree of pseudonymity when using asymmetric cryptography. While there can only be one user, a user can have multiple nodes. Blockchain ODR platforms can require some sort of confirmation to ensure that a user is not using multiple nodes in resolving a dispute.

100 *See, e.g.*, Federico Ast et al., *Dispute Revolution: The Kleros Handbook of Decentralized Justice*, Kleros 1, 54–55 (2020), https://kleros.io/book.pdf [https://perma.cc/2UEP-TGC8].

given area of law would self-select for those types of disputes, as expertise means a greater likelihood of voting with a majority of others with an understanding of the area of law. A blockchain's use of cryptoeconomics can also reduce the extent of the "garbage in, garbage out" conundrum seen with AI ODR, as nodes that are unable to distinguish useful from useless information are more likely to reach the wrong outcome and therefore experience financial loss.

i. Blockchain ODR Trade-Offs & Complications

Despite these benefits, the application of blockchains to dispute resolution comes with potential shortcomings. The emphasis that cryptoeconomics places on financial incentives can create problematic outcomes for certain types of disputes. When nodes are being compensated based on the value of the dispute, nodes may be financially incentivized to avoid low-value disputes or disputes that are time-consuming to resolve. Because of the incentives to vote with the majority, complex disputes—including those where individuals are unsure how other nodes would treat a case—may receive less attention due to fear of experiencing financial loss. That is, cases where the outcome is uncertain may be more likely to be overlooked in comparison to non-ambiguous outcomes. The cryptocurrency analogy to this is with miners[101] on Ethereum, the largest general purpose blockchain. Those parties transacting on the Ethereum blockchain, who do not offer a high enough gas price to incentivize miners to verify a transaction, have long waits and may never have the transaction verified until the gas price is increased.[102] The outcome of these conditions with Blockchain ODR is decreased access to justice, as some disputes may be crowded-out due to low monetary value, or because the disputes have expected outcomes that are hard to predict for arbitrators. Indeed, access to justice has historically been a challenge[103] for dispute resolution

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101 Under the proof-of-work consensus mechanism, miners process new blocks of data filled with transactions that are subsequently added to the Ethereum blockchain.

102 *See, e.g.*, Michael Garbade, *High Gas Fees Prevent Ethereum from Being Ethereum*, CoinDesk (Sept. 14, 2021, 6:09 AM), https://www.coindesk.com/tech/2020/10/14/high-gas-fees-prevent-ethereum-from-being-ethereum/ [https://perma.cc/9K8J-JYS2].

103 *See generally* Russell Engler, *And Justice for All-Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987 (1999); *see also* Leonard Wills, *Access to Justice: Mitigating the Justice Gap*, Am. Bar Ass'n (Dec. 3, 2017), https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2017/access-to-justice-mitigating-justice-gap/ [https://perma.cc/MJ4V-PEQA].

systems, and Blockchain ODR can be seen as a tool to mitigate—without entirely curing—this phenomenon.

Blockchain ODR's use of cryptoeconomics to incentivize voting with the majority also raises the question of the value in having disagreement and dissent in a panel of adjudicators. In judicial decision-making, a dissent can provide some social value without holding any precedential value. Supreme Court Chief Justice Hughes stated that "[a] dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[104] As such, a dissent can highlight values and considerations that the majority overlooked. Blockchain ODR's use of cryptoeconomics may diminish the willingness of arbitrators to go against the majority, even as doing so could be valuable for future arbitrators to understand the shortcomings of one panel's perspective. Justice Ruth Bader Ginsburg also classified dissents as valuable for their ability to "attract immediate public attention and . . . propel legislative change."[105] For Blockchain ODR, an arbitrator may use a dissent as an opportunity to attract attention from a broader, relevant community about an important, or perhaps ambiguous, element that underlies a given dispute, even when the arbitrator knows they will be in the minority of arbitrators. With how cryptoeconomics is currently modeled, voting against the majority results in a monetary penalty. There are moments where voting against the majority can be an intentional act to subvert the process. There are also moments where voting with the majority and providing consistent decisions are valuable for the ODR platforms legitimacy.[106] Indeed, dissents can make a dispute resolution system "appear indecisive and quarrelsome,"[107] yet, although rare, there are important instances where a dissent can speak to a future panel of adjudicators or outline important considerations for the relevant community. The current model of Blockchain ODR diminishes the likelihood that arbitrators would opt for being in the minority and accept the financial costs of such an act, even though there may be social value in this form of self-sacrifice.

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104 Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 144 (1990).

105 Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 6 (2010), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1427&context=mlr [https://perma.cc/3UDR-6CDD].

106 *Id.* at 3 ("In civil-law systems . . . the disallowance of dissent [is] thought to foster the public's perception of the law as dependably stable and secure.").

107 *Id.* at 7.

An additional drawback is based on a system design consideration: permissionless blockchains typically use asymmetric cryptography in order to provide pseudonymity for nodes in the network.[108] In keeping with fitting the forum to the fuss,[109] this can be valuable for online transactions that already use a certain degree of pseudonymity, where users mask their true identity with an identity unique to the platform. The use case is clearest with smart contracts,[110] because parties transacting with a smart contract already operate under the pseudonymous conditions of a blockchain. As a group of scholars have already recognized, "disputes regarding smart contracts are inevitable, and parties will need means for dealing with smart contract issues."[111] As with e-commerce, litigation and traditional ADR will struggle to resolve disputes originating from smart contracts, given their cross-jurisdictional and pseudonymous nature.[112] What transacting parties using smart contracts can learn from e-commerce is that having protocols for managing and resolving disputes will be critical for wider engagement with this novel industry. Blockchain ODR has the added value of already operating on the blockchain system—the technology driving smart contracts—thus promoting greater efficiency in operability.

A current impediment to Blockchain ODR scaling further is a lack of interoperability between different blockchains and a need to enhance the ease of exchanging data on and off the blockchain.

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108 *See, e.g.*, Symposium, *Hawk: The Blockchain Model of Cryptography and Privacy-Preserving Smart Contracts*, 2016 IEEE SYMP. SEC. & PRIV. 839 (2016), https://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=7546538 [https://perma.cc/7YSE-RHY7] (describing the incorporation of zero-knowledge proof cryptography to enhance the privacy of smart contracts).

109 GREENSTEIN, *supra* note 7.

110 *See generally* Nick Szabo, *Smart Contracts: Building Blocks for Digital Markets*, PHONETIC SCI., AMSTERDAM (1996) http://www.truevaluemetrics.org/DBpdfs/BlockChain/Nick-Szabo-Smart-Contracts-Building-Blocks-for-Digital-Markets-1996-14591.pdf [https://perma.cc/C7ZY-8CZJ] (Smart contracts are self-executing lines of code, capable of incorporating data that reside on a blockchain.); *see also* Vitalik Buterin, *Ethereum Whitepaper*, ETHEREUM (2013), https://ethereum.org/en/whitepaper/ [https://perma.cc/7MDF-649V].

111 SCHMITZ & RULE, *supra* note 22. At present, smart contracts have their own limitations, so it is unlikely for this system to be the default transacting method. *See generally* Stuart Levi & Alex Lipton, *An Introduction to Smart Contracts and Their Potential and Inherent Limitations*, HARV. L. SCHOOL ON CORP. GOVERNANCE (May 26, 2018), https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations [https://perma.cc/KR74-7V8M] (identifying limitations to smart contracts scaling, including non-technical parties negotiating or drafting smart contracts and incorporating data not on the blockchain).

112 *See* Amy J. Schmitz & Colin Rule, *Online Dispute Resolution for Smart Contracts*, 2019 J. DISP. RESOL. 103, 105 (2019).

To illustrate the latter scenario, a family law dispute on a blockchain platform would face hurdles, as the parties would need to incorporate information that is not on the blockchain, such as marital assets. The parties' true identities would also be masked with public keys, complicating the accuracy for third-party nodes to verify their disputing parties' identities. Of note, digitizing an offline record (e.g., offline identities or products) onto a blockchain comes with increased verification costs, in determining the accuracy of the offline information.[113] Additionally, when an ODR platform is on a different blockchain from the blockchain that contains data relevant to the dispute, there can be challenges in having interoperability between the different blockchains. To be sure, technology is still evolving to resolve operability challenges. Though limited, atomic swaps have the capabilities of transferring data between different blockchains.[114] Oracles allow for data from the physical world to be stored on a blockchain, thus promoting blockchain interoperability.[115] However, the use of oracles is still novel, with room for improvement,[116] and has not reached scale within the blockchain industry. In seeking to address the interoperability challenge, blockchain companies like Chainlink and Kleros present a potential solution. Chainlink uses oracles to allow data from the physical world to be inserted into a blockchain, in addition to facilitating communication between blockchains.[117] As a Blockchain ODR platform, Kleros has implied that its ability to serve as an oracle is more narrowly tailored, such as in serving as a price oracle, though the aspiration is for a more robust oracle capa-

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113 *See* Christian Catalini & Joshua Gans, *Some Simple Economics of the Blockchain*, 63 NAT'L BUREAU ECON. RSCH. 80 (2019), https://dl.acm.org/doi/fullHtml/10.1145/3359552 [https://perma.cc/7P7D-4XC2].

114 Though this has been limited to using smart contracts to swap cryptocurrencies, there is the potential for more robust exchanges of data between different blockchains. *See* Ron van der Meyden, *On the Specification and Verification of Atomic Swap Smart Contracts*, 2019 IEEE INT'L CONF. BLOCKCHAIN & CRYPTOCURRENCY 3 (2019), https://ieeexplore.ieee.org/document/8751250 [https://perma.cc/2L6P-CLUA].

115 *See, e.g.*, Lorenz Breidenbach et al., *Chainlink 2.0: Next Steps in the Evolution of Decentralized Oracle Networks* 1, 6 (Apr. 15, 2021), https://research.chain.link/whitepaper-v2.pdf [https://perma.cc/82JK-PBH3].

116 A group of researchers has also scrutinized the accuracy and trustworthiness of oracles, finding that there remains room for further improvements. Hamda Al-Breiki & Muhammad Habib Ur Rehman, *Trustworthy Blockchain Oracles: Review, Comparison, and Open Research Challenges*, 2019 IEEE ACCESS 1, 10 (Jan. 2020).

117 *Id.* at 6; *see generally Interoperability and Connectivity: Unlocking Smart Contracts 3.0*, CHAINLINK (Oct. 18, 2019), https://blog.chain.link/interoperability-and-connectivity-unlocking-smart-contracts-3-0-2/ [https://perma.cc/SER7-AAVT].

bility.[118] Until oracles are sufficiently trusted, without the accompanying concern that physical data will be corrupted during the process of digitizing data onto a blockchain, Blockchain ODR will, to some extent, be restricted to blockchain-based or digital disputes.

C. *Facilitative ODR*

Facilitative ODR presents noteworthy benefits and limitations when compared to the more transformative branch of AI and blockchain-based ODR. The National Center for State Courts ("NCSC") has articulated this form of ODR as a "public-facing digital space for parties to resolve their dispute or case."[119] This use of ODR recognizes ICT as a tool through which parties and ADR practitioners can engage with each other to resolve a given dispute. Rather than the technology being actively involved in resolving the dispute—as with AI—or incorporating platform-specific incentives to promote efficient resolution—as with Blockchain ODR—Facilitative ODR merely brings parties together remotely in order to promote resolution. This branch was particularly critical during the pandemic, when health and safety concerns restricted the ability of parties to resolve disputes in-person. In contrast to the other two forms of ODR, Facilitative ODR is most closely connected with the court system, as court-annexed ODR has grown significantly in recent years and has relied on facilitative technology tools for this growth.[120] In 2014, there was only one court-implemented ODR system; by the end of 2019, though, there were a total of sixty-six court-implemented ODR systems dispersed throughout America, all of which fall within the Facilitative ODR branch.[121] Indeed, the NCSC advertises Facilitative ODR use cases to courts while providing a series of models for courts to engage with the technology.[122]

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118 Federico Ast et al., s*upra* note 100, at 147–49.

119 *Online Dispute Resolution*, NAT'L CTR. STATE CT., https://www.ncsc.org/odr [https://perma.cc/TH68-9FLK] (last visited May 10, 2021).

120 *See* American Bar Association, *Online Dispute Resolution in the United States: Data Visualizations*, AM. BAR ASS'N CTR. INNOVATION 1 (Sept. 2020), https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odrvisualizationreport.pdf [https://perma.cc/YF9Z-N6YZ].

121 *Id.* at 3.

122 *National Center for State Courts*, NAT'L CTR. STATE CT., https://www.ncsc.org [https://perma.cc/F3YV-VS97] (last visited Dec. 22, 2021).

Courts have a strong need for incorporating a digital forum to resolve disputes, as court facilities have geographic limitations. Additionally, with the use of court-annexed ADR, there has been a shortage of space within courts.[123] A digital forum also allows for enhanced confidentiality and responsiveness to disabled individuals, something that a physical environment struggles to handle.[124] Relatedly, a digital forum provides flexibility for parties to participate in a similar process to ADR while worrying less about logistics, such as commuting to the courthouse. This level of flexibility is well-illustrated with cross-jurisdictional disputes, where parties no longer face geographic constraints. When one party presents safety concerns to their counterpart, such as in domestic violence cases, Facilitative ODR may also provide a safer method for disputing parties to reach a resolution, as geographic separation and the ability to mute disruptive individuals can reduce threats or intimidation that can occur with in-person ADR proceedings. For decades, the use of ADR has been criticized when instances of power imbalances and safety concerns arise, which can undermine ADR's expectation of equal bargaining power and party autonomy.[125] Though far from being a complete cure, Facilitative ODR should be explored to maximize safety and comfort throughout the dispute resolution process.

One of the leading use cases of Facilitative ODR has been in family law, where parties seek collaborative processes to create agreements that will redefine their relationships into the future. ODR services have allowed spouses to reach agreements for child support, alimony, and parental time with children. Each of these factors could create hostilities between spouses, so ODR's value has come from incentivizing cooperation and allowing for more efficient agreements to be reached, as opposed to adverse litigation.[126] In recognizing these benefits, there has been a proliferation of private actors providing ODR services, often working in collaboration with courts. Matterhorn, for instance, operates

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123 *See, e.g.*, Anne Endress Skove, *Making Room for Mediation: ADR Facilities in Courthouses*, NAT'L CTR. STATE CT. (2000), https://cdm16501.contentdm.oclc.org/digital/collection/facilities/id/130 [https://perma.cc/B5DV-QS9G].

124 *Id.*

125 *See, e.g.*, Sarah Krieger, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L. J. 235, 245–47 (2002).; *see also* Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2165–70 (1993).

126 Rebecca Aviel, *Family Law and the New Access to Justice*, 86 FORDHAM L. REV. 2279, 2282 (2018) ("A sophisticated system will help divorcing spouses see and avoid [the] costs [of hostilities], offering them the infrastructure to recognize the shared gains to be had from cooperation.").

in sixteen states, with multiple different courts throughout the country. A compliance report with the Twentieth Circuit Court of Michigan found that Matterhorn had an annual increase of 22% in child support collected, 29% fewer hearings per month, and 35% fewer warrants issued per month.[127] Although this is only one company operating in one court, these results illustrate how increased flexibility provided through facilitative technology can lead to positive outcomes for disputants. Yet, intimate partner violence ("IPV") poses a challenge for Facilitative ODR. Geographic separation can be beneficial for a harmed spouse, while also simultaneously limiting the ability for ADR practitioners to identify instances of coercion between the parties.[128] A randomized controlled study restricted to Washington, D.C., involving family law disputes where IPV was present, found that parents were equally satisfied with shuttle mediation and Facilitative ODR.[129] However, there was a statistically significant preference in favor of either shuttle mediation or Facilitative ODR, compared to litigation.[130] The use of Facilitative ODR in family law is also important as a tool to prevent future disputes from occurring. Within these platforms, spouses can agree to make changes to parental schedules for children in response to both unexpected and expected circumstances. Such changes can be made simply through a smartphone application or a web browser associated with the ODR platform, thus providing geographic and time flexibility for spouses—so long as adequate notice is provided to their counterparts. In the absence of this flexibility, sudden schedule changes can escalate hostilities between parents where court intervention becomes necessary.

Facilitative ODR also has an important use when mediating international disputes, as illustrated during the Sudanese Peace Talks, where video conferencing became the predominant method of communication due to the coronavirus pandemic.[131] Technology

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127 *Family Court Results*, MATTERHORN, https://getmatterhorn.com/get-results/family-court/ [https://perma.cc/AD6U-LG7N] (last visited Nov. 29, 2021).

128 *See generally Online Dispute Resolution and Domestic Violence*, BATTERED WOMEN'S JUST. PROJECT (Sept. 3, 2020), https://www.bwjp.org/news/online-dispute-mediation-tipsheet.html [https://perma.cc/GF37-H3H3].

129 Amy Holtzworth-Munroe et al., *Intimate Partner Violence (IPV) and Family Dispute Resolution: A Randomized Controlled Trial Comparing Shuttle Mediation, Videoconferencing Mediation, and Litigation*, 27 PSYCH. PUB. POL'Y & L. 45, 56 (2021).

130 *Id.*

131 *See* Lisa K. Dicker & C. Danae Paterson, *COVID-19 and Conflicts: The Health of Peace Processes During a Pandemic*, 25 HARV. NEGOT. L. REV. 213, 236 (2020).

has an important role in promoting greater transparency. [132] In the absence of Facilitative ODR, a large group of stakeholders and disputing parties converge on one physical location, typically requiring safety and security expenditures for involved parties. This leads to increased financial costs for peaceful negotiations.[133] This is especially harmful to those stakeholders and groups that have limited financial resources to send their representatives. Moreover, security concerns have already been used to delay important stakeholders from partaking in mediating peace processes.[134] With Facilitative ODR, the financial costs of promoting peace are greatly reduced, as the primary expense becomes ICT. As is often the case, using facilitative technologies to resolve international disputes provides greater geographic and temporal flexibility for various stakeholders to engage with one another. The leading consideration for broader use of Facilitative ODR in mediating international disputes is whether the monetary savings are greater than the non-monetary cost[135] of a loss of interpersonal communication.[136] As entrepreneurial stakeholders involved in transitional justice continue to experiment with Facilitative ODR, only time will tell how entrenched these practices will be in the future.[137]

i. Facilitative ODR Trade-Offs & Complications

In assessing the risks of using this form of ODR, it is useful to consider what is being excluded. With Facilitative ODR, disputants are not exposed to the benefits of AI and blockchains as with the other branches of ODR. Facilitative ODR does not allow parties to benefit from the comparative advantage of AI as a fourth party in analyzing large swaths of data, or allow for the fourth party to be used as a conduit for crowdsourcing, as seen in blockchains. Rather, a third-party neutral will, at times, play a cen-

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132 *Id.* at 244 ("Broadened access to the negotiating room may also hold negotiators accountable for representing their delegations accurately and effectively and provide a measure of inclusion to diverse stakeholders by allowing them to observe and be seen during the negotiations.").

133 *See, e.g.*, Faten Ghosn & Joanna Jandali, *The Price of Prosecution: The Reality for Syrian Transitional Justice*, 8 PENN ST. J. L. & INT'L AFF. 1, 27–28 (2020).

134 *See* Dicker & Paterson, *supra* note 131, at 243 (discussing how Yemeni opposition leader Ansar Allah refused to travel to Geneva for peace negotiations unless security guarantees for the flight were provided).

135 *Id.* (discussing potential non-monetary tradeoffs with having Facilitative ODR as part of an international peace process).

136 *Id.* at 243–44 ("Interpersonal dynamics should not be underestimated, and they can be more consciously developed by mediators when negotiators are engaged directly with one another in the same physical space.").

137 *See id.* at 239.

tral role in accurately analyzing shared information, as with ADR. In addition, Facilitative ODR excludes the crowdsourced nature of blockchains, thus allowing multiple third parties to provide input on what should be the ideal outcome. Instead, the fourth party is the technology platform facilitating communication between disputants and ADR practitioners. Because of Facilitative ODR's relatively reduced reliance on technology to promote efficiency, a resolution is likely to take a longer period of time. As a result, Facilitative ODR could be best situated for use with higher-value disputes, where quick outcomes are less critical. Facilitative ODR's capacity to promote flexible communications between parties also means that those disputes requiring extended interpersonal communication would derive much value from this process.

While Zoom, Skype, and similar online platforms play an important role during the pandemic, recent innovations in hologram technology raise the possibility for a more holistic technology to be incorporated into ODR systems. A common ADR critique of Facilitative ODR is that this form of ODR manages disputes that were previously handled exclusively in-person. As such, the trade-off is that valuable non-verbal communication would be unidentified in Facilitative ODR proceedings, while ADR practitioners would have greater recognition of this phenomenon in-person. In his seminal book, Albert Mehrabian developed what has become one of the leading frameworks on the importance of nonverbal communication through an equation: "Total feeling = 7% verbal feeling + 38% vocal feeling + 55% facial feeling."[138]

As such, the tone with which words are communicated, nonverbal body cues accompanying the message, and the actual words expressed each play a role in understanding a message. Particularly relevant to ADR, Mehrabian posits that when the nonverbal communication expressed is inconsistent with the verbal expression, typically, the nonverbal communication will be persuasive.[139] Though nascent, incorporating hologram technology may serve to provide the complete breadth of communication that facilitative technologies, like Zoom, may not provide, while still preserving the benefits of Facilitative ODR through greater flexibility for dispu-

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138 ALBERT MEHRABIAN, SILENT MESSAGES 44 (Wadsworth Publishing, 1971).

139 This can be seen with sarcasm, where nonverbal communication and the vocal tone determines how a listener should interpret the message more than the actual words expressed. Mehrabian uses the example of messaging based on dominance-submissiveness, where domineering nonverbal communication will hold sway, even when using submissive words. *Id.* at 45–46.

tants. While Google's Project Starline, Microsoft Mesh, and WeWork have been at the forefront of experimenting with hologram technology, it is easy to see a world where holograms become as vital as Zoom is with Facilitative ODR.[140]

IV. Determining the Contours of ODR's Soul

In analyzing the soul of ODR, it is important to assess and identify the specific contours of ODR. ODR's orthodox definition has focused on the broad application of information and communication technology to prevent, manage, and resolve disputes.[141] However, the pandemic's influence has blurred the lines between this orthodox conception of ODR and other dispute resolution systems, as will be discussed in Section VII. As a result, a new conception of ODR will be needed in the future—one that focuses on a dispute resolution mechanism with the **ability to resolve online-exclusive disputes**, while also incorporating ICT tools into the system design. Without reassessing ODR's contours, there may be inadequate distinctions between ODR and other dispute resolution systems, as the latter are increasingly incorporating ICT in the system design. As technology always evolves[142] and the preferences of disputants on online platforms never stagnate, the scope of what ODR was needed for and capable of achieving have also drastically expanded, compared with ODR's origin.

A. *ODR's Ability to Resolve Online-Exclusive Disputes*

From the dawn of the Internet, there has been a need to resolve disputes in a manner consistent with how individuals use the Internet. The Internet facilitates cross-jurisdictional interactions that are conducted in a matter of seconds on a pseudonymous ba-

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140 *See* Ann-Marie Alcántara, *Tech Companies Want to Make Holograms Part of Routine Office Life*, Wall St. J. (June 9, 2021, 6:00 AM), https://www.wsj.com/articles/tech-companies-want-to-make-holograms-part-of-routine-office-life-11623232800 [https://perma.cc/VW9C-L76M].

141 *See* Katsh & Rule, *supra* note 32, at 329.

142 Indeed, following Moore's law, microprocessors underpinning the capabilities for technological innovation are ever-increasing. *Moore's Law*, Moore's Law 1, https://www.kth.se/social/upload/507d1d3af276540519000002/Moore's%20law.pdf [https://perma.cc/9NDY-7DPK] (last visited Nov. 29, 2021).

sis.[143] In seeking to fit the forum to the fuss,[144] there are complications with using an in-person dispute resolution mechanism to resolve disputes that develop online. ODR can be seen as a response to the unique complexities presented by an online environment. The Internet is diffuse, and it lacks geographic constraints. ODR platforms have consequently required a comparably diffuse capability, allowing online parties to resolve their disputes regardless of their geographic location. As will be discussed in Section V, the variety of different ways individuals use the Internet requires flexibility in ethical standards, so that there can be a broader range of system designs to respond to the various ways individuals transact and communicate on the Internet. Additionally, the Internet allows users to interact on a pseudonym, either through IP addresses or fictitious monikers, which do not necessarily equate with their physical identity. For instance, Amazon and eBay, among the two largest global e-commerce platforms, allow transacting parties to present themselves using monikers.[145] Parties seeking to resolve their disputes online can substantially benefit from ODR platforms that allow for a comparable level of pseudonymity in their system design. In many online circumstances, a lack of pseudonymity would mean that disputing parties would be unable or uninterested in engaging with the ODR platform. This is seen most clearly with permissionless blockchains, where asymmetric cryptography[146] imposes a system design requirement for parties to be pseudonymous. Without a comparable pseudonymous feature, users could be less

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143 Though it may be easy to overlook just how revolutionary the Internet has been, these features of the Internet have been critical for promoting democratic movements—such as with the Arab Spring. The features are also critical in altering our sense of community, as this internationalizing technology allows for interest-based group formation that can be limited when relying on physical proximity.

144 Frank Sander developed this concept to recognize that different types of disputes are best suited for different dispute resolution systems. The design and process of a given dispute resolution mechanism influences which type of dispute accesses a given mechanism. 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).

145 Social media platforms like Instagram and Reddit—among many others—allow users to use monikers. In the online gaming industry, users have a near total expectation of being pseudonymous. With permissionless blockchains, asymmetric cryptography imposes a system design requirement for parties to be pseudonymous.

146 Asymmetric cryptography creates public and private alpha-numeric characters to enhance security for nodes in a system. *See generally* Ralph C. Merkle, *Protocols for Public Key Cryptosystems*, ELXSI INT'L 122 (1980), http://www.merkle.com/papers/Protocols.pdf [https://perma.cc/K95K-MJ8X].

inclined[147] to engage with ODR platforms or experience challenges in synchronizing their identity with an ODR platform. This all suggests that ODR systems will increasingly need to have the capacity to resolve online-exclusive disputes in a geographically flexible manner and incorporate pseudonymity in the system design.

i. ODR Incorporating Technological Tools in the System Design

In seeking to resolve disputes online, ODR platforms benefit from sharing a certain amount of technological consistency with the platform from where the underlying dispute originates. This component of ODR is the category that has changed the most, as platforms from where disputes occur have evolved significantly since the Internet's emergence.[148] For instance, among the earliest use cases for ODR came in the early 2000s, with e-commerce.[149] Today, e-commerce has experienced exponential growth, reaching much of the world with access to the Internet while increasing the demand for ODR. Early thinkers and practitioners of ODR were comfortable conceiving ODR as merely ADR in an online format that used information communication technology.[150] Due to changes in how users interact online and because of recent technological developments, ODR has since grown beyond merely replicating ADR approaches in an online environment.[151] This transformation has been important in creating technologically integrated ODR systems that could be more responsive to the preferences of disputants. Today, different technological tools, including advances in ICT, provide ODR practitioners with a wider array of options that can be used to resolve a broader breadth of disputes. Indeed, the use of more tools highlights the fact that ODR entrepreneurs are seeking differentiating technological features that at-

147 There is also a feasibility consideration, as users on a permissionless blockchain would struggle to know the physical identity of a counterparty.

148 *See, e.g.*, Fareeha Ali & Jessica Young, *US Ecommerce Grows 32.4% in 2020*, DIGIT. COM. 360 (Jan. 29, 2021), https://www.digitalcommerce360.com/article/us-ecommerce-sales/ [https://perma.cc/X4YT-EXNF]; *see also* Michelle Evans, *Global E-Commerce Market to Expand By $1 Trillion By 2025*, FORBES (Mar. 25, 2021, 9:10 AM), https://www.forbes.com/sites/michelleevans1/2021/03/25/global-e-commerce-market-to-expand-by-us1-trillion-by-2025/?sh=3d5aad596cc0 [https://perma.cc/6RF8-45CY].

149 SCHMITZ & RULE, *supra* note 22, at 35.

150 *See, e.g.*, Ethan Katsh, *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*, 21 INT'L REV. L. COMPUT. & TECH. 97, 99 (2007) (Early ODR efforts "copied offline models of mediation and arbitration and, as a result, were inevitably labor intensive processes.").

151 Indeed, ODR practitioners and scholars have recognized that "the goal of ODR is not simply to digitize inefficient offline processes." Katsh & Rule, *supra* note 32, at 330.

tract different types of disputes to their platforms. Additionally, ADR practitioners have become increasingly receptive to incorporating different tools in the dispute resolution process, both because of the ways technology simplifies their responsibilities and because of the increasing pressure from disputing parties.[152]

Early in the Internet age, resolving disputes remotely was rare. During these early days, few disputes requiring a formal dispute resolution system[153] occurred on the Internet, and access to the Internet was not sufficiently distributed for ODR to reach scale. The NSF's ban on the Internet's use in commerce further limited the public's ability to interact with the technology, until the ban was eventually lifted in 1992.[154] Additionally, the general public and ADR professionals lacked a sufficient degree of comfort with different technological tools, stifling greater adoption of ODR. There were also concerns that a virtual environment would diminish the ability for parties to communicate with each other and that parties would be less content with a dispute resolution process that was situated online.[155] ADR practitioners would slowly incorporate more ICT tools, even as the underlying method of resolving disputes remained unchanged.[156] That is, ADR professionals maintained the same or analogous customary practices for resolving disputes, such as the technological-equivalent of opening statements and private caucusing. This has gradually changed over the years: Internet accessibility has grown exponentially, leading to the scalability of ODR and the creation of a plethora of different ODR platforms. Equally important, the needs and preferences of Internet users have quickly evolved to seek out ODR platforms that are comparably agile for the Internet age. This user demand has

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152 For instance, eBay discovered that its ODR platform increased user loyalty. *See* SCHMITZ & RULE, *supra* note 22, at 37.

153 As one scholar recognized, the Internet was invented in 1969 with few disputes for the next two decades, as early users were predominantly academics or members of the military. *See* ETHAN KATSH, ODR: A LOOK AT HISTORY—A FEW THOUGHTS ABOUT THE PRESENT AND SOME SPECULATION ABOUT THE FUTURE, IN ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE—A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 21 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainy eds., 2011).

154 *See* Jay P. Kesan & Rajiv C. Shah, *Fool Us Once Shame on You—Fool Us Twice Shame on Us: What We Can Learn from the Privatizations of the Internet Backbone Network and the Domain Name System*, 79 WASH. UNIV. L. Q. 89, 113 (2001).

155 *See, e.g.*, David Allen Larson, *Technology Mediated Dispute Resolution (TMDR): Opportunities and Dangers*, 38 UNIV. TOL. L. REV. 213, 226 (2006).

156 *See, e.g.*, Katsh & Rule, *supra* note 32, at 330 ("[W]hen a new online technology is created for any process, the initial impulse is to create online mirror images of the 'live' or offline process.").

incentivized considerable entrepreneurial innovation in online platforms and software capability, to support resolution of online disputes. For instance, the novel branch of Blockchain ODR circumvents approaches taken in ADR by de-prioritizing interest-based resolution[157] and eliminating the need for orthodox ADR tools, such as private caucusing. One scholar has recognized interest-based dispute resolution as an outgrowth of the early 1980s, where "general concerns with efficiency overshadowed communitarian efforts" seen in colonial America's use of peer-based dispute resolution.[158] Rather, blockchain technology has allowed one branch of ODR to prioritize the perspective of a disputant's peers that draws upon a communitarian ethos akin to ADR in colonial America yet situated in cyberspace.

As will be discussed in Section VII, the coronavirus pandemic has also served as a catalyst for Facilitative ODR, as ADR practitioners and parties in offline disputes have been required to operate in a remote environment that relied primarily on ICT.[159] While some ADR practitioners were historically doubtful of the role ODR could play in resolving disputes, many have since been converted, due to factors that promote efficiency and flexibility for involved parties.[160] The pandemic's catalyst effect also extended to courts throughout the U.S.—including the Supreme Court—all of which were forced to adopt ICT in resolving disputes remotely.[161] In short, what has become known as Facilitative ODR[162] has had unprecedented adoption due to the pandemic.

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157 Interest-based resolution emphasizes identifying disputants' interests and identifying options that can create value for the parties involved. *See, e.g.*, Mamo, *supra* note 29, at 1420 (addressing the interests of the parties and following a principled procedure to identify interests and design options for mutual gain, and to select among those options on the basis of objective criteria).

158 *Id.* at 1403.

159 *See, e.g.*, R. Thomas Dunn, *Virtual Mediations Are Zooming Forward . . . Jump on Board*, NAT'L L. REV. (Apr. 10, 2020), https://www.natlawreview.com/article/virtual-mediations-are-zooming-forward-jump-board [https://perma.cc/NL9S-ALF8].

160 *See, e.g.*, Hon. Diane Welsh, *Why Virtual Mediation Is Here to Stay*, LEGAL INTELLIGENCER (Feb. 3, 2021, 11:15 AM), https://www.law.com/thelegalintelligencer/2021/02/03/why-virtual-mediation-is-here-to-stay/?slreturn=20210424123722 [https://perma.cc/7NU4-M8YT] (discussing how virtual mediation affords greater participation, more civility, and more efficient negotiations).

161 *See, e.g.*, Amy Howe, *Courtroom Access: Faced with a Pandemic, the Supreme Court Pivots*, SCOTUSBLOG (Apr. 16, 2020, 2:58 PM), https://www.scotusblog.com/2020/04/courtroom-access-faced-with-a-pandemic-the-supreme-court-pivots/ [https://perma.cc/AVD8-SGQC].

162 *See National Center for State Courts*, *supra* note 122.

V. The Uniqueness of the Soul: Where Ethical Conformity to Orthodox Dispute Resolution Can be Problematic

"[T]he time has come for us to realize that by defining ourselves as an alternative to judicial processes we have an almost infinite palette of resolution options from which to choose. Our position enables us to be endlessly inventive in experimenting with new approaches and creatively responding to the needs and expectations of our customers."[163]

—Colin Rule & Chittu Nagarajan, Co-Founders of Modria.com

Although ADR has served as a point of departure for conceptualizing ODR's ethical commitments,[164] there are certain characteristics that make the soul of ODR entirely unique from ADR. Expecting uniformity in ethical commitments for a physical, as opposed to, digital environment would complicate the value and usability of different branches of ODR. Core tenets of ADR include confidentiality, impartiality, and third parties avoiding conflicts of interest.[165] These factors have been critical in promoting the effectiveness of ADR proceedings. For instance, confidentiality promotes candor and understanding of the totality of experiences present between mediating parties.[166] Although valuable within the context of in-person disputes, a variety of factors justify some amount of deviation from certain core ethical commitments of ADR. The need for deviation from historical ADR ethics is most pronounced when considering the evolving nature of online disputes, the increased opportunity for peer-to-peer online interactions, and ODR's use of novel technologies. This all suggests that the use cases between ADR and ODR are diverging, leading to, or perhaps because of, ethical divergence.

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163 Colin Rule & Chittu Nagarajan, *Leveraging the Wisdom of Crowds: The eBay Community Court and the Future of Online Dispute Resolution*, ACResolution 7 (Winter 2010), http://colinrule.com/writing/acr2010.pdf. [https://perma.cc/PJ4K-CBT2].

164 *Cf.* Leah Wing, *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, 3 Int'l J. on Online Disp. Res. 12, 16 (arguing that the ethical foundation for ODR should be much broader than ADR since ODR has a broader use-case).

165 *See generally Model Standards of Conduct for Mediators*, *supra* note 31; *The Code of Ethics for Arbitrators in Commercial Disputes*, *supra* note 31. The listed ethical tenets illustrate why there should be a flexible ethical framework based on the type of technology being used and user preferences. There should be constant vigilance for the extent future ethical frameworks adopt a flexible approach.

166 *See generally* Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 Ohio State J. Disp. Resol. 37 (1986).

Currently, the International Council for Online Dispute Resolution ("ICODR") has shared guiding ethical standards for ODR systems. These standards are "intended to provide a touchstone for best practices, rules, qualifications, and certification efforts" in ODR.[167] ICODR draws on ethical frameworks from ADR, primarily through expectations for confidentiality and impartiality. Absent from ICODR's approach, however, is any mention of flexible ethical standards. Such flexibility will be vital for ODR to better respond to the needs and interests of disputants. Additionally, flexible ethical tenets that focus on context-specific circumstances will allow for a greater breadth of technological tools to be incorporated into ODR platforms.

A. *Challenges to Confidentiality in ODR*

Critical for a victorious outcome in the battle for the soul of ODR will be a recognition of the primacy of the needs and interests of disputants, so that untethering confidentiality from the system design, depending on the context, can be used to benefit these disputants. A common feature of ADR systems is confidentiality, which protects information disclosed during the proceedings. Confidentiality is critical, because if parties do not reach an agreement, they might be worried that any information shared will be used adversely against them in subsequent litigation.[168] Ombuds also illustrate the value of confidentiality in ADR, as individuals using an ombuds may fear repercussion in the relevant community for sharing this information in the absence of confidentiality.[169] However, such categorical commitment to confidentiality can prove damaging for an ODR platform.[170] Consider, for instance, that AI ODR

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167 *ICODR Standards*, INT'L COUNCIL ONLINE DISP. RESOL., https://icodr.org/standards/ [https://perma.cc/3J75-6MTQ] (last visited Oct. 3, 2021).

168 Freedman & Prigoff, *supra* note 166, at 44 ("Without confidentiality, the mediation process becomes a house of cards subject to complete disarray by a variety of potential disruptions.").

169 The primacy of confidentiality is especially strong for organizational ombuds. *See, e.g.*, Kendall D. Isaac, *The Organizational Ombudsman's Quest for Privileged Communications*, 32 HOFSTRA LAB. & EMP. L. J. 31, 34 (2014) (Parties can "vent in a more informal manner and venue without having definitive action immediately taken relative to the concern.").

170 *See, e.g.*, KATSH, *supra* note 39, at 46–47 (Oxford Scholarship Online, 2017) ("Expanding access to justice through ODR involves . . . the shift from an emphasis on the value of confidentiality to an emphasis on collecting, using, and reusing data in order to prevent disputes."); *see also* Orna Rabinovich-Einy & Ethan Katsh, *Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment*, 1 INT'L. J. ONLINE DISP. RESOL. 26 (2014) ("The decrease in pri-

requires the aggregation of large amounts of data for AI, in order to provide reliable support to the ADR practitioner. These platforms can use the data as part of a pattern recognition exercise, where comparable information from prior disputes can be used in assessing—as seen with family law ODR platforms—the language that should be interpreted as hostile, or in determining a fair outcome in a particular dispute. In using data and technology, ODR has the capability to spot trends and engage in pattern recognition, which can identify circumstances that could lead to a dispute. With this information, platforms can notify users to take action in order to prevent a given dispute from occurring.[171] By limiting the amount of data AI can assess, confidentiality can undermine the accuracy and reliability of support AI provides, as generated outputs are using limited or incomplete inputs.[172] Broad confidentiality would limit the effectiveness of AI—or worse, distort the algorithm's analysis—so as to produce an unjust outcome. The considerable value of increasing access to large data sets and shifting away from stringent confidentiality expectations has also led to the U.S. government's creation of a task force, through the National Artificial Intelligence Act of 2020,[173] to "coordinate ongoing artificial intelligence research, development, and demonstration activities," in order to "lead the world in the development and use of trustworthy [AI] systems in the public and private sectors," allowing for greater research into AI use-cases.[174] Officials have expressed interest in using anonymized census and medical data, while protecting privacy in order to promote the effectiveness of AI, signaling the balancing act many ODR platforms could mimic.[175] Even with Blockchain ODR platforms, third-party nodes have tremendous value in understanding whether a given user has previously been involved in a dispute and in understanding the

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vacy due to documentation and record preservation can assist in quality control, dispute prevention and monitoring performance.").

171 *See* Katsh & Rule, *supra* note 32, at 330 ("Most communications exchanged online are automatically recorded, thus leaving a 'digital trail,' which presents opportunities to collect and use data in novel ways.").

172 *See* Hillary Sanders & Joshua Saxe, *Garbage In, Garbage Out: How Purportedly Great ML Models Can Be Screwed Up by Bad Data*, PROC. BLACKHAT (2017) (discussing how privacy can worsen the accuracy of AI).

173 15 U.S.C. § 9411 (2021).

174 *Id.*

175 *See, e.g.*, Ryan Tracy, *U.S. Launches Task Force to Study Opening Government Data for AI Research*, WALL ST. J. (June 10, 2021, 7:36 PM), https://www.wsj.com/articles/u-s-launches-task-force-to-open-government-data-for-ai-research-11623344400 [https://perma.cc/6EPT-DMZS].

substance of the dispute. As permissionless blockchains already operate under pseudonymous conditions, less historical information regarding disputing parties or how similar disputes in the past have been treated would prove detrimental to the process and outcome. This is not to say that a complete absence of confidentiality would be appropriate either. For instance, ODR platforms may not need to know the names of parties or other identifying information; however, the content of a dispute would be valuable for AI systems and blockchains seeking to identify trends and assessing how similar cases have previously been treated.

As discussed in Section II, ODR has a history of taking a bottom-up approach for system design considerations, where the needs and interests of stakeholders are prioritized. This is because ODR has been at the forefront of innovative practices, so stakeholder trust in the system is particularly important. Fostering greater trust, therefore, is one of ODR's principal priorities—not confidentiality for its own sake. As such, ODR platforms can benefit from using a less restrictive confidentiality standard if doing so would promote greater trust in, and effectiveness of, the platform. Rather than relying on surveys that may not be the most accurate representation of user preferences, reduced confidentiality allows ODR platforms to use aggregated data to identify user-based outcomes and potential disparities between groups. Considering how dispute resolution systems have struggled to address inequities between groups of disputants,[176] this information could be used in creative ways across different platforms to address the inequities that disputants face. Revealed preferences, and a focus on what people do rather than what they say in surveys, will play a critical role for increasing the effectiveness of ODR platforms.[177] Reduced confidentiality would allow for a robust use of digital footprints, to focus on actual, rather than stated, preferences.

The use of AI in medicine can inform how AI ODR considers confidentiality. Hospitals' access to large data sets offers the promise of helping doctors improve their responsiveness to patients' needs, similar to how AI with access to large data sets can help an

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176 *See* MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 65–69 (Princeton University Press 2020) (describing how disadvantaged defendants can experience alienation from their court-appointed lawyers, leading to legal officials silencing, coercing, and punishing them in a manner that advantaged defendants do not experience).

177 NASSIM NICHOLAS TALEB, SKIN IN THE GAME: HIDDEN ASYMMETRIES IN DAILY LIFE 231 (Random House 2018) ("[Y]ou will not have an idea about what people *really* think . . . merely by asking them—they themselves don't necessarily know.").

ADR practitioner resolve disputes between parties. While raising privacy concerns, a recently created joint venture that includes the largest national hospital operators is seeking to use algorithms and large data sets from patients to improve healthcare outcomes, particularly for preventative healthcare treatment, akin to the hopes of big data providing preventative dispute resolution.[178] Yet, the use of AI in medicine raises significant privacy concerns over how patient data would be stored and used. Indeed, there is even concern over whether anonymized data can remain truly anonymous when hospitals collaborate with big technology companies.[179] This has important legal implications, as the Health Insurance Portability and Accountability Act ("HIPAA") places restrictions on the extent that patient data can be shared.[180] Moreover, individual patients are unlikely to have the requisite knowledge and ability to ask questions in order to fully understand the subject of their consent. Given the complexities in ensuring that individual patients all have informed consent over how their data is used, one recommended approach has been to have a group-based approach, with ongoing consent from patients.[181] When the data in question is de-anonymized, a committee composed of, and/or representing, patients would have to provide input.[182] As such, AI ODR may benefit from a framework that still incorporates big data, while also having group-based authorization from disputants. Particularly for de-anonymized data, this framework would need to create a healthy equilibrium with effective AI while recognizing the primacy of user consent in how data is used.

Because ADR has had a strong influence on ODR, it is also important to note that there are increasing critiques of the inflexible adherence to confidentiality in certain ADR processes. For in-

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178 *See* Anna Wilde Mathews, *Major Hospitals Form Company to Capitalize on Their Troves of Health Data*, WALL ST. J. (Feb. 11, 2021, 9:00 AM), https://www.wsj.com/articles/major-hospitals-form-company-to-capitalize-on-their-troves-of-health-data-11613052000?mod=article_inline [https://perma.cc/L2BK-XZEP].

179 *See, e.g.*, Glenn Cohen & Michelle Mello, *Big Data, Big Tech, and Protecting Patient Privacy*, JAMA (2019) (discussing how anonymized health records shared by the University of Chicago could be de-anonymized when partnering with Google's access to user geolocation and smartphone data).

180 Truveta's CEO, Terry Myerson, has argued that the company's use of anonymized patient data satisfies a HIPAA safe harbor method. *See* Charlotte Schubert, *Seattle Startup Truveta Raises $95M for Ambitious Vision to Aggregate Data Across Healthcare Systems*, GEEKWIRE (July 13, 2021, 5:00 AM), https://www.geekwire.com/2021/seattle-startup-truveta-raises-95m-ambitious-vision-aggregate-data-across-healthcare-systems/ [https://perma.cc/4UC8-DDBB].

181 Cohen & Mello, *supra* note 179.

182 *Id.*

stance, mandatory arbitration in employment contracts often imposes confidentiality in a manner that restricts the self-determination of a party, too often negatively impacting those with fewer resources and/or reduced access to information. Though within the ADR nexus, mandatory arbitration has highlighted the tension between ADR's aspiration of autonomy and self-determination for disputants, with a dogged commitment to confidentiality. ODR need not become trapped in the quicksand of this tension and should instead identify ways that privacy-preserving approaches with reduced confidentiality—such as through the use of anonymized data-sharing—can be used to promote more effective technology-integrated dispute systems. Uncritical enforcement of mandatory arbitration has led to a legal regime that deprives classes of individuals of substantive rights and compromises access to justice for vulnerable groups.[183] It is this inflexible commitment to confidentiality that has led to the blossoming in legal academia of Critical Arbitration Theory[184] and public outcry[185] from civil society. ODR must be attentive to these movements and recognize the pitfalls of taking comparably inflexible approaches.

Underlying confidentiality considerations for ODR is whether individuals, especially digital natives,[186] place value in confidentiality and privacy. As a group of scholars recognized, the digital era is filled with a privacy paradox, where individuals' stated preferences emphasizing the value of privacy conflicts with their own actions.[187] The proliferation of cookies[188] and invasive social media platforms has also left many pondering whether the Internet era is one where

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183 *See* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 703 (2018) (discussing how mandatory arbitration "virtually amounts to an ex ante exculpatory clause, and an ex ante waiver of substantive rights that the law declares non-waivable.").

184 Jill I. Gross, *Arbitration Archetypes for Enhancing Access to Justice*, 88 FORDHAM L. REV. 2319, 2321 (2020).

185 Stephanie Russell-Kraft, *Meet the Four Harvard Law Grads Taking on the Entire Legal System*, N.Y. TIMES (Feb. 12, 2021), https://www.nytimes.com/2021/02/10/us/peoples-parity-project-founders.html [https://perma.cc/SX5H-P25F].

186 This term was popularized by Marc Prensky, in discussing how students who grew up with the Internet process information differently than preceding generations. Marc Prensky, *Digital Natives, Digital Immigrants*, 9 GIFTED 1, 1 (2001).

187 Susan Athey et al., *The Digital Privacy Paradox: Small Money, Small Costs, Small Talk*, NAT'L BUREAU ECON. RSCH. 1 (June 2017), https://www.nber.org/papers/w23488 [https://perma.cc/6WJS-55MB].

188 Daniel Palmer, *Pop-Ups, Cookies, and Spam: Toward a Deeper Analysis of the Ethical Significance of Internet Marketing Practices*, 58 J. BUS. ETHICS 271, 273 (2005) ("Cookies are small files placed on a user's computer by a third party entity when that person is browsing web sites. [Cookies] record various information about the user that is later retrieved by the computer that placed them on the user's site.").

users place less value on privacy. There should be a distinction between the Internet era—where privacy is based on pseudonymity—in comparison to the pre-Internet era—which emphasized physical control over personal information. While digital natives value pseudonymity, digital immigrants can extend the same notion of physical privacy to digital privacy in a manner inconsistent with digital natives.[189] Rather than viewing digital natives as uninterested in confidentiality and digital privacy, increased use of cookies[190] and invasive social media platforms suggests that digital natives are operating in a moment where privacy is difficult to achieve. This is consistent with Pew Research showing that, at least in America, more than 80% of adults believe they have little-to-no control over the data that either the private or public sector collects about them, while the vast majority of adults are concerned over how their digital footprint is being used.[191] In short, there is a feeling of powerlessness. Despite this, there are a host of increasingly popular technology tools being used to combat privacy-diminishing technology, and digital natives are at the forefront of adopting these tools.[192] As web browsers and search engines are at the forefront of privacy considerations in the digital era, it is especially noteworthy that these are the two industries being disrupted by privacy-focused companies.[193] In addition, research also suggests that small incentives from a third party can lead to groups with and without a stated privacy preference to act in a similarly care-free manner about privacy.[194] The same research also found

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189 Patricia Sanchez Abril, *A (My)Space of One's Own: On Privacy and Online Social Networks*, 6 Nw. J. Tech. & Intell. Prop. 73, 77 (2007) (contrasting competing notions of privacy between digital natives and digital immigrants).

190 *But see* Janice C. Sipior, Burke T. Ward, & Ruben A. Mendoza, *Online Privacy Concerns Associated with Cookies, Flash Cookies, and Web Beacons*, 10 J. Internet Com. 1, 3 (2011) (Finding that "39 percent of users may be deleting cookies monthly" and if anti-spyware software is included, "the cookie deletion rate might be as high as 58 percent of users.").

191 Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, Pew Rsch. Ctr. (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/ [https://perma.cc/4KUH-XU2Q].

192 *See, e.g.*, Peter Snyder & Brendan Eich, *Why Brave Disables FLoC*, Brave (Apr. 12, 2021), https://brave.com/why-brave-disables-floc/ [https://perma.cc/TZ4H-JEGV]; *see also* Coral Murphy Marcos, *DuckDuckGo Search Engine Increased its Traffic by 62% in 2020 as Users Seek Privacy*, USA Today (Jan. 18, 2021, 2:09 PM), https://www.usatoday.com/story/tech/2021/01/18/search-engine-duckduckgo-increases-traffic-google-competitor/4202556001/ [https://perma.cc/QQW2-4BU8].

193 Snyder & Eich, *supra* note 192; *see also* Marcos, *supra* note 192.

194 Athey et al., *supra* note 187, at 8–9 (discussing how the promise of pizza led to both groups sharing sensitive information).

that groups with and without a privacy preference acted in a similar care-free manner when encryption, a privacy-enhancing communication method, was slightly more complicated to use.[195] Both of these findings imply that having small incentives for individuals to act in a privacy-conscious manner, or simplifying the use of privacy enhancing tools, would lead to greater adoption. Indeed, the European Union's General Data Protection Regulation ("GDPR")[196] is a recognition that simplifying settings on devices to promote privacy would lead to increased user adoption in favor of privacy.[197]

This signifies that ODR will have to grapple with confidentiality, yet not in the same sense as ADR has done for digital migrants within the context of physical disputes. Rather, effective ODR will need to balance incorporating data collected from users with anonymizing or pseudonymizing features. Blockchain ODR already incorporates asymmetric cryptography to promote pseudonymity, while AI ODR can, as previously mentioned, collect privacy-preserving data that would not undermine the accuracy of AI analysis. Moreover, although not presently used in Blockchain ODR,[198] the incorporation of zero-knowledge proof cryptography would allow a node on the platform to prove that certain information an ODR platform has access to is true or false, without revealing the substance of the information.[199] This has considerable privacy-enhancing implications, as secondary parties, if hacked, would not have sensitive information provided from the originator of the data. In e-commerce disputes, for instance, disputants would not need to disclose financial information or sensitive personal in-

195 *Id.* at 14–15. This can also be seen with Apple's IDFA system, where allowing iOS users the ability to reduce apps from tracking activity was infrequently used when users had to go through a series of steps to activate the privacy enhancing tool. This is in contrast to early results of broad adoption, with reduced friction. *See, e.g.*, Alexandra Bannerman, *A History of IDFA—Apple's Privacy U-turn*, PERMUTIVE (Sept. 3, 2020), https://permutive.com/2020/09/03/a-history-of-idfa-apples-privacy-u-turn/ [https://perma.cc/S3Y2-KXYB]; Samuel Axon, *96% of US Users Opt Out of App Tracking in iOS 14.5, Analytics Find*, ARS TECHNICA (May 7, 2021, 2:59 PM), https://arstechnica.com/gadgets/2021/05/96-of-us-users-opt-out-of-app-tracking-in-ios-14-5-analytics-find/ [https://perma.cc/5YQJ-8LHB].

196 2016 O.J. (L 119) 679.

197 Though there are exceptions, GDPR creates a presumption that companies need the consent of users before processing their data. *See, e.g.*, *Data Protection Under GDPR*, EUR. UNION (Mar. 26, 2021), https://europa.eu/youreurope/business/dealing-with-customers/data-protection/data-protection-gdpr/index_en.htm [https://perma.cc/ZSJ5-TVQ4].

198 *See, e.g.*, Federico Ast et al., *supra* note 100, at 80 (discussing how zero-knowledge proof systems have not been incorporated in the platform, though there has been experimentation).

199 *See generally* Shafi Goldwasser et al., *The Knowledge Complexity of Interactive Proof-Systems*, 18 SIAM J. ON COMPUTING 186, 186–208 (1989).

formation, such as street addresses, when showing that a product was correctly shipped.

B. *Challenges to Impartiality and Conflicts-of-Interest in ODR*

A second core ADR tenet that will need to be re-oriented for ODR is impartiality.[200] Impartiality[201] is defined as "freedom from favoritism, bias, or prejudice."[202] Different ODR platforms have benefited from some degree of partiality in the system design. For instance, eBay's Community Court sought out eBay merchants to assess whether a party is at fault in a dispute, particularly for their partiality based on experiences as a merchant, since this category has preferences and biases that would benefit the dispute resolution process.[203] With the incorporation of cryptoeconomics in blockchain-based ODR, nodes in a system are also not impartial, as financial incentives give them a direct stake in the outcome of a decision.[204] Rather than partiality in ADR serving as a hindrance in reaching a fair outcome, some ODR platforms use partiality to motivate parties to reach a fair outcome. These ODR platforms recognize partiality as a means to reach a fair outcome, rather than as a flaw that should be suppressed.[205]

This marks a sharp, revolutionary deviation from traditional dispute resolution systems that actively avoid circumstances where decision-makers are not considered impartial. This is not to necessarily contest that the aspiration of impartiality in ADR has been a noble goal; instead, impartiality's value depends on the context in which it is situated. There are dispute resolution systems where limited impartiality serves a beneficial role to promote equitable

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200 Though this has been a bedrock principle of ADR, impartiality has come under scrutiny in an environment of power imbalances and bias between, and within, mediators and mediating parties. *See* Audrey J. Lee, *Implicit Bias in Mediation: Strategies for Mediators to Engage Constructively with "Incoming" Implicit Bias*, 25 HARV. NEGOT. L. REV. 167, 168 (2020) (reflecting on ways mediators can approach implicit biases affecting the mediation experience); *see also* Izumi, *supra* note 65, at 102.

201 Impartiality has a rich history, valued in different cultures. *See, e.g.*, LAO TZU, TAO TE CHING (1868) ("Knowing the constant gives perspective. This perspective is impartial. Impartiality is the highest nobility; the highest nobility is Divine.").

202 *Model Standards of Conduct for Mediators*, American Bar Association, *supra* note 31.

203 Rule & Nagarajan, *supra* note 163 (The platform benefited from having merchants participate in resolving disputes, as they were often stricter on other merchants in a dispute and because they understood their circumstances and obligations.).

204 *See, e.g.*, Federico Ast et al., *supra* note 100, at 21.

205 *See id.* at 108.

outcomes and fairness in the process. As such, ADR's filtering process of removing those third parties that are deemed partial or incapable of being impartial does not extend to the same degree with ODR. There has also been a robust historical critique against imposing impartiality as a core tenet of ADR. One scholar identified ways that a mediator aspiring to be neutral actually creates a paradoxical dilemma, notably when a mediator states their neutral position while later inquiring into the disputant's experience in a manner that creates the illusion of an alliance between the mediator and disputant.[206] More recent scholarship has shown that ADR practitioners express both explicit and implicit biases that significantly undermine the expectation for impartiality.[207] This illustrates that impartiality may not be a practical expectation for many dispute systems, while having systems to promote partiality may serve benefits in ODR on a context-specific basis, so long as disputants are cognizant of the incentives employed.

ODR platforms seeking to untether from ADR's impartiality commitment should also consider what is sacrificed when operating within a context of strict impartiality. One such potential trade-off can be seen with ombuds. In seeking to be impartial, ombuds often sacrifice their ability to address systemic change within the organization. Addressing systemic change, by definition, requires being somewhat partial through a recognition that current power dynamics between different groups are no longer tenable. In focusing on individualized problems and weighing the interests and needs of both disputants equally, an ombuds risks the dangerous situation of merely facilitating the preservation of the status quo. However, impartiality is encoded within the ethical standards of an ombuds.[208] This creates greater pressures on an ombuds to address disputes on a case-by-case basis, where the broader context within which an ombuds operates can be de-prioritized. Just as reduced impartiality can create beneficial incentives for ODR practitioners in certain contexts, as seen in Blockchain ODR, so too can reduced impartiality for ombuds in certain situations allow for the growth of a "*Systemic Ombuds*," capable of addressing systemic institutional challenges in an ethical manner.

Related to impartiality is avoidance of conflicts of interest, a principle that is fundamental to a range of dispute resolution sys-

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206 Janet Rifkin et al., *Toward a New Discourse for Mediation: A Critique of Neutrality*, 9 MEDIATION Q. 151, 154 (Winter 1991).

207 *See generally* Izumi, *supra* note 65.

208 IOA Code of Ethics, *supra* note 31.

tems, including litigation, mediation, and beyond. The use of cryptoeconomics in Blockchain ODR calls for a re-adjustment from the traditional conflict-of-interest analysis in ADR. For mediators, a conflict of interest is defined as "involvement . . . with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality."[209] In litigation, judges are required to recuse themselves when they have "a financial interest in the subject matter in controversy . . . or any other interest that could be substantially affected by the outcome of the proceeding."[210] As seen with Operation Greylord,[211] where seventeen judges were indicted under bribery charges, providing a judge with monetary incentives based on the outcome of a case can have unspeakably harmful consequences for parties subject to judicial decision-making.[212] However, cryptoeconomics provides a sharp contrast to the concern of monetary incentives undermining the decision-making of an adjudicator. Cryptoeconomics, as a system design tool, combines the use of cryptography and monetary incentives to promote cooperation between nodes in the absence of trust, so that a conflict of interest does not undermine the ability for third-party nodes to reach a fair assessment. The value of this system exists so long as the individual incentive to reach a fair outcome is greater than the incentive to be influenced by the conflict of interest. Because Blockchain ODR is currently focused on low value disputes,[213] it is unlikely that the incentive to be influenced by the conflict of interest would be greater than the individual incentive to reach a fair outcome. Even for higher value disputes, the conflict-of-interest analysis should remain focused on whether the benefit of the conflict is greater than the benefit created from the cryptoeconomic

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209 *Model Standards of Conduct for Mediators*, American Bar Association, *supra* note 31, at 4.

210 28 U.S.C. § 455(b)(4); *see also* Tramonte v. Chrysler Corp., 136 F.3d 1025, 1029 (5th Cir. 1998) ("[I]t seems fairly obvious that where a judge . . . is a member of a class seeking monetary relief, § 455(b)(4) requires recusal because of the judge's financial interest in the case.").

211 *See generally* Terrence Hack & Wayne Klatt, Operation Greylord: The True Story of an Untrained Undercover Agent and America's Biggest Corruption Bust (American Bar Association, 2015); *see also* Maurice Possley, *Archives: Operation Greylord: A Federal Probe of Court Corruption Sets the Standard for Future Investigations*, Chi. Trib. (Jan. 19, 2017, 4:41 PM), https://www.chicagotribune.com/nation-world/chi-chicagodays-greylord-story-story.html [https://perma.cc/LPT3-Z7TG].

212 *See generally* Ian Ayres, *The Twin Faces of Judicial Corruption: Extortion and Bribery*, 74 Denv. Univ. L. Rev. 1231 (1997).

213 *See* Federico Ast et al., *supra* note 100, at 139.

incentives; when the incentives from acting adversely on the conflict is greater, then, and only then, should a node be prevented from partaking in the dispute resolution. Similar to AI ODR, Blockchain ODR is focused on generating fast resolutions, so extended conflict-of-interest inquiries, especially for low-value disputes, would likely make the system less appealing for disputing parties.

ODR is still young enough to not have a fixed soul, as the ethical considerations are less fixed than other dispute resolution systems. In seeking to promote greater legitimacy, ODR has prioritized the experience of disputants through systems that are responsive to their needs and interests. As illustrated in this section, for an industry integrating a wide range of different technological tools, inflexible ethical principles can serve as an impediment to innovation and more effective ODR systems. Under limited conditions, there is also an open debate in the related ADR field about whether some ethical principles are practical or beneficial. With new technologies being integrated into ODR, promoting greater trust and effectiveness will increasingly come into conflict with certain antiquated ethical factors that do not, when fully scrutinized, favor disputant experiences. Flexible and fluid ethical considerations should play a greater role for ODR system designers, while continuing the historical prioritization on trust and convenience for disputants.[214]

VI. The Soul in Action: ODR's Role in Promoting Trust and Access to Justice

Even as ODR can benefit from greater ethical flexibility with core dispute resolution tenets, there must be consideration for how ODR's implementation impacts the disputants using these systems. It is becoming increasingly apparent that those systems that insufficiently promote trust with core stakeholders or, worse, exclude stakeholders from participating in the process, are less likely to experience longevity. Though ODR remains youthful, its emerging and somewhat connected branches raise distinct considerations for stakeholder trust. The parties seeking out these systems also have different levels of confidence in allocating decision-making authority, regardless of the scope, to crowds, algorithms, and experts.

214 Katsh, *supra* note 21, at 25 ("[T]he new challenge is finding tools that can deliver trust, convenience, and expertise for many different kinds of conflicts.").

Moreover, in recognizing that disputants have varying interests and needs, these branches introduce a greater degree of optionality for resolving disputes. Despite this, ODR's increased reliance on the Internet and technology reasonably raises considerations about who is being excluded from the process. Creating a dichotomy between disputes that arise online or in-person can be valuable for the legal community's assessment of whether ODR promotes access to justice for a variety of disputes. Observing the soul in action—with all the related nuances—will be critical in assessing whether ODR's soul is compromised or whether it is a living, breathing instrument of change.

A. *Nuances in Trust Between the Three Branches*

Trust is critical to the soul of ODR. While all dispute resolution systems seek to promote trust with potential disputants, ODR has had to place a particularly significant priority on promoting trust since technological tools are novel and disputants may not have substantial exposure to such new systems. The standard definition of *trust* as "[something] in which confidence is placed" may seem straightforward. However, each of the branches of ODR works within a specific context and addresses different classes of disputants.[215] As such, there are variations in how *trust* is conceptualized. Despite these variations, no approach should be considered the "right" method for fostering trust. Rather, these differences are important for different classes of disputants and the preferences that they seek in a given platform.

Distrust about the centralization of power in the judicial system is not new. Indeed, the 1970s is particularly informative as a period where distrust of State actors increased and, simultaneously, ADR experimentation increased.[216] In the context of legal and societal history, this phenomenon came from the aftermath of the Civil Rights movement, where groups sought to both question judicial decision-making and re-envision a new relationship with State

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215 *Trust*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/trust [https://perma.cc/ED42-ZY97] (last visited Nov. 28, 2021).

216 As one scholar identified, the 1970s was a moment in American legal history with a growth of "institutional mechanisms to resolve individual disputes [through] alternatives to the direct application of state law." Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 53 (2009).

institutions.[217] Expressed societal distrust and critiques would be met with a severe State crackdown on communities championing change, well-illustrated through the rise of mass incarceration that targeted Black communities.[218] In building off societal distrust of legal institutions, the Critical Legal Studies movement would emerge in the 1970s and channel distrust towards the ability of contemporary jurisprudence to advance justice for non-elites. In recent years, illustrated through the Black Lives Matter movement, the killing of unarmed minorities by State actors has continued the thread of distrust towards the judiciary and other State actors.[219] There is also the consideration of *mistrust*: when expecting State actors to address systemic social issues, there is mistrust about whether government constraints will produce appropriate outcomes. This was seen in the aftermath of the 2008–2009 financial crisis, as both the Tea Party and Occupy Wall Street movements expressed mistrust in the ongoing governmental operations. Indeed, in the financial crisis's aftermath, 81% of cases brought against ten of the largest U.S. banks resulted in individual employees not being identified or charged.[220] Underlying this notion would be a disturbing trend at the Department of Justice, where prosecutors avoided bringing claims against high-ranking employees. This was driven by the fear of reducing their highly regarded conviction rate and recognition of the substantial resources it would take to successfully convict such well-resourced individuals.[221] ODR and ADR operate within this context of both historical and ongoing trust complications with State institutions.

Though each branch of ODR conceives of trust in a different manner, Blockchain ODR, in particular, has a close relationship

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217 *See, e.g.*, Cass R. Sunstein, *What the Civil Rights Movement Was and Wasn't (With Notes on Martin Luther King, Jr. and Malcolm X)*, 1995 UNIV. ILL. L. REV. 191, 198 (1995) ("[T]he civil rights movement was hardly focussed (*sic*) on courts, and in fact the notion of 'participatory democracy' enjoyed a large-scale revival.").

218 *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW 22 (New Press, 2012).

219 *See, e.g.*, *NPR/PBS NewsHour/Marist Poll*, MARIST POLL (June 2020), http://maristpoll.marist.edu/wp-content/uploads/2020/06/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables_2006041039.pdf#page=3 [https://perma.cc/8C5Z-L2QG] (finding that roughly two-thirds of surveyed African Americans are either not confident or somewhat not confident that police would treat African Americans equally to Whites).

220 Jean Eaglesham & Anupreeta Das, *Wall Street Crime: 7 Years, 156 Cases and Few Convictions*, WALL ST. J. (May 27, 2016, 4:37 PM), https://www.wsj.com/articles/wall-street-crime-7-years-156-cases-and-few-convictions-1464217378 [https://perma.cc/79Z2-JFNL].

221 JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES 196–97 (2017) (discussing prosecutorial recognition of "big cases, big problems" leading to a preference for settlements).

with distrust of State actors, or at least the centralized decision-making that is typical of State institutions. Blockchain ODR has arisen out of a context where centralized intermediaries are viewed with deep distrust. Although this branch does not seek to resolve core disputes that the judiciary resolves, such as criminal cases, the context-influencing conceptions of trust is important as a motivating factor creating demand from various stakeholders. The related decentralized finance sub-industry of the blockchain field has focused on decreasing reliance on third parties in finance. Blockchain ODR has been significantly influenced by the Nakamoto Consensus, where parties in the blockchain system rely more on "cryptographic proof instead of trust."[222] As such, many disputants seeking Blockchain ODR systems prefer the disintermediation of decision-making through, for instance, crowdsourcing. The 2021 British lawsuit involving Cøbra, the pseudonymous creator of Bitcoin.org, is particularly illustrative. Craig Wright claimed to have created Bitcoin and sued Cøbra for copyright infringement, because Bitcoin.org previously published the Bitcoin whitepaper.[223] Based solely off the fact that Cøbra was committed to preserving their pseudonymous identity and not appearing in court, the presiding judge issued a default judgment in Wright's favor. Continuing the mantra of some in the Blockchain ODR industry, Cøbra would state:

> All your fiat based assets are ultimately secured by the same legal system that today made it illegal for me to host the Bitcoin whitepaper because a notorious liar swore before a judge that he's Satoshi. A system where "justice" depends on who's got the bigger wallet. . . . Rules enforced through cryptography are far more superior than rules based on whoever can spend hundreds of thousands of dollars in court.[224]

The orthodox judicial system is not suited to handle cases involving pseudonymous identities, even as the growth of e-commerce and Internet communication has provided ample opportunities for individuals to transact and communicate safely with pseudonyms. Stakeholders involved in the blockchain indus-

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222 Nakamoto, *supra* note 86, at 1.

223 *See generally* Sebastian Sinclair, *UK Court Orders Bitcoin.org to Remove White Paper Following Craig Wright Lawsuit*, CoinDesk (June 29, 2021, 3:10 AM), https://www.coindesk.com/bitcoin-white-paper-craig-wright-cobra-copyright [https://perma.cc/DT5S-9ZPX].

224 CobraBitcoin, Twitter (June 28, 2021, 4:11 PM), https://twitter.com/CobraBitcoin/status/1409605494629613571?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1409605496080904195%7Ctwgr%5E%7Ctwcon%5Es2_&ref_url=https%3A%2F%2Fwww.coindesk.com%2Fbitcoin-white-paper-craig-wright-cobra-copyright [https://perma.cc/7MXK-LX5M].

try have deep distrust over procedural inequities embedded within traditional dispute systems. The implication of this has been a greater propensity to use the blockchain system as a tool to crowdsource decision-making, so that a single third party is not dispositive in the dispute resolution process. While many dispute resolution systems use a single central authority—for example, judges and mediators—a preference amongst many involved in blockchains has been for cryptographic proofs and crowdsourced adjudication. The absence of Blockchain ODR would be a denial of access to justice—as seen with Cøbra—for many stakeholders who place their trust in cryptography and the wisdom of the crowds.

Trust in AI ODR comes with unique considerations. Rather than relying on cryptographic proofs and crowdsourcing, AI ODR places a great deal of trust in the algorithms driving AI. ADR practitioners receiving support from AI and the disputants involved in the process are trusting the accuracy and reliability of this system. AI technologists are increasingly recognizing the role of AI governance practices that can better promote trust in this technology.[225] As such, trust is being allocated to the programmers developing the AI and to the system designers, in the belief that they will implement systems that effectively balance AI's efficiency with an inclusive and accountable system. Yet, as the use of AI increases, especially in connection with dispute resolution, AI governance will need to consider the role of the programmers and system designers—particularly the ways that these stakeholders can act[226] to promote greater trust in their actions. Without proper AI governance, AI can be disempowering to both disputants and ADR practitioners who have to abdicate some amount of decision-making, in the hopes that AI's capability to analyze large data sets will be accurate.

A question with AI ODR, as one experienced arbitrator has previously written, is whether the underlying algorithms result in "decision-making processes that will constrain and limit opportunities for human participation."[227] Algocracy, or governance by al-

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225 *See, e.g.*, Jessica Fjeld et al., *supra* note 63, at 2 (identifying eight key themes important to AI governance).

226 System designers can use whitepapers to describe their use of AI, in order to provide critical transparency and promote stakeholder trust.

227 Sophie Nappert, *Arbitration in the Age of Algocracy: Who Do You Trust?*, KLEROS (Nov. 11, 2019), https://blog.kleros.io/sophie-nappert-kleros-arbitration-in-the-age-of-algocracy/ [https://perma.cc/S7WG-36TS] (quoting John Danaher, *The Threat of Algocracy: Reality, Resistance and Accommodation*, 29 PHIL. & TECH. 245 (2016)).

gorithms, has an important role to play where disputants have a sufficient level of trust in the underlying code.[228] As Lessig aptly identified, code is "a tool of control . . . to the end of whatever sovereign does the coding," and therefore can inspire or diminish the extent stakeholders trust a given AI ODR platform.[229] A platform using open-source code, or sharing the code with potential disputants, can be critical for both increasing transparency and allowing for informed consent, in order to promote greater trust. Trust is inextricably linked to disputants' perceptions of the process's fairness, while fairness is linked to the extent a dispute system can foster either neutrality or consistency. [230] What algocracy illustrates is that trust in dispute systems goes beyond the centrality of the third-party neutral, as seen with ADR, and also extends to the algorithms computer programmers create, and system designers implement, in an AI system.

Given the parallels between Facilitative ODR and traditional dispute resolution, much of the conceptions of trust are shared between the two systems. Trust is placed in the third party to use orthodox ADR approaches, in order to identify disputants' interests in a way that can reduce tensions, reach a mutually beneficial agreement, and avoid adverse litigation. Moreover, disputing parties have some degree of trust that a third party's biases will not adversely impact the process, a presupposition that has been under scrutiny in the ADR field. [231] Where Facilitative ODR deviates from traditional dispute resolution systems is through trust in the underlying technology. Disputants engage in Facilitative ODR based on trust that Internet usage during the process will be reliable and will not disrupt the process. Both distrust in one's Internet speed and a lack of knowledge in operating the Internet, as will be discussed in Part B of this section, can serve as a significant impediment to access to justice. This is particularly concerning when there is no effective alternative to Facilitative ODR if the dispute arose in-person. Lastly, disputants and practitioners involved in the process also trust that the absence of non-verbal communication will not interfere with the resolution process.

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228 *See id.*

229 LESSIG, *supra* note 10, at 114.

230 *See, e.g.*, Noam Ebner & John Zeleznikow, *Fairness, Trust and Security in Online Dispute Resolution*, 36 HAMLINE UNIV. J. PUB. L. & POL'Y 143, 149–54 (2015) (discussing how insufficient trust and fairness will reduce adoption of ODR).

231 *See, e.g.*, Laura Athens, *Top Ten Cognitive Biases and Distortions in Mediation*, MEDIATE.COM (Mar. 2021), https://www.mediate.com/articles/athens-cognitive-biases.cfm [https://perma.cc/D59Q-JEE3] (discussing common biases impacting ADR practitioners).

B. *An Access to Justice Framework*

Access to justice has long been an issue for the judicial system, both domestically and internationally. The United Nations defines access to justice as "[t]he ability of people to seek and obtain a remedy through formal or informal institutions of justice."[232] Access to justice has historically been focused on ensuring marginalized communities are not excluded from the process, as these communities have been the most vulnerable to exploitation by State and non-State actors. Far from being resolved through litigation, evidence suggests that access to justice for low-income communities is only worsening.[233] Increased use of ADR is closely connected with a backlog of cases—leading to a justice deficit—making it more difficult for individuals to resolve disputes.[234] Underlying both ADR and ODR is a recognition that justice can be advanced without using adversarial litigation and that there are disputes ill-suited for the confines of litigation. Without an alternative to litigation, there would be disputes that are overlooked, further accentuating the access to justice problem. Frank Sanders' aspiration of "fitting the forum to the fuss" cannot be disentangled from access to justice: if dispute systems are not in place to address a variety of disputes, there will be disputants unable to obtain a remedy or have their voices heard. It is within this context that access to justice concerns for ODR should be analyzed.

As ODR has gained greater prominence, increased scrutiny has been placed on the field, to the extent it actually promotes access to justice. Critical to the use of ODR is access to the Internet, something that Barlow described as a tool where "all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth."[235] This highlights an aspiration

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232 UNITED NATIONS DEVELOPMENT PROGRAMME, PROGRAMMING FOR JUSTICE: ACCESS FOR ALL 1, 5 (2005), https://www.un.org/ruleoflaw/files/Justice_Guides_ProgrammingForJustice-AccessForAll.pdf [https://perma.cc/P8RZ-XLDL].

233 *See, e.g.*, Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L. J. 1531, 1537 (2016) (discussing "near-impossible obstacles in the path to the courthouse for economically disadvantaged groups").

234 Similar trends of using ADR to reduce case backlogs can be seen internationally. *See, e.g.*, Justice Markandey Katju, *Backlog of Cases Crippling Judiciary*, TRIB. INDIA (May 22, 2019, 6:42 AM), https://www.tribuneindia.com/news/archive/comment/backlog-of-cases-crippling-judiciary-776503 [https://perma.cc/D8V4-L566]; *see also* Jerusha Gichohi, *Judiciary Counts Gains of Court Annexed Mediation*, BUS. DAILY AFR. (June 1, 2021), https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/judiciary-counts-gains-of-court-annexed-mediation-3420850 [https://perma.cc/6QB2-HT96].

235 Barlow, *supra* note 11.

in the early period of the Internet, in that it was to serve as an equitable and accessible tool. There is less concern about where individuals are accessing the ODR platform, given the high ownership rates of computers.[236] To understand the extent that ODR promotes or restricts access to justice, focus should be placed on what the threshold question is to judge the commitment to access to justice. To access the benefits of ODR, individuals must still be able to use, and understand how to, the technology associated with an ODR platform. The unshakeable fear is that by incorporating technology in the system design, demographics with limited access to the Internet or knowledge on how to use the Internet would be deprived of the benefits ODR presents.[237] While the access to justice threshold question in litigation is typically whether individuals have access to effective legal representation, a tempting yet unsatisfactory threshold question for ODR is whether individuals have access to, and an understanding of, how to operate the technology that relies on the Internet. This is particularly relevant for older digital migrants, the urban poor, and rural communities. For instance, only 68% of baby boomers and 40% of the silent generation have a smartphone, an instrument many ODR platforms use.[238] Meanwhile, although rural communities are narrowing the historical gap they have had with urban communities in having access to important technologies, the gap continues to be statistically significant: rural communities are 12% less likely to have access to home broadband and are 12% less likely to own a smartphone.[239] There is also the question of the quality of Internet speed, as slow Internet connections reduce the ability of individuals to use ODR systems.[240] Another Pew study noted that 24% of rural residents viewed Internet speed as a major problem, while another 34%

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236 *See, e.g.*, American Bar Association, *supra* note 120, at 11.

237 Amy J. Schmitz, *Measuring "Access to Justice" in the Rush to Digitize*, 88 FORDHAM L. REV. 2381, 2384 (2020).

238 Emily A. Vogels, *Millennials Stand Out for their Technology Use, But Older Generations Also Embrace Digital Life*, PEW RSCH. CTR. (Sept. 9, 2019), https://www.pewresearch.org/fact-tank/2019/09/09/us-generations-technology-use/ [https://perma.cc/88Z7-DDXF].

239 Andrew Perrin, *Digital Gap Between Rural and Nonrural America Persists*, PEW RSCH. CTR. (May 31, 2019), http://web.archive.org/web/20190613141154/https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/ [https://perma.cc/6L4P-C6L4]; *see also* Andrew Perrin, *Digital Gap Between Rural and Nonrural America Persists*, PEW RSCH. CTR. (May 19, 2017), https://medium.com/@pewresearch/digital-gap-between-rural-and-nonrural-america-persists-53bec5ebc6de [https://perma.cc/22Q4-NY4P].

240 *See, e.g.*, Harvey Skinner et al., *Quality of Internet Access: Barrier Behind Internet Use Statistics*, 57 SOC. SCI. & MED. 875 (2003) (describing how Internet quality has impacted how a sample group interacts with health information).

found this to be a minor problem.[241] Yet the threshold question focusing on access to the technology would be inadequate, because communities with limited access to the Internet are also unlikely to have an online-based dispute in the first place—as they are unlikely to be transacting or communicating over the Internet.

Distinct threshold questions for access to justice must be posed, depending on whether the dispute initially arose online or in-person. To have a dispute online, parties would already have requisite understanding of the Internet, while ODR managing in-person disputes raises the thorny question of whether the individuals have access to, and can operate, the Internet. Thus, the proper threshold question for in-person disputes is whether individuals have an effective alternative to ODR in managing their disputes, in the absence of knowledge and familiarity with the Internet. Meanwhile, for situations where the underlying dispute originated online—for instance with e-commerce—the threshold questions for access to justice should be the extent to which there are barriers to access the ODR platform and whether the platform allows for ease of operation. An effective alternative to ODR for digital disputes would be unnecessary, as the concern of access to the Internet has already been established. Moreover, digital disputes are often ill-suited for in-person resolution, given the tendency to be cross-jurisdictional, which often involves pseudonymous identification. E-commerce and smart contracts disputes, for instance, should have different criteria for analyzing access to justice concerns than family law disputes, because the latter type of dispute arises out of an in-person context.

So long as there is an effective alternative to ODR for in-person disputes, those willing to interact with ODR should have access to the benefits. ODR does not exist in a vacuum: in many situations, disputants have alternatives to participating in an ODR process. As such, the extent that there are effective alternatives to ODR should be a leading consideration when assessing access to justice issues in the industry. The benefits of ODR are inextricably tied to promoting access to justice for those with access to the technology, as seen with early pilot projects. Indeed, the collaboration between Tyler Technologies and Travis County in civil claims led to the County recognizing that "providing [ODR] is another way . . .

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241 Monica Anderson, *About a Quarter of Rural Americans Say Access to High-Speed Internet is a Major Problem*, PEW RSCH. CTR. (Sept. 10, 2018), https://www.pewresearch.org/fact-tank/2018/09/10/about-a-quarter-of-rural-americans-say-access-to-high-speed-internet-is-a-major-problem/ [https://perma.cc/B7LJ-N7B9].

to help ensure all members of our community have access to a court system that will provide them fairness and justice."[242] When Franklin County in Ohio implemented one of the first U.S.-based ODR platforms for small claims court—using Facilitative ODR—they found that 94% of surveyed users preferred ODR and 85% felt that they gained control in resolving their case.[243] Most important to access to justice, 90% of users felt that their voices were respected through the process.[244] Further illustrating the access to justice benefits of ODR, the Franklin County court recognized that parties using ODR have greater autonomy "to select their own process at their own convenience," in contrast with the "strict schedules and procedural rules" seen in the court system.[245] This would explain why there are more case dismissals favoring disputants than default judgments, which typically occur because a party did not follow procedural rules or the party failed to appear in court.[246] An ODR pilot in Utah also saw benefits for access to justice: parties had greater variation in the time of day the ODR platform was accessed and greater variation in the geographic location that the platform was used, revealing increased flexibility for parties[247] Users also experienced faster resolutions to their cases as a result of the pilot, with settlements occurring at a three times faster rate than non-ODR alternatives.[248] However, the Utah pilot did not result in a statistically significant change in outcomes, including with default judgments or settlements.[249] Problematically, "more than one-third of related study participants did not understand the summons and affidavit information directing them to register on the ODR platform."[250] Moreover, participants "experienced difficulty entering the URL for the platform on their phones, and registering and logging onto the platform," potentially

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242 *Travis County JP 2 First in the Country to Use Online Dispute Resolution Technology*, TRAVIS CNTY. TEX. (2018), https://www.traviscountytx.gov/news/2018/1644-travis-county-jp-2-first-in-the-country-to-use-online-dispute-resolution-technology [https://perma.cc/963V-MKLH].

243 Alex Sanchez & Paul Embley, *Access Empowers: How ODR Increased Participation and Positive Outcomes in Ohio*, NAT'L CTR. STATE CTS. 14, 17 (2020), https://www.ncsc.org/__data/assets/pdf_file/0019/42166/access_empowers_Sanchez-Embley.pdf [https://perma.cc/KQ5U-L49K].

244 *Id.*

245 *Id.* at 19.

246 *Id.* at 18.

247 Paula Hannaford-Agor et al., *Impact of the Utah Online Dispute Resolution (ODR) Pilot Program: Final Report*, NAT'L CTR. STATE CTS. 1, 2–4 (Dec. 10, 2020), https://www.ncsc.org/__data/assets/pdf_file/0025/57823/NCSC-UT-final-2020.pdf [https://perma.cc/4NV8-LMQ6].

248 *Id.* at 11.

249 *Id.* at 10.

250 *Id.*

leading to harmful dispositions for users.[251] This highlights that improperly-designed ODR platforms can increase the concerns relating to access to justice for users. Having an effective alternative to ODR also protects against the ODR risks, as disputants would not be exclusively beholden to the ODR process.

The ongoing e-commerce revolution can also help in contextualizing the access to justice threshold question for in-person and online-based disputes. The past two decades have produced an e-commerce revolution that has provided benefits to those with Internet access—and this phenomenon has especially been heightened during the pandemic. E-commerce users now have access to a broader breadth of consumer options, lower prices, and, for some, one-day delivery. The fact that communities exist without access to e-commerce does not mean that e-commerce should not be used, so long as there is an effective alternative for individuals to make purchases. One effective alternative for e-commerce would be the physical store. Although individuals are relying less on physical stores,[252] the presence of physical stores still allows for those with limited access to the Internet to transact. The same applies to ODR: access to justice would be threatened if, and only if, disputants did not have access to an effective alternative to ODR to manage in-person disputes. Indeed, ADR and ODR system designers have placed an emphasis on recognizing the needs and preferences of all stakeholders. The preference for parties to use ODR is merely a continuation of the broader preference individuals have in using smartphones and the Internet to manage the most intimate[253] parts of their lives.

In family law, there has been a proliferation of private actors and courts seeking to implement ODR processes, as previously discussed in Section III(C). This builds on family law's transition towards promoting collaboration in managing family disputes, as opposed to the historical use of adversarial litigation.[254] Prior to the latter half of the 20th century, spouses were prohibited from collaborating with one another while the innocent spouse standard allowed divorce to occur only under exceptional circumstances.[255] This meant that access to dispute resolution systems was incredibly

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251 *Id.*

252 *See generally* Ali & Young, *supra* note 148.

253 From increased use of dating apps to find love, or telehealth to save lives, smartphones and Internet use has migrated our lives more and more into cyberspace.

254 Aviel, *supra* note 126, at 2280.

255 *Id.*

limited and, even when narrow exceptions were satisfied, the psychological fears of adverse litigation meant that potential disputants would be less willing to resolve their disputes. When the innocent spouse standard was eventually abandoned, the continued use of litigation entrenched fears that parties could have about increasing hostilities, should they seek justice through courts.[256] As with the aforementioned ODR pilot projects in small claims courts, having fewer barriers along with greater disputant comfort in engaging with dispute resolution systems has proven important for promoting access to justice in family law disputes. Indeed, the use of ODR in family law is inseparable from broader reforms in family court "[in] design[ing] systems and processes that do not exacerbate family conflict but do not ignore it, either."[257] Thus, so long as parties continue to have an effective alternative to ODR, these new technology-integrated systems for in-person disputes promote access to justice, primarily by reducing barriers and allowing for a system that better suits the preferences of disputants.

ODR's existence for digital disputes is critical because, in ODR's absence, many of these disputes would not be resolved. This is well illustrated with the Cøbra dispute in the UK, where a defendant was forced to take a default judgment because the individual did not want to sacrifice their pseudonymous identity (as discussed in Section VI[A]). As such, for digital disputes, the key questions for assessing ODR's ability to promote access to justice is whether there are barriers to access the ODR platform and whether users can easily operate the platform. The Internet and e-commerce have contributed to the rise of cross-jurisdictional, low-value disputes. Individuals involved in digital disputes, where transactions and communication happen quickly, would be less willing to engage with slow judicial proceedings. Both courts and ADR systems would also be unwilling or incapable of dealing with the expectations of pseudonymous identification that is seen in cyberspace. The reality is that ODR serves an indispensable role in promoting access to justice for digital disputes. However, poorly designed systems can prevent disputants from having their voices heard and resolving their disputes. As seen with the Utah ODR pilot program, problems with inputting URLs and accessing the platform led to harmful case rulings.[258] The aggregate of these disputes reveals how vital ODR's existence is for access to justice.

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256 *Id.* at 2281.

257 *Id.* at 2282.

258 *See* Hannaford-Agor et al., *supra* note 247, at 10.

In ODR's absence, parties would have less trust in using e-commerce, given the challenges in resolving these disputes within in-person dispute systems.[259]

ODR system designers for digital disputes should be preoccupied with ensuring that users can easily operate the platform, especially when considering that there is likely to be no effective in-person alternative for managing these digital disputes. Regardless of whether ODR is addressing in-person or online exclusive disputes, a poorly designed platform that overlooks the needs of important stakeholders serves as an impediment to access to justice. A well-designed system that considers the needs and interests of disputants will prove beneficial for access to justice. Yet, the pandemic has—perhaps more than at any other moment in ODR's history—shown how critical these ODR processes are for access to justice when health and safety concerns are present with in-person interactions. The pandemic era may also broadly influence expectations the legal industry's next generation has for technology and dispute resolution. Rather than raising barriers, ODR can have an important role in ensuring that the courthouse doors, whether physical or digital, are more open to a broader group of disputants.

VII. Tectonic Shifts: The Pandemic's Effect in Increasing ODR Adoption

"This pandemic was not the disruption any of us wanted, but it might be the disruption we needed to transform the judiciary into a more accessible, transparent, efficient and customer-friendly branch of government."[260]

—The Honorable Bridget Mary McCormack, Michigan Supreme Court Chief Justice

The pandemic has resulted in tectonic plates shifting in the dispute resolution field, as in-person interactions have been significantly restricted, thus increasing the urgency to consider ODR

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259 Schmitz & Rule, *supra* note 22, at 97 ("Large internet intermediaries, like online marketplaces (eBay), large merchants (Amazon) and payment processors (PayPal), realized very early on that the consumer trust problem was creating friction on the internet and that solving it could provide a valuable market advantage.").

260 *See* Justin Hicks, *Technology Brought 'Much-Needed Change' to Judicial System, Michigan Supreme Court Chief Justice Tells Congress*, MLive (June 25, 2020, 2:33 PM) https://www.mlive.com/public-interest/2020/06/technology-brought-much-needed-change-to-judicial-system-michigan-supreme-court-chief-justice-tells-congress.html [https://perma.cc/R8FP-JP8U].

ethics. As a result of the lockdown measures taken shortly after the start of the pandemic, the Supreme Court closed to the public on March 12, 2020,[261] and within a few days, the Court postponed a series of upcoming hearings.[262] By March 19, 2020, California became the first state to issue a stay-at-home order for all non-essential activities, starting a trend[263] that would extend throughout much of the country.[264] The judiciary and ADR practitioners would face the dilemma of either indefinitely postponing dispute resolution processes or increasing their adoption of ODR processes. The ensuing months would be a seismic shift in how disputes were managed. The Supreme Court would soon adopt Facilitative ODR tools and stream a live audio feed of oral arguments, an unprecedented level of transparency provided to the general public.[265]

The pandemic has created blurred lines between what is considered an ODR and a non-ODR system. These blurred lines have validated the arguments that early ODR professionals posited, that technology could be used to effectively respond to the needs and interests of disputants and various stakeholders. With the level of convenience these technological tools provide, it is increasingly difficult to imagine a reversion to the pre-pandemic era. All dispute systems operate within a particular context, and the inescapable reality has been that technology has an important role to play in managing and resolving disputes. The value of ODR in streamlining processes will be particularly valuable as a result of the rise of case backlogs brought on by the pandemic, which has potentially deprived a substantial number of people of access to justice. As mentioned in Section II, case backlogs have played an important role in causing courts and disputants to seek non-judicial processes

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261 *See* Amy Howe, *Court to Close to Public in Pandemic*, SCOTUSBLOG (Mar. 12, 2020, 3:40 PM), https://www.scotusblog.com/2020/03/court-to-close-to-public-in-pandemic/ [https://perma.cc/8H4U-BMSW].

262 Press Release, For Immediate Release, Sup. Ct. U.S. (Mar. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20 [https://perma.cc/XE6F-AUS7].

263 There were 42 states and territories that issued stay-at-home orders. *See* Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement— United States, March 1–May 31, 2020*, CTR. DISEASE CONTROL & PREVENTION (Sept. 4, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6935a2.htm [https://perma.cc/56UR-6PSQ].

264 Gavin Newsom, *Executive Order N-33-20*, EXEC. DEP'T STATE CAL. (Mar. 19, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf [https://perma.cc/SE2Z-Y46Q].

265 Press Release, For Immediate Release, Sup. Ct. U.S. (Apr. 13, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20 [https://perma.cc/K5KE-SKG9].

to resolve disputes.[266] While the pandemic era promoted ODR out of necessity to protect health and safety, the next moment of ODR's evolution may be to increase the efficiency of the judicial system—even as health and safety concerns recede.

In preparing for a post-pandemic era, housing disputes may be the legal area most ripe for ODR's intervention. Section 4024 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act")[267] placed a temporary moratorium on evictions, and many jurisdictions extended additional tenant protections. However, legitimate concerns[268] remain about what will happen after these moratoriums are lifted, particularly for the most vulnerable. As of April 2021, there were nearly six million renters nationwide who missed rent payments.[269] More troubling is the geographical disparities in late rent payments: Alabama has roughly 30% and New Jersey has 20% of renters owing rent, compared with Utah, which only has 5% of renters owing rent.[270] Large cities have a disturbingly high percentage of renters with missed rent: Atlanta is at 24% of renters with missed rent payments, while San Francisco's figure stands at 19%.[271] Will all of these jurisdictions rely on pre-pandemic processes for managing an eviction crisis? Access to justice and equity should be a concern if these jurisdictions were to rely exclusively on pre-pandemic processes: From the surveyed population, African-Americans, Asians, and Latinx renters have been two times more likely to be behind on rent, when compared with their White counterparts.[272] In recognizing that maintaining the pre-pandemic posture is untenable, the Illinois Supreme Court issued a directive to promote "alternative dispute resolution [in] eviction cases, including but not limited to mediation and online dispute resolution."[273] So long as an effective alterna-

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266 Sander, *supra* note 33, 111–13.

267 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, § 4024, 134 Stat. 281 (2020).

268 *See, e.g.*, Ken Sweet & Michael Casey, *Millions Fear Eviction as US Housing Crisis Worsens*, ASSOC. PRESS (June 16, 2021), https://apnews.com/article/race-and-ethnicity-health-coronavirus-pandemic-lifestyle-business-cdce22f5ae976032e9e6fa89831c0a93 [https://perma.cc/G8XK-NQBW].

269 Sarah Treuhaft et al., *Rent Debt in America: Stabilizing Renters is Key to Equitable Recovery*, NAT'L EQUITY ATLAS (May 25, 2021), https://web.archive.org/web/20210626090616/https://nationalequityatlas.org/rent-debt-in-america.

270 *Id.*

271 *Id.*

272 *Id.*

273 *M.R. 30370 - In re: Illinois Courts Response to COVID-19 Emergency/ Eviction Early Resolution Programs*, ILL. SUP. CT. (Feb. 23, 2021), https://ilcourtsaudio.blob.core.windows.net/an-

tive to these ODR procedures is provided, the streamlined process for those who self-select into ODR processes may result in greater stakeholder demand for ODR into the future.

The post-pandemic era will also raise questions about what should be considered ODR for the future. If, in fact, the pandemic's tectonic shifts are *permanent*, there will be a need to reassess the contours of precisely what is considered ODR and what, specifically, makes ODR unique from other dispute systems. If judges are using Facilitative ODR to manage disputes, then what makes ODR distinct from litigation? Recall that ODR is the use of information communication technology in resolving, managing, and preventing disputes. If a significant percentage of ADR practitioners adopt Facilitative ODR, to the extent that this is ADR's new norm, then what, specifically, makes ADR distinct from ODR? If the blurred lines between ODR and other dispute resolution systems were to become entrenched permanently, then paradoxically, ODR would revert to its origin moments, where ODR was merely "an online mirror image of the . . . offline process."[274] Yet, ADR subsuming its younger sibling, ODR, would be especially damaging when considering the need for greater flexibility in ODR's ethical tenets as discussed in Section V. Facilitative ODR is most likely to have the most integration with traditional dispute systems, as the gap between facilitative technologies and in-person communication is slim, relative to the other branches of ODR.

The Hangzhou Internet Court in China is an exception, which supports the rule that AI ODR and Blockchain ODR are more likely to be siloed from other dispute systems, considering that there are few comparable examples internationally. Established in August 2017, the Court's jurisdiction focuses mostly on online-exclusive disputes, including disputes with copyright infringement, domain names, and e-commerce.[275] By September 2019, the Court accepted over 14,000 disputes, resolving 60% with an average resolution time period of 28 minutes, thus highlighting the efficiencies in integrating more technology within dispute systems.[276] Using cryptographic hash functions, online evidence stored on the Court's blockchain has increased security and cannot be manipu-

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tilles-resources/resources/c3b0acd5-1ebe-4d59-af7f-079f43814e8c/022321-2.pdf [https://perma.cc/K636-WU7S].

274 Katsh & Rule, *supra* note 32, at 330 (citing ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 260 (Ethan Katsh et al. eds., 2012)).

275 *See* Huang-Chih Sung, *Can Online Courts Promote Access to Justice? A Case Study of the Internet Courts in China*, 39 COMPUT. L. & SEC. REV. 1, 6 (2020).

276 *Id.*

lated, as the evidence's corresponding hash function can be tracked into the future to promote evidentiary integrity. If the stored evidence were to be manipulated, the evidence would have a distinct hash function and would signal that the evidence has been manipulated. As these are online-exclusive disputes, and there has been a proliferation of ransomware attacks corrupting data during the pandemic,[277] the Hangzhou Court has aspired to provide a heightened level of data security, compared with non-blockchain court systems. It is possible, yet perhaps improbable, that courts in other jurisdictions will experiment with similar Blockchain ODR tools in their system design, in order to promote evidentiary security. This would likely depend on the extent that courts continue using Facilitative ODR tools, because more digital data is used when technology facilitates interact between parties. The pandemic has overlapped with, or perhaps been the cause of,[278] increased ransomware attacks, so more jurisdictions may benefit from greater data security initiatives—as seen with the Hangzhou Court.

The pandemic has also seen an unprecedented growth of e-commerce, one of the leading historical use cases for ODR. As people avoided in-person transactions due to health and safety considerations, e-commerce sales from the first quarter of 2021 increased 39%, when compared to a year earlier.[279] In China, the pandemic has contributed to increased demand for live-streaming products in e-commerce transactions, perhaps reducing the level of uncertainty that buyers have when transacting with merchants.[280] Given the close connection between ODR and e-commerce, greater reliance on e-commerce will promote the need for more robust ODR processes to manage related disputes. Yet, there remains the question of whether transacting parties in a post-pandemic world will maintain their interest in online exclusive interactions, once health and safety concerns recede. A potential

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277 In 2020, ransomware attacks increased by 150%, compared to the prior year. *See* Brenda R. Sharton, *Ransomware Attacks Are Spiking. Is Your Company Prepared?*, HARV. BUS. REV. (May 20, 2021), https://hbr.org/2021/05/ransomware-attacks-are-spiking-is-your-company-prepared [https://perma.cc/S5YA-32S9].

278 The pandemic has increased reliance on digital interactions, introducing more ways for individuals to be financially exploited.

279 *Quarterly Retail E-Commerce Sales 3rd Quarter 2021*, U.S. CENSUS BUREAU NEWS 2 (Nov. 18, 2021, 10:00 AM), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf [https://perma.cc/QY5S-NL3Z].

280 *See* Michelle Greenwald, *Live Streaming E-Commerce is the Rage in China. Is the U.S. Next?*, FORBES (Dec. 10, 2020, 8:49 AM), https://www.forbes.com/sites/michellegreenwald/2020/12/10/live-streaming-e-commerce-is-the-rage-in-china-is-the-us-next/ [https://perma.cc/UBD9-7MUE].

heuristic is whether the work-from-home experience will be sustained, as this was among the pandemic's leading transformation towards an online existence. A current trend in the labor market has been that employers who do not provide work-from-home flexibility are seeing higher rates of employee resignations,[281] while credentialed employees are seeking out those employers providing work-from-home options.[282] While future data will provide more clarity, the trend currently is a preference for online interactions. If this preference were to become more entrenched over the long term, ODR might see sustained growth—even as health and safety concerns recede.

The pandemic may very well prove to be the catalyst that was needed for a wider range of stakeholders to understand the importance and value of ODR systems. In the absence of ODR, there would have been considerable structural challenges in the dispute resolution process. The innovations that led to the Internet and ODR's creation have proved instrumental throughout the pandemic. However, only through the passage of time will we have greater clarity on whether the seismic shifts were merely transitory or rather a catalyst for a structural change in the relationship between technology and dispute resolution systems.

VIII. CONCLUSION

Online dispute resolution now finds itself in the midst of an impending battle for its soul, one that will have ripple effects into the entire dispute resolution industry. Technological innovation, unavoidable health and safety interventions, and social changes have contributed to this impending battle. New technologies have been championed by a variety of different stakeholders—leading to new possibilities in how disputes can be managed, and, importantly, how responsive dispute resolution can be to the needs and interests of disputants. These new technologies have introduced unprecedented optionality to disputants, while also introducing unique ethical considerations for how these systems should be de-

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281 *See, e.g.*, Lauren Weber, *Forget Going Back to the Office— People Are Just Quitting Instead*, WALL ST. J. (June 13, 2021, 5:30 AM), https://www.wsj.com/articles/forget-going-back-to-the-officepeople-are-just-quitting-instead-11623576602?mod=article_inline [https://perma.cc/8RHY-7V98].

282 *See, e.g.*, Chip Cutter & Kathryn Dill, *Remote Work is the New Signing Bonus*, WALL ST. J. (June 26, 2021), https://www.wsj.com/articles/remote-work-is-the-new-signing-bonus-11624680029 [https://perma.cc/XU2F-JXSJ].

signed. These ethical considerations will continue to be debated, precisely because they are essential to a vibrant soul. As each branch of ODR uses different technologies, flexibility must be prioritized in how ethical factors are conceptualized. The absence of ethical flexibility will promote uniformity and stymie innovation in ODR, even as innovation is what has made ODR so unique when compared with other dispute systems.

Historically, traditional court systems have experienced challenges in resolving novel disputes, while operating in the backdrop of international technological innovation. The emergence of e-commerce in the 1990s and the resulting birth of cross-jurisdictional, low-value disputes have also created a new class of disputants who were under-justiced. The financial costs of using courts to manage these disputes outweighed the courts' benefits. As such, e-commerce platforms constructed ODR platforms to promote ease and certainty for managing these disputes. Due to judicial backlogs, other disputants sought to evade courts out of preference. The new era of ODR builds on aversion to dispute systems, where the financial and temporal costs are significant. Unifying the three branches of ODR is a capability to streamline processes.

Meanwhile, more recent technological innovation has created disputes ill-suited for traditional dispute systems. While the Internet allowed for pseudonymous transactions, new technologies have made pseudonymous identities the default and some stakeholders are seeking out these systems, particularly through blockchain technology's use of asymmetric cryptography. As illustrated with Cøbra, when the judiciary's requirement for in-person identification conflicts with disputants' preference for pseudonymity, these individuals are willing to sacrifice winning a case in order to avoid engaging with courts. The judiciary operates with top-down system design frameworks, where disputants are required to conform to a specific procedural approach. The outcome is a class of disputants with restricted access to justice. In contrast, ODR has been focused on engaging with those disputants with limited access to justice, driven by bottom-up system design frameworks. It is within this context, one where parties are transacting with increasing technological sophistication, that the impending battle for the soul of ODR is situated. As the pandemic has propelled greater reliance on ODR processes, this impending battle becomes all the more critical for the future of dispute resolution.

The Internet has allowed, and the pandemic has catalyzed, the possibility for an untethering of dispute resolution from physical

locations. Enabling technological tools will allow for a broader breadth of disputes to be resolved in a seamless fashion. Competition to attract disputes to a specific resolution platform, using a specific type of technology, will only increase the optionality for disputants, while promoting fairness and access to justice by being more responsive to the needs and interests of different classes of disputants. As we witness the inescapable reality of technological innovation, the soul of ODR will continue to evolve. The outcome of this impending battle should be the prevalence of dispute systems with greater responsiveness to the particular circumstances of disputants.

WHAT HAPPENS BEFORE THE FIRST MEDIATION SESSION? AN EMPIRICAL STUDY OF PRE-SESSION COMMUNICATIONS

*Roselle L. Wissler and Art Hinshaw**

ABSTRACT

Mediator, lawyer, and party preparation in advance of the first formal mediation session is widely seen as important for the effectiveness of the mediation. Communications between the mediator and the mediation participants before the first mediation session, along with the submission of case information and documents to the mediator, are two primary means of information exchange to aid preparation. Few studies have looked at what occurs during these early stages, despite their centrality to mediation. The present Article reports the findings of a study of more than 1,000 mediators in different mediation settings and dispute types across eight states that begins to fill the gaps in our empirical knowledge of what happens before the first formal mediation session. The study examines whether and when pre-session communications take place, the case information that the mediators have access to before the first mediation session, the factors that are related to pre-session communications and document submissions, whether the disputants themselves are present and how much they speak, and the specific process and substantive issues that are discussed.

The findings suggest that current practices contravene conventional mediation advice and negatively impact the ability of mediators, lawyers, and disputants to prepare for the first mediation

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session and to customize the mediation process to the needs of the individual case. Moreover, blanket assertions cannot be made about what "typically" occurs before the first mediation session, as what takes place varies between civil and family cases, by the case referral source, and by whether the parties do or do not have counsel, among other factors. The present Article helps lay the groundwork for future empirical research that can deepen our understanding of how mediators and mediation participants can most effectively use pre-session communications and document submissions to prepare for mediation and enhance the quality of the mediation process and its outcomes.

I. INTRODUCTION

Mediator preparation in advance of the first formal mediation session is widely seen as important for the effectiveness of the mediation,[1] as are party and lawyer preparation.[2] Two primary means of information exchange are thought to aid each group in their preparation: pre-session[3] communications between the mediator and the mediation participants, and party submission of case information and documents to the mediator.[4]

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[1] *See, e.g.*, HAROLD I. ABRAMSON, MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS 161, 187–88 (2d ed. 2010); DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION 97–98 (3d ed. 2018); R. Wayne Thorpe et al., *Task Force on Improving Mediation Quality* 3, 6–7, 32 (2008) (reporting the survey, interview, and focus group responses of over 300 mediators, lawyers, and insurance company and corporate representatives throughout the United States who had "significant experience" in the private mediation of "large commercial and other civil cases in which all parties are represented by counsel."; *id.* at 4).

[2] *See, e.g.*, SUSAN NAUSS EXON, ADVANCED GUIDE FOR MEDIATORS 29–30, 35 (2014); FRENKEL & STARK, *supra* note 1, at 381–86; Marilou Giovannucci & Karen Largent, *A Guide to Effective Child Protection Mediation: Lessons From 25 Years of Practice*, 47 FAM. CT. REV. 38, 45–46 (2009); Thorpe et al., *supra* note 1, at 7, 10, 33.

[3] Although these typically are referred to as "pre-mediation" communications and submissions, "mediation" is often considered to begin with the first contact between the mediator and the parties or their lawyers. *See, e.g.*, EXON, *supra* note 2, at 6; CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 32–33 (1986) (describing twelve stages of mediation, with five of them occurring before the first mediation session); IOWA CODE § 20.31 (2016) (stating that mediation begins at the mediator's receipt of the assignment); 42 PA. CONS. STAT. § 5949(c); JoAnne Donner, *When Does Mediation Really Start?*, MEDIATE (Nov. 2010), https://www.mediate.com/articles/donnerJ1.cfm [https://perma.cc/E8A9-SG7W]. Accordingly, we use the term "pre-session" (i.e., before the first formal mediation session) to more accurately describe the timing.

[4] *See, e.g.*, ABRAMSON, *supra* note 1, at 95, 97–98, 161; EXON, *supra* note 2, at 6, 42–43; JAY FOLBERG & DWIGHT GOLANN, LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW 269–71

The most common goals for pre-session communications are for: (1) the mediator to develop a basic understanding of the dispute;[5] (2) the mediation participants to gain an understanding of the mediator's approach and the mediation process;[6] (3) the mediator and the mediation participants to discuss how to structure the mediation process for the particular dispute;[7] and (4) the mediator and the mediation participants to begin to build rapport and trust.[8] Accomplishing these goals would enable the mediator and the mediation participants to plan how they can most productively approach the first mediation session and would also help reduce the parties' stress before and during the mediation.[9]

To help accomplish these goals, mediators and lawyers generally recommend the following topics be discussed or explored during pre-session communications:[10] (1) the mediation process, the role of the participants, and the mediator's approach;[11] (2) the background of the dispute, the main issues to be addressed, the parties' interests, and any non-legal issues;[12] (3) the status of settlement negotiations and the offers that have been exchanged, the obstacles to settlement, whether the parties need additional infor-

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(3d ed. 2016); FRENKEL & STARK, *supra* note 1, at 125–26, 378; Thorpe et al., *supra* note 1, at 6–7, 32.

5 *See, e.g.*, EXON, *supra* note 2, at 6; FRENKEL & STARK, *supra* note 1, at 127–28.

6 *See, e.g.*, ABRAMSON, *supra* note 1, at 97; EXON, *supra* note 2, at 30–31; FRENKEL & STARK, *supra* note 1, at 127; Giovannucci & Largent, *supra* note 2, at 46; Thorpe et al., *supra* note 1, at 8, 10–11; Jill S. Tanz & Martha K. McClintock, *The Physiologic Stress Response During Mediation*, 32 OHIO ST. J. DISP. RESOL. 29, 55–56, 62 (2017).

7 *See, e.g.*, ABRAMSON, *supra* note 1, at 320; FOLBERG & GOLANN, *supra* note 4, at 261; FRENKEL & STARK, *supra* note 1, at 127–28; Thorpe et al., *supra* note 1, at 7–9, 12–13; Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, WINTER 2016 DISP. RESOL. MAG. 6, 10 (2016) (reporting the survey responses of 141 private civil and commercial mediators who are members of the International Academy of Mediators, a majority of whom regularly practice in the United States).

8 *See, e.g.*, ABRAMSON, *supra* note 1, at 97; FOLBERG & GOLANN, *supra* note 4, at 271; Giovannucci & Largent, *supra* note 2, at 46; Tanz & McClintock, *supra* note 6, at 54–55, 62.

9 *See, e.g.*, FRENKEL & STARK, *supra* note 1, at 126; Tanz & McClintock, *supra* note 6, at 53–56, 62.

10 *See* Thorpe et al., *supra* note 1, at 6 (noting that "[m]any mediation training programs have traditionally not paid substantial attention to the content" of pre-session discussions).

11 ABRAMSON, *supra* note 1, at 97, 320; EXON, *supra* note 2, at 31; FRENKEL & STARK, *supra* note 1, at 127; Giovannucci & Largent, *supra* note 2, at 46; Thorpe et al., *supra* note 1, at 8; Tanz & McClintock, *supra* note 6, at 55–56, 62.

12 *See, e.g.*, ABRAMSON, *supra* note 1, at 320; Brian Farkas & Donna Erez Navot, *First Impressions: Drafting Effective Mediation Statements*, 22 LEWIS & CLARK L. REV. 157, 183 (2018) (reporting the survey responses of 180 primarily commercial and labor/employment mediators in New York and across the United States; *id.* at 166); FRENKEL & STARK, *supra* note 1, at 127–28; Giovannucci & Largent, *supra* note 2, at 46; Thorpe et al., *supra* note 1, at 8, 32.

mation, and possible settlement options;[13] (4) the procedural status of the case;[14] (5) the parties' personalities and emotional dynamics, issues of violence or coercion, who should or should not attend the mediation, and the specifics of how the mediation process should proceed in this case (e.g., opening presentations, the role the parties will play, or topics to be avoided in joint sessions);[15] (6) giving the parties a chance to vent and work through emotions before the formal mediation session;[16] (7) establishing the ground rules, encouraging a civil tone, and coaching on more productive opening presentations and communications;[17] and (8) the particular documents that should be submitted to the mediator before the first session and whether these documents should be exchanged between the parties.[18]

Whether pre-session communications are held and which of these topics are discussed are said to depend on a number of factors, including the mediator, the case, and whether written case information has been or will be submitted.[19] These communications can take place prior to or on the same day as the first mediation session.[20] Pre-session communications are often said to take place between the mediator and the lawyers, without the disputants.[21]

The submission of case information and documents to the mediator is another aspect of preparation for the first mediation session.[22] Whether mediators request pre-session submissions and what types of documents they want to receive is said to depend on

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13 *See, e.g.*, ABRAMSON, *supra* note 1, at 97, 320; Farkas & Erez Navot, *supra* note 12, at 182; FOLBERG & GOLANN, *supra* note 4, at 270–71; Thorpe et al., *supra* note 1, at 8–9.

14 *See, e.g.*, Thorpe et al., *supra* note 1, at 9.

15 *See, e.g.*, ABRAMSON, *supra* note 1, at 97, 320; Farkas & Erez Navot, *supra* note 12, at 183; FRENKEL & STARK, *supra* note 1, at 127; Giovannucci & Largent, *supra* note 2, at 46; Thorpe et al., *supra* note 1, at 9, 12–13, 32–34; Kelly Browe Olson, *Screening for Intimate Partner Violence in Mediation*, 20 DISP. RESOL. MAG. 25, 27 (2013).

16 *See, e.g.*, FOLBERG & GOLANN, *supra* note 4, at 271; Giovannucci & Largent, *supra* note 2, at 46; Tanz & McClintock, *supra* note 6, at 60.

17 *See, e.g.*, ABRAMSON, *supra* note 1, at 320; FRENKEL & STARK, *supra* note 1, at 128; Thorpe et al., *supra* note 1, at 9, 13, 32; Tanz & McClintock, *supra* note 6, at 70–71.

18 *See, e.g.*, ABRAMSON, *supra* note 1, at 319; FRENKEL & STARK, *supra* note 1, at 128; Thorpe et al., *supra* note 1, at 9, 32.

19 *See, e.g.*, ABRAMSON, *supra* note 1, at 97; Thorpe et al., *supra* note 1, at 8.

20 *See, e.g.*, Michael Geigerman, *New Beginnings in Commercial Mediations: The Advantages of Caucusing Before the Joint Session*, 19 DISP. RESOL. MAG. 27, 29 (2012); Tanz & McClintock, *supra* note 6, at 55.

21 *See, e.g.*, ABRAMSON, *supra* note 1, at 319; Geigerman, *supra* note 20, at 29; Thorpe et al., *supra* note 1, at 6–7, 11 (reporting also that the lawyers preferred that the parties not be present during pre-session communications).

22 *See supra* text accompanying note 4.

the mediator, the complexity of the issues in the case, the amount at stake, and other factors.[23] As to what information mediation memos should contain, mediators and lawyers most commonly recommend including the background of the dispute, a summary of the disputed factual or legal issues and the parties' positions on them, the relief sought, key people needed for resolution, the procedural status of the case, and the history of settlement discussions.[24]

Much of what has been written about the use of pre-session communications and submissions has been in the context of private mediation involving large civil and commercial cases, where such communications and submissions are reported to be common.[25] Studies that involved more varied case types and mediation settings (both private and court-connected) showed mixed findings. One study found that 81% of surveyed commercial and labor/employment mediators said they usually or always require the pre-session submission of mediation statements,[26] while another study found that 46% of the mediators and 62% of the lawyers said that all parties had submitted a statement to the mediator in more than half of their recent civil and family cases.[27] In the second survey, fewer than 20% of the surveyed mediators and lawyers said they had a substantial pre-session discussion about the mediation in

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23 *See, e.g.*, ABRAMSON, *supra* note 1, at 97, 271; Farkas & Erez Navot, *supra* note 12, at 166–74; Thorpe et al., *supra* note 1, at 8, 12. There appears to be more consensus among mediators and lawyers on the importance of submitting mediation memos and "relevant exhibits" than on submitting pleadings, discovery, and expert reports. *See* Farkas & Erez Navot, *supra* note 12, at 166–68; Thorpe et al., *supra* note 1, at 12.

24 *See, e.g.*, ABRAMSON, *supra* note 1, at 411–14; Farkas & Erez Navot, *supra* note 12, at 178–81; FOLBERG & GOLANN, *supra* note 4, at 270. If the information will be submitted confidentially to only the mediator and will not be exchanged among the parties, additional items such as these are recommended to be included: candid analyses of the strengths and weaknesses of the case, the parties' nonlegal interests, proposed settlements, and any personal or emotional issues or dynamics. *See, e.g.*, Farkas & Erez Navot, *supra* note 12, at 181–83.

25 *See* ABRAMSON, *supra* note 1, at 97; Jay Folberg, *The Shrinking Joint Session: Survey Results*, 22 DISP. RESOL. MAG. 12, 19 (2016) (reporting the survey responses of 205 private civil and commercial JAMS mediators across the United States); Thorpe et al., *supra* note 1, at 6, 12 (finding that "many" mediators said they have pre-session discussions as part of their regular practice, and a majority of mediators and lawyers think it is important to submit a memo to the mediator); Stipanowich, *supra* note 7, at 10.

26 Farkas & Erez Navot, *supra* note 12, at 166–68.

27 John Lande, *Analysis of Data from New Hampshire Mediation Trainings*, INDISPUTABLY (Dec. 10, 2017), at 6–7, https://secureservercdn.net/45.40.149.159/gb8.254.myftpupload.com/wp-content/uploads/Analysis-NH-training-data.pdf [https://perma.cc/HRJ9-J7U4] (reporting the responses of a total of 87 mediators and lawyers surveyed regarding their recent civil and family cases; *id.* at 1–3).

more than half of their recent civil and family cases.[28] Some have noted that in smaller-stakes cases and court mediation settings, pre-session communications and submissions might be barred or "logistically impossible or cost prohibitive."[29]

Thus, the findings of the few empirical studies that have been conducted, taken together, suggest that practices regarding pre-session communications and document submissions might vary considerably in different case and mediation contexts.[30] None of these studies has examined the factors that contributed to whether pre-session communications and document submissions occurred. Nor have they examined the specific process or substantive matters that were discussed during the pre-session communications.

The present Article reports the findings of a study that begins to fill the gaps in our empirical knowledge about the early stages of mediation by taking a more systematic and comprehensive look at pre-session communications and document submissions in a wider range of mediation settings and dispute types across the United States. Section II describes the survey procedure, the mediators who responded to the survey, and the mediated disputes that form the basis of the mediators' responses. Section III presents the survey findings regarding the mediators' pre-session communications with the parties and/or their lawyers, including whether and when pre-session communications took place, the case information the mediators had access to before the first mediation session, the factors that were related to pre-session communications and document submissions, whether the disputants themselves were present and how much they spoke, and the specific process and substantive issues that were discussed. Section IV discusses the findings and their implications for mediation practice, and Section V summarizes the key conclusions.

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[28] Lande, *supra* note 27, at 6.

[29] Thorpe et al., *supra* note 1, at 19. *See also* Lande, *supra* note 27, at 6; EXON, *supra* note 2, at 6; FRENKEL & STARK, *supra* note 1, at 125; Geigerman, *supra* note 20, at 29; Tanz & McClintock, *supra* note 6, at 55.

[30] *See* Lande, *supra* note 27, at 6–7 (noting that it "would involve a change in the practice culture" for the mediators to regularly have pre-session communications); Thorpe et al., *supra* note 1, at 3, 18–19 (noting that there are many differences among different mediation contexts, and that the conclusions of the Task Force are limited to "the arena of private practice" in "commercial and civil cases involving reasonably sophisticated users of mediation . . . in which all parties are represented by counsel").

II. Survey Procedure and Respondents

We selected mediators from eight states across four regions of the United States for the survey.[31] In each state, we obtained the names and email addresses of family and civil case mediators whose contact information was publicly available online, primarily from the mediator rosters of state and federal court mediation programs, the National Academy of Distinguished Neutrals, and the American Arbitration Association.[32]

We then sent a personalized email invitation to each mediator identified by this approach, asking them to participate in an online survey and providing them a unique code to access the survey. When the mediators logged in, they were first asked two screening questions to limit participation to those who had mediated (1) a non-appellate level civil or family dispute (other than small claims or probate) involving only two named parties (2) within the United States in the prior four months.[33]

Of the 5,510 mediators whose email invitation was not returned as undeliverable and who met the survey eligibility criteria, 1,065 mediators participated in the survey, for a response rate of 19.3%. This response rate is within the bounds of what can be expected for the present survey given a number of factors, including the survey's web-based format, length, and complexity, as well as the lack of a connection between the researchers and the respondents.[34] Moreover, this figure is conservative because an unknown

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31 California and Utah in the West; Michigan and Illinois in the Midwest; Florida and North Carolina in the Southeast; and Maryland and New York in the Northeast.

32 In Maryland and Utah, we obtained additional mediators' names from rosters of statewide professional conflict resolution organizations. Given the small number of mediators in Utah relative to the other states, we also included names from the roster of a statewide private ADR provider. Many mediators were on more than one roster in each state; we cross-checked the lists and eliminated duplicates. We included all mediators identified in each state, up to a randomly selected maximum of 1,000 per state.

33 Experience was limited to the prior four months so that respondents would be more likely to remember the mediation and report it accurately. *See* Floyd J. Fowler, Jr., Survey Research Methods 93–94 (2d ed. 1988); Claire Selltiz et al., Research Methods In Social Relations 156, 159 (4th ed. 1981).

34 *See, e.g.*, *Response Rates – An Overview*, AAPOR, https://www.aapor.org/Education-Resources/For-Researchers/Poll-Survey-FAQ/Response-Rates-An-Overview.aspx [https://perma.cc/ASW5-2HXB] (last visited Aug. 3, 2020); Weimiao Fan & Zheng Yan, *Factors Affecting Response Rates of the Web Survey: A Systematic Review*, 26 Comput. Hum. Behav. 132, 133–34, 36 (2010); Mirta Galesic & Michael Bosnjak, *Effects of Questionnaire Length on Participation and Indicators of Response Quality in a Web Survey*, 73 Pub. Op. Q. 349, 358 (2009); Bennett Porter, *Tips and Tricks to Improve Survey Response Rate*, Momentive, https://www.surveymonkey.com/curiosity/improve-survey-response-rate/ [https://perma.cc/2PFJ-8TWJ] (last visited Aug. 3,

number of emails that were not returned as "undeliverable" might not have reached their intended recipients[35] due to outdated email addresses, spam filters, or other reasons.[36]

We conducted tests of statistical significance to determine whether an observed difference between two or more groups (e.g., between civil and family cases) is a "true" difference (or whether an observed relationship between two measures is a "true" relationship) and does not merely reflect chance variation (or association).[37] Thus, throughout the article, any "differences" or "relationships" reported are statistically significant differences or relationships, while "no differences" or "no relationships" indicate there were no statistically significant differences or relationships.

Two-thirds of the mediators who responded to the survey most frequently mediate civil cases, while one-third most frequently mediate family cases. Three-fourths of the mediators had been mediating for more than eight years and typically mediate more than two cases per month.[38] A majority of both civil and family

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2020); Tse-Hua Shih & Xitao Fan, *Comparing Response Rates in E-mail and Paper Surveys: A Meta-Analysis*, 4 EDUC. RSCH. REV. 26, 36–37 (2009). Moreover, the response rate is not necessarily an indicator of the quality of the survey findings. *See* Response Rates – An Overview, *supra*; Colleen Cook et al., *A Meta-Analysis of Response Rates in Web- or Internet-Based Surveys*, 60 EDUC. & PSYCH. MEASUREMENT 821, 821 (2000).

35 *See* Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793, 807 n.55 (2016) (explaining that the 10% response rate in that study was conservative for a similar reason: due to uncertainty about address accuracy, one could not tell whether a non-response to the mailed survey was because the survey did not reach the intended recipient or because that person chose not to participate).

36 Spot-checking revealed that some mediators had changed firms; others had moved out of the relevant state or were no longer actively mediating; and some had died. Others might not have responded out of fear that the survey invitation was a phishing attempt; several mediators contacted us to confirm the authenticity of the survey request, but others with similar concerns might simply have deleted the invitation.

37 The tests of statistical significance used in this Article are t-tests and chi-square ($\div^2$) tests. *See* RICHARD P. RUNYON & AUDREY HABER, FUNDAMENTALS OF BEHAVIORAL STATISTICS 278–80, 363–67 (5th ed. 1984). The conventional level of probability for determining the statistical significance of findings is the .05 level (i.e., $p < .05$). *Id.* at 230, 278–80. Findings of $p > .05$ and $p < .10$ are considered "marginally significant"—the difference is not statistically significant but is worth mentioning in exploratory research—and those are noted as such. *See* Anton Olsson-Collentine, Marcel A. L. M. van Assen & Chris H. J. Hartgerink, *The Prevalence of Marginally Significant Results in Psychology Over Time*, 30 PSYCHOL. SCI. 576 (2019). Cramer's *V* provides a measure of the strength of the effect for chi-square ($\div^2$) analyses. As a guide to interpreting the size of effects, .10 is considered a small effect; .30, a medium effect; and .50, a large effect. *See, e.g.,* Charles Zaiontz, *Effect Size for Chi-square Test*, REAL STAT. USING EXCEL, https://www.real-statistics.com/chi-square-and-f-distributions/effect-size-chi-square/ [https://perma.cc/K7VQ-AVS9] (last accessed Nov. 4, 2021).

38 The civil mediators had mediated, on average, three years longer than the family mediators (means of 16 years vs. 13 years; $t(944) = -3.58$, $p < .001$). The civil mediators mediate,

mediators (88% and 68%, respectively) had only a legal background, and a minority had only a non-legal background (3% and 21%, respectively).[39] Over two-thirds of the mediators who usually mediate civil cases (68%) and almost half of those who usually mediate family cases (47%) have served regularly as a neutral in one or more non-mediator roles where they make a formal decision, recommendation, or evaluation to resolve disputes.[40]

When responding to most of the questions in the survey, the mediators were asked to focus on their most recently concluded mediation that involved a civil or family dispute with only two named parties. Focusing on a single recent case provides more precise and accurate information[41] and enables us to examine relationships between case characteristics and what took place before the first mediation session.

Approximately two-thirds of the mediators' most recent mediations were civil cases (68%) and one-third were family cases (32%).[42] The four substantive areas accounting for most of the civil cases were tort (30%), contract (27%), employment (21%), and property/real estate (10%). Over half of the family cases involved two or more types of divorce-related issues (58%); roughly equal proportions of the remaining family cases involved only custody/visitation issues (22%) or only financial issues (19%). One or both parties did not have legal counsel in relatively few civil cases (11%) and in over one-third of family cases (37%).[43] A majority of parties in both civil and family cases had no prior mediation experi-

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on average, one fewer case per month than the family mediators (means of five cases vs. six cases per month, $t(940) = 3.28$, $p < .01$).

39 The civil mediators were more likely than the family mediators to have only a legal background and were less likely to have only a non-legal background ($\chi^2(2) = 82.10$, $p < .001$, $V = .29$). Eight percent of the civil mediators and 11% of the family mediators had both legal and non-legal backgrounds. The most common non-legal backgrounds included mental health fields, business, construction or engineering, accounting, and conflict resolution.

40 These roles included judge, arbitrator, case or neutral evaluator, and a role that involved making recommendations to the court about the children in family cases. The civil mediators were less likely than the family mediators to have *not* served regularly in any role where they make a formal decision, recommendation, or evaluation (32% vs. 53%; $\chi^2(1) = 37.03$, $p < .001$, $V = .20$).

41 *See, e.g.*, SELLTIZ ET AL., *supra* note 33, at 158–59; Donna Stienstra, *Rules of Thumb for Designing and Administering Mailed Questionnaires*, FED. JUD. CTR. (Aug. 1, 1996), https://www.fjc.gov/sites/default/files/2015/0027.pdf [https://perma.cc/Z28Z-4ME4].

42 For almost all mediators, the general type of case (civil or family) they most recently mediated was the same as the type they usually mediate.

43 One or both parties were less likely to *not* have counsel, and both parties were more likely to have counsel (89% vs. 63%), in civil cases than in family cases ($\chi^2(2) = 101.18$, $p < .001$, $V = .31$).

ence (63% to 75%), with the exception of the responding parties in civil cases (34%).[44]

In both civil and family cases, the two most common case referral sources were court mediation programs/judges (42% and 39%, respectively) and the lawyers (43% and 30%, respectively); few civil cases but almost one-fourth of family cases were referred from the parties; and fewer than 10% of civil and family cases were referred from a professional mediation organization or a private mediation provider or firm.[45] Some civil and family cases "directly referred" from the parties or the lawyers might nonetheless have been in a court-connected mediation program because, in some programs, the parties or their lawyers choose and directly contact the mediator.[46]

The proportion of cases mediated in each state was as follows: California (20%), Florida (16%), New York (16%), North Carolina (12%), Maryland (11%), Michigan (10%), Illinois (8%), Utah (6%), and several other, mostly adjoining states (2%). Two states (New York and California) accounted for almost half of the civil mediations, and three states (Florida, Illinois, and Maryland) accounted for just over half of the family mediations. The relative proportion of civil and family mediators within a state largely reflected the proportion of civil and family mediators whose contact information was available in each state.

There were differences among the states in the proportion of cases referred from different sources, especially from state and federal courts,[47] in part because of the different rosters from which

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[44] Both complainants and respondents had more prior mediation experience in civil cases than in family cases (complainants: $\chi^2(3) = 24.96$, $p < .001$, $V = .16$; respondents: $\chi^2(3) = 182.63$, $p < .001$, $V = .44$).

[45] Civil cases were more likely to be referred from federal courts/judges or the lawyers and were less likely to be referred from state courts/judges or the parties than were family cases ($\chi^2(4) = 170.62$, $p < .001$, $V = .41$).

[46] *See, e.g.*, C.D. Cal. R. 11-10 §7.1(a); Utah Code Jud. Admin. R. 4-510.05(4)(E); S.D. Fla. R. 16.2(d)(1)(B); Mich. Ct. R. 2.411(B)(1); Mich. Ct. R. 3.216(F)(2)(e); Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, 373 N.C. Admin. Code 2(a) (2020).

[47] Civil: $\chi^2(21) = 300.21$, $p < .001$, $V = .40$; family: $\chi^2(21) = 77.51$, $p < .001$, $V = .49$. For instance, 71% of the civil cases in Maryland were referred directly from a state court; the proportion of state court referrals in the other states was 33% or fewer. And 58% of the civil cases in New York were referred directly from a federal court, compared to 12% or fewer in the other states. In states other than Maryland and New York, the largest proportion of civil cases was referred directly from the lawyers, ranging between 45% and 74%. And among family cases, across the states the proportion of cases referred from state courts ranged from one-fifth to half of the cases, and the proportion of cases referred directly from the lawyers or the parties each ranged from fewer than 10% to around 60%.

mediators' contact information was obtained in each state. Due to this and other differences related to the case referral sources,[48] any observed inter-state differences in pre-session communications might reflect these other factors, rather than the practices and policies in each state. To address this, we would need to examine differences among the states while controlling for the case referral source; unfortunately, there seldom was a sufficient number of cases to permit these analyses. We were able to examine whether the case referral source, the mediator's background, and whether the parties had counsel were related to most aspects of pre-session communications.

III. Pre-Session Communications and Case Information

The mediators were asked about their mediation communications with the parties and/or their lawyers before the first formal mediation session that dealt with topics *other than* hiring, scheduling, or other administrative matters, as well as the particular types of case information the mediators had access to before the first mediation session.

A. *Whether and When Mediators Held Pre-Session Communications*

Overall, 66% of the mediators in civil cases and 39% in family cases held pre-session discussions about non-administrative matters with the parties and/or their lawyers in their most recent case.[49] As to the timing of these discussions, around half of the mediators in both civil and family cases (54% and 47%, respectively) held pre-session communications both prior to and on the same day as (but before) the first mediation session; over one-third held discussions only prior to the day of the first session (37% and

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[48] For instance, in both civil and family cases, the case referral source was related to whether the mediators had a non-legal background (civil, $\chi^2(3) = 20.07$, $p < .05$, $V = .18$; family, $\chi^2(3) = 18.39$, $p < 001$, $V = .25$) and whether the parties had counsel (civil, $\chi^2(3) = 38.16$, $p < .001$, $V = .24$; family, $\chi^2(3) = 100.81$, $p < .001$, $V = .56$). Some of the relationship between referral source and having counsel is inevitable: cases referred from the lawyers would involve counsel, and cases referred from the parties generally would not.

[49] Conversely, one-third of mediators in civil cases and almost two-thirds in family cases did *not* have pre-session communications. Mediators in civil cases were more likely than those in family cases to have pre-session communications ($\chi^2(1) = 65.52$, $p < .001$, $V = .25$).

35%, respectively); and the rest had pre-session communications only on the same day as the first session (9% and 18%, respectively).[50]

B. *Constraints on or Requirements to Hold Pre-Session Communications*

Some mediators had no feasible opportunity to hold pre-session discussions with the parties and/or their lawyers (9% in civil cases and 24% in family cases) and a few were prohibited from doing so (2% and 7%, respectively), while others were required to hold pre-session discussions (18% and 13%, respectively). Over half of the mediators, however, had *no* requirements for or constraints on pre-session communications (71% in civil cases and 56% in family cases).[51]

Whether there were requirements for, or constraints on, pre-session discussions varied depending on the referral source. Civil cases were more likely to have *no* requirements for, or constraints on, pre-session discussions when the case was referred from the lawyers or a private provider (85% and 75%, respectively) than when it was referred from a state or federal court (56% and 47%, respectively).[52] Family cases were more likely to have *no* requirements for, or constraints on, pre-session discussions when the case was referred from the parties or the lawyers (72% and 63%, respectively) than when it was referred from a state court or mediation organization (43% and 28%, respectively).[53]

Because there were differences among the states in the proportion of cases referred from different sources, and because some of the sources were more likely than others to have requirements

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[50] Mediators in civil cases were more likely than those in family cases to have communications at both times and were less likely to have communications only on the same day as the first mediation session ($\chi^2(2) = 8.84$, $p < .05$, $V = .12$).

[51] Mediators in civil cases were more likely than those in family cases to have *no* requirements or constraints on mediation communications before the first session and were less likely to say that communications before the first mediation session were not feasible ($\chi^2(3) = 59.67$, $p < .001$, $V = .24$).

[52] $\chi^2(9) = 139.27$, $p < .001$, $V = .27$. Pre-session communications were most likely to be unfeasible in cases referred from state courts and most likely to be required in cases referred from federal courts. *See supra text accompanying* note 46 for a caveat regarding cases "directly referred" from the parties or the lawyers.

[53] $\chi^2(9) = 29.82$, $p < .001$, $V = .18$. Pre-session communications were most likely to be unfeasible in cases referred from state courts or from mediation organizations and most likely to be required in cases referred from mediation organizations.

or constraints,[54] we examined inter-state differences in requirements for, or constraints on, pre-session discussions while controlling for the referral source.[55] In civil cases, there were no inter-state differences in constraints or requirements on pre-session discussions in cases referred directly from the lawyers, but there were differences in cases referred from state courts.[56] In family cases, there were no inter-state differences in constraints or requirements on pre-session discussions in cases referred either directly from the lawyers or from the state courts.[57]

C. *Factors Related to Holding Pre-Session Communications*

When pre-session communications were *not* required, prohibited, or unfeasible, they took place in 73% of civil cases and 51% of family cases.[58] We examined whether several case and mediator practice and background characteristics were related to whether mediators held pre-session discussions when they had no constraints or requirements to do so.[59]

The factor that was by far the most strongly related to whether mediators held pre-session communications in their most recent

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[54] *See supra* notes 47, 52–53, and accompanying text.

[55] We looked at inter-state differences in cases referred from the lawyers and, separately, in cases referred from state courts. There were not enough cases referred from federal courts, mediation providers, or the parties to analyze inter-state differences separately in those sets of cases. These analyses were conducted by comparing the category of no requirements or constraints versus the three other categories combined (required, prohibited, and unfeasible), given the small numbers of cases in some of those categories in some states.

[56] Lawyers: $p = .29$; state courts: $\chi^2(7) = 14.11$, $p < .05$, $V = .29$. Among cases referred from state courts, Illinois mediators were the most likely to report constraints or requirements on pre-session communications (83%), followed by mediators in Maryland (60%) and Florida (56%), with the other states ranging between 27% to 41%. Illinois and Maryland state courts do not appear to have rules requiring or prohibiting pre-session communications in civil cases; Florida state courts require mediators to determine whether mediation is the proper process in civil and family cases; *see* Fla. R. Med. 10.400. This suggests that informal policies, judge-specific rules, or the unfeasibility of having pre-session communications might instead have contributed to the observed differences in "constraints" among the states.

[57] Lawyers: $p = .46$; state courts: $p = .10$.

[58] Mediators in civil cases were more likely than those in family cases to have pre-session communications when there were no constraints or requirements ($\chi^2(1) = 30.34$, $p < .001$, $V = .21$).

[59] A cautionary note: finding an association between a particular factor and whether pre-session communications were held does not mean that factor necessarily influenced the decision to have pre-session communications. That is, a factor might be *associated with* the increased use of pre-session communications but might not have *influenced* whether those communications took place (i.e., correlation does not equal causation).

case was the mediators' usual practice regarding the use of pre-session communications. In both civil and family cases, mediators who usually or always hold pre-session communications in their mediations were more likely to hold pre-session communications in the instant case than were mediators who never or seldom hold pre-session communications as part of their usual mediation practice.[60] Other mediator practice[61] or background characteristics generally had small or no relationships with whether pre-session communications were held. In civil cases, but not in family cases, mediators were less likely to hold pre-session discussions if they had *not* served regularly in any non-mediation evaluative or decision-making role than if they had served in one or more of those roles.[62] In both civil and family cases, whether mediators held pre-session communications was not related to whether they had only a legal background, only a non-legal background, or both backgrounds.[63]

Several case characteristics,[64] in addition to the general type of case (i.e., civil or family case),[65] had relatively small relationships with whether mediators held pre-session communications. There was a difference among the main civil case subtypes in whether pre-session discussions took place, but not among family cases sub-

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60 Civil: $\chi^2(2) = 177.71$, $p < .001$, $V = .62$; family: $\chi^2(2) = 55.11$, $p < .001$, $V = .58$. In civil cases, 95% of mediators who usually or always have pre-session communications did so in the instant case, compared to 61% of mediators who have pre-session communications in one-third to two-thirds of their cases and 34% of mediators who never or seldom have pre-session communications. A similar pattern was seen in family cases: 87% of mediators who usually or always have pre-session communications did so in the instant case, compared to 58% of mediators who have pre-session communications in one-third to two-thirds of their cases and 26% of mediators who never or seldom have pre-session communications.

61 Mediators in civil cases were more likely to have pre-session communications when they mediate fewer disputes per month ($r(447) = -.10$, $p < .05$); there was no relationship for family cases ($p = .79$). There was no relationship between the number of years the mediators had been mediating and whether they had pre-session communications in either civil or family cases (p's of .30 and .11, respectively).

62 Civil: 64% vs. 76% ($\chi^2(1) = 7.14$, $p < .01$, $V = .13$); family, $p = .70$. With regard to specific roles, mediators in civil cases were more likely to have pre-session communications if they had served regularly as an arbitrator (77% vs. 66%, $\chi^2(1) = 7.06$, $p < .01$, $V = .13$) or a case evaluator (84% vs. 69%, $\chi^2(1) = 8.62$, $p < .01$, $V = .14$); there was no difference if mediators had served as a judge ($p = .73$). In family cases, there was no relationship between any of the specific roles and pre-session communications (p's ranged from .28 to .83).

63 Civil: $p = .22$; family, $p = .63$.

64 We examined only those case characteristics that mediators might be aware of at the time they were deciding whether to have pre-session communications, as that decision could not have been influenced by case features the mediators did not know about.

65 *See supra* note 58 and accompanying text.

types.[66] In civil cases, pre-session discussions were more likely to occur when one or both parties had counsel than when neither party had counsel; there was no difference in family cases.[67] There was no relationship between the disputants' prior mediation experience and whether pre-session communications were held in civil cases; in family cases, pre-session discussions were more likely to be held when the responding party had more rather than less prior mediation experience.[68] In both civil and family cases, the case referral source was related to whether pre-session discussions were held.[69] In civil cases referred directly from the lawyers, there were differences among the states in the use of pre-session communications.[70]

D. *Case Information That Mediators Had Access to Before the First Mediation Session*

Relatively few mediators in civil cases, but almost half in family cases, did *not* have access to any information about the dispute before the first mediation session (*see* Table 1).[71] In civil cases, over three-fourths of the mediators had party mediation state-

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66 Mediators in civil cases were less likely to have pre-session communications with the parties and/or their lawyers in tort cases (63%) than in contract, property, or employment cases (76%, 77%, and 81%, respectively) ($\chi^2(3) = 11.42$, $p < .05$, $V = .16$). This could not be explained by differences among these case subtypes in referral source or in whether the parties had counsel, as those characteristics would have produced different patterns. Family: $p = .92$.

67 One or both parties had counsel vs. neither had counsel: civil, 74% vs. 42% ($\chi^2(1) = 9.69$, $p < .01$, $V = .14$); family: $p = .42$.

68 Civil: p's = .23 and .70. Family: responding party, $r(163) = .16$, $p < .05$; complaining party, $p = .14$.

69 This was true even though these cases had no requirements for or constraints on pre-session communications. Mediators in civil cases were more likely to have pre-session communications when the case was referred directly from a private provider (87%) than from a federal court or from the lawyers (77% and 75%, respectively); they were least likely to have pre-session communications when the case was referred from a state court (63%) ($\chi^2(3) = 10.14$, $p < .05$, $V = .15$). Mediators in family cases were marginally more likely to have pre-session communications when the case was referred directly from the parties (61%) than from the lawyers or a mediation organization (52% and 50%, respectively); they were least likely to have pre-session communications when the case was referred from a state court (36%) ($\chi^2(3) = 7.35$, $p = .06$, $V = .21$).

70 In civil cases referred from the lawyers, pre-session communications were least likely to take place in North Carolina (46%), followed by Utah (67%); they were more likely to take place in the rest of the states (ranging from 79% to 92%) ($\chi^2(6) = 27.43$, $p < .001$, $V = .34$). There were insufficient cases to repeat this analysis for the other case referral sources in civil cases and to examine inter-state differences within any of the referral sources in family cases.

71 Mediators in civil cases were less likely than those in family cases to *not* have any information about the dispute before the first mediation session ($\chi^2(1) = 96.94$, $p < .001$, $V = .31$).

ments or memos, around half had the pleadings and/or motions, and almost one-fourth had other case documents (e.g., financial statements, medical records, or contracts). In family cases, almost one-third of the mediators had the pleadings and/or motions; fewer than one-fifth had either mediation statements or other case documents.[72] Few civil or family mediators had access to the results of intimate partner violence screenings before the first mediation session.[73]

TABLE 1. CASE INFORMATION THAT MEDIATORS HAD ACCESS TO BEFORE THE FIRST MEDIATION SESSION

	Civil Cases	***Family Cases***
Parties' mediation statements or memos	77%	19%
Pleadings and/or motions	51%	32%
Depositions and/or expert reports	11%	2%
Results of intimate partner violence ("IPV") screening	0.3%	11%
Other documents (financial, medical, contracts, etc.)	23%	14%
Other	2%	8%
No information	16%	45%
Number of respondents	*679*	*321*

Whether the mediators had case information before the first mediation session varied depending on whether the parties had counsel. When neither party had counsel, mediators in both civil and family cases were more likely to *not* have any information about the dispute,[74] and were less likely to have the pleadings and/

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[72] Mediators in civil cases were more likely than those in family cases to have mediation statements ($\chi^2(1) = 298.56$, $p < .001$, $V = .55$), pleadings/motions ($\chi^2(1) = 29.86$, $p < .001$, $V = .17$), depositions/expert reports ($\chi^2(1) = 25.17$, $p < .001$, $V = .16$), and other case documents ($\chi^2(1) = 9.50$, $p < .01$, $V = .10$).

[73] These small percentages might suggest that cases involving intimate partner violence ("IPV") had been screened out before referral to the mediator, or that screening had not yet taken place and was to be done by the mediator. Mediators in civil cases were less likely than those in family cases to have the results of IPV screening ($\chi^2(1) = 71.10$, $p < .001$, $V = .27$).

[74] Neither party had counsel vs. both had counsel: civil, 54% vs. 13% ($\chi^2(1) = 50.15$, $p < .001$, $V = .28$); family, 60% vs. 40% ($\chi^2(1) = 8.68$, $p < .01$, $V = .18$). In this set of analyses, we compared

or motions,[75] than when both parties had counsel. And mediators in civil cases were less likely to have mediation memos when neither party had counsel than when both parties had counsel; there was no difference in family cases.[76] Whether the mediators themselves had a legal background (i.e., legal only or legal in addition to a non-legal background) compared to only a non-legal background was related to the specific types of case information they had before the first mediation session in civil cases but not in family cases.[77]

The case referral source also was related to whether mediators had case information before the first mediation session. In civil cases, mediators in cases referred from federal courts were less likely to *not* have any information about the case, and were more likely to have mediation memos, than were mediators in cases referred from state courts, with cases referred from the lawyers or from mediation organizations or providers falling between the federal and state courts.[78] Mediators in civil cases were much more likely to have pleadings and/or motions in cases referred from federal courts than in cases referred from the three other sources.[79] In family cases, mediators in cases referred directly from the parties were less likely to have the pleadings and/or motions than were mediators in cases referred from the lawyers, state courts, or mediation organizations.[80] Mediators in family cases were marginally less likely to have mediation memos in cases referred from the parties or state courts than in cases referred from the lawyers or from

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cases where neither party had counsel versus where both parties had counsel, and excluded cases where only one party had counsel, to be able to assess the effect of counsel more clearly. This applies to similar analyses throughout the rest of the Article.

75 Neither party had counsel vs. both had counsel: civil, 12% vs. 55% ($\chi^2(1) = 27.60$, $p < .001$, $V = .21$); family, 14% vs. 38% ($\chi^2(1) = 14.38$, $p < .001$, $V = .23$).

76 Neither party had counsel vs. both had counsel: civil, 22% vs. 82% ($\chi^2(1) = 80.74$, $p < .001$, $V = .35$); family, $p = .26$. Whether the mediators had access to other case documents was not related to whether the parties had counsel in either civil or family cases (p's of .21 and .33, respectively).

77 In civil cases, mediators who had a legal background were more likely to have mediation memos (79% vs. 32%, $\chi^2(1) = 27.34$, $p < .001$, $V = .21$) and the pleadings (53% vs. 33%, $\chi^2(1) = 7.71$, $p < .01$, $V = .11$), but were less likely to have *no* information (14% vs. 50%, $\chi^2(1) = 21.20$, $p < .001$, $V = .18$), than were mediators who had only a non-legal background. There were no differences in family cases (p's ranged from .22 to .97).

78 No information: federal courts, 0%; organizations, 12%; lawyers, 15%; state courts, 25% ($\chi^2(3) = 34.90$, $p < .001$, $V = .23$). Mediation memos: federal courts, 97%; organizations, 84%; lawyers, 79%; state courts, 66% ($\chi^2(3) = 40.95$, $p < .001$, $V = .25$).

79 Federal courts, 89%; other sources, 36% to 49% ($\chi^2(3) = 74.00$, $p < .001$, $V = .34$).

80 Parties, 10%; other sources, 35% to 44% ($\chi^2(3) = 25.37$, $p < .001$, $V = .28$).

mediation organizations.[81] Whether mediators in family cases had *no* information of any kind was not related to the case referral source.[82]

E. *Parties' Presence and Participation in Pre-Session Communications*

For mediation communications that took place *prior to* the day of the first session,[83] neither party (i.e., the disputants themselves) was present in person or by phone for any of the communications in approximately three-fourths of civil cases and one-fourth of family cases (*see* Table 2). One party was present for at least some of the communications in almost one-fourth of civil cases and almost half of family cases; both parties were present during all discussions in few civil cases and over one-fourth of family cases.[84] For pre-session communications held on the *same day as* the first mediation session,[85] in both civil and family cases, neither party was present in relatively few cases and both parties were present in around half of the cases (*see* Table 2).[86] Parties generally were less likely to be present for pre-session discussions held prior to the day

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[81] Parties, 14%; state courts, 16%; lawyers, 26%; organizations, 33% ($\chi^2(3) = 7.35$, $p = .06$, $V = .15$).

[82] $p = .16$.

[83] Findings regarding communications held *prior to* the day of the first session include cases that had communications only prior to the day of the first session as well as the "prior to" communications in cases that had communications both prior to and on the same day as the first session. This applies to similar analyses throughout the rest of the Article.

[84] Parties in civil cases were less likely to be present for communications held *prior to* the day of the first session than were parties in family cases ($\chi^2(2) = 97.97$, $p < .001$, $V = .45$).

[85] Findings regarding pre-session communications held on the *same day as* the first mediation session include cases that had communications only on the same day as the first session as well as the "same day" communications in cases that had communications at both times. This applies to similar analyses throughout the rest of the Article.

[86] There was no difference between civil and family cases in whether parties were present for pre-session communications held on the *same day as* the first session ($p = .19$).

of the first session than on the same day as the first session[87] in both civil and family cases.[88]

TABLE 2. WHETHER THE PARTIES THEMSELVES WERE PRESENT FOR PRE-SESSION COMMUNICATIONS

	Civil Cases			**Family Cases**	
	Prior To	***Same Day***		***Prior To***	***Same Day***
Both parties were present for all communications	6%	46%		28%	56%
At least one party was present for some or all communications	18%	40%		48%	28%
Neither party was present for any communications	76%	14%		24%	17%
Number of respondents	*385*	*263*		*96*	*72*

Parties' presence during pre-session communications held *prior to* the day of the first session was related to whether they had counsel in both civil and family cases.[89] When both parties had

[87] This comparison required separate analyses to be conducted for (1) cases where pre-session communications were held at both times and (2) cases where pre-session communications were held at one time or the other. For the first set of cases, the analyses compared the parties' presence at the two different times in the same case. For the second set of cases, the analyses compared (a) the parties' presence during communications *prior to* the day of the first session in cases that had communications only at that time versus (b) the parties' presence during pre-session communications on the *same day as* the first session in cases that had communications only at that time. Because these two sets of analyses are based on different sets of cases, the resulting percentages will differ from each other, and from those reported in the text or tables. This applies to similar analyses throughout the rest of the Article.

[88] In civil cases, one or both parties were less likely to be present for communications held prior to the day of the first session than on the same day as the first session when communications were held at both times (22% vs. 87%, $t(200) = -18.93$, $p < .001$) and when communications were held at one time or the other (21% vs. 75%, $t(203) = -7.61$, $p < .001$). In family cases, one or both parties were less likely to be present for communications held prior to the day of the first session than on the same day as the first session when communications were held at both times (73% vs. 89%, $t(44) = -2.85$, $p < .01$), but there was no difference when communications were held at one time or the other ($p = .92$).

[89] Because the question asked whether neither, one, or both parties had counsel and, similarly, whether neither, one, or both parties were present, we could not match the presence of a particular party with whether they did or did not have counsel. Accordingly, these analyses were conducted at the level of the case rather than the individual party.

counsel, one or both parties were present in 20% of civil cases and 62% of family cases. By contrast, when neither party had counsel, one or both parties were present in 100% of civil and family cases.[90] Whether parties had counsel was not related to parties' presence during pre-session communications held on the *same day* as the first session in civil cases; in family cases, one or both parties were less likely to be present when both parties had counsel than when neither party had counsel (76% vs. 100%).[91]

With regard to party participation during pre-session communications prior to and on the same day as the first session, the parties (*i.e.,* the disputants themselves) talked a considerable amount in around one-third of civil cases and almost two-thirds of family cases (*see* Table 3).[92] The parties did not talk at all in approximately one-fourth to one-third of civil cases but in few family cases. In both civil and family cases, there was no difference in how much the parties talked during communications held prior to versus on the same day as the first session.[93]

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[90] Civil: $\chi^2(1) = 37.04$, $p < .001$, $V = .32$; family: $\chi^2(1) = 13.36$, $p < .001$, $V = .40$. Of course, parties who did not have counsel would have to be present in order for pre-session discussions to take place.

[91] Civil: $p = .36$; family: $\chi^2(1) = 5.56$, $p < .05$, $V = .30$. We could not examine the relationship between the mediators' background and parties' presence because there were too few cases in which the parties were present and the mediators had a non-legal background.

[92] Parties in civil cases spoke less than parties in family cases during communications held prior to ($\chi^2(2) = 19.55$, $p < .001$, $V = .36$) and on the same day as ($\chi^2(2) = 11.92$, $p < .01$, $V = .21$) the first session.

[93] For the set of cases where pre-session communications took place either only prior to or only on the same day as the first mediation session, there was no difference between the two times in how much the parties spoke (civil: $p = .41$; family: $p = .14$). There were too few cases where communications were held at both times and the parties were present at both times to analyze differences in that set of cases.

TABLE 3. HOW MUCH THE PARTIES THEMSELVES TALKED DURING PRE-SESSION COMMUNICATIONS

	Civil Cases		Family Cases	
	Prior To	***Same Day***	***Prior To***	***Same Day***
Not at all	32%	26%	7%	7%
A little	34%	35%	28%	33%
A considerable amount	33%	38%	65%	60%
Number of respondents	*87*	*221*	*68*	*55*

How much the parties talked during communications held *prior to* the day of the first mediation session was related to whether they had counsel in civil cases but not in family cases.[94] Parties in civil cases talked a considerable amount in 26% of the cases when both parties had counsel, compared to in 67% of the cases when neither party had counsel. Conversely, parties did not talk at all in 41% of the cases when both parties had counsel, but in none of the cases when neither party had counsel. During pre-session communications held on the *same day as* the first mediation session, however, there was no relationship between having counsel and how much the parties talked in either civil or family cases.[95]

F. *Actions the Mediators Engaged in Regarding the Mediation Process Itself*

This section describes the process actions the mediators engaged in during pre-session communications held prior to and on the same day as the first mediation session, first for civil cases and then for family cases. We examine whether the mediators' actions differed at the two times and in civil versus family cases. We also examine whether the mediators' process actions varied depending on whether the parties were or were not present for pre-session

94 Civil: $\chi^2(2) = 7.91$, $p < .05$, $V = .32$; family: $p = .14$. Because the question asked about the parties' overall participation, not separately for each party, we could not match the participation of a particular party with whether they did or did not have counsel. Accordingly, these analyses were conducted at the level of the case rather than the individual party.

95 Civil: $p = .31$; family: $p = .36$. We could not examine the relationship between the mediators' background and parties' participation because there were too few cases in which the parties were present and the mediators had a non-legal background.

communications and on whether the mediators had a legal background.

i. Civil Cases

During communications with the parties and/or their lawyers held *prior to* the day of the first mediation session, a majority of the mediators discussed the information to submit before the first mediation session and explored who should or should not attend the mediation (*see* Table 4). Over half of the mediators explored options for how the opening mediation session might be structured, assessed the parties' and/or their lawyers' ability to communicate civilly, explored whether the parties would be okay being together in the same room, and explained her or his approach. Broadly speaking, between one-third and half of the mediators explained the mediation process, explained the ground rules, explained mediation confidentiality, and explored options for structuring the rest of the mediation following the opening session. Around one-fourth of the mediators assessed the parties' capacity to mediate (e.g., cognitive ability, violence, coercive control, or intimidation) and coached the parties and/or their lawyers on non-adversarial communications.

TABLE 4. ACTIONS MEDIATORS ENGAGED IN REGARDING THE MEDIATION PROCESS ITSELF IN CIVIL CASES

	Prior To	***Same Day***	***At One or Both Times***
Explained the process/mediator's role	43%	81%	71%
Explained my approach	52%	71%	71%
Explained the ground rules	39%	81%	68%
Explained mediation confidentiality	36%	73%	62%
Discussed what information to submit	76%	--	76%
Explored who should or should not attend mediation	69%	12%	67%
Assessed participants' ability to communicate civilly	54%	49%	65%
Assessed the parties' capacity to mediate	26%	47%	43%
Explored whether parties would be okay together	52%	49%	63%
Explored options for structuring the opening session	57%	41%	64%
Coached participants on non-adversarial communications	21%	34%	33%
Explored options for structuring the rest of mediation	32%	46%	48%
Other	5%	3%	--
None of the above	6%	2%	--
Number of respondents	*387*	*252*	--

During pre-session communications held on the *same day as* the first session, a majority of the mediators explained the mediation process, the ground rules, mediation confidentiality, and his or her approach (*see* Table 4). Almost half of the mediators assessed the parties' and/or their lawyers' ability to communicate civilly, explored whether the parties would be okay being together in the same room, assessed the parties' capacity to mediate, and explored options for how the opening session and the rest of the mediation might be structured. Approximately one-third of the mediators coached the parties and/or their lawyers on non-adversarial com-

munications; few explored who should or should not attend the mediation.

To get an overall sense of how frequently mediators engaged in each action *at some time* during pre-session communications, we created a single overall measure for each action. That is, if an action occurred either prior to or on the same day as the first session, or at both times, that action was counted as having occurred.[96] Using this measure, we see that, *at some time* during pre-session communications, a majority (between 62% and 71%) of the mediators in civil cases engaged in most of the process actions (*see* the final column in Table 4). Broadly speaking, between one-third and half of the mediators explored options for how to structure the rest of the mediation after the opening session, assessed the parties' capacity to mediate, and coached the parties and/or their lawyers on non-adversarial communications *at some time* during pre-session communications.

There were differences in the process actions that the mediators engaged in during pre-session communications held prior to the day of the first session compared to those held on the same day as the first session. In cases where pre-session communications occurred *both* prior to *and* on the same day as the first session, there were differences between the two times in the frequency with which mediators engaged in each of these actions. Mediators who had pre-session communications at both times were less likely to engage in the following actions during communications held prior to than on the same day as the first session: explain the mediation process, her or his approach, the ground rules, and mediation confidentiality; assess the parties' capacity to mediate; explore options for how to structure the rest of the mediation after the opening session; and coach the participants on non-adversarial communications.[97] Conversely, mediators were more likely to engage in the following actions during pre-session communications held prior to than on the same day as the first session: discuss who should or should not attend the mediation, explore options for how

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[96] For those mediators who had pre-session discussions at both times, each action was counted only once, even if it occurred at both times. Comparable measures were used for the process actions mediators engaged in *at some time* during pre-session communications in family cases, as well for the substantive issues mediators discussed *at some time* during pre-session communications in both civil and family cases. *See infra* Sections III(F)(ii), (G).

[97] Prior to vs. same day: process, 44% vs. 85% ($t(196) = -9.15$, $p < .001$); approach, 55% vs. 74% ($t(196) = -3.89$, $p < .001$); ground rules, 39% vs. 86% ($t(196) = -11.32$, $p < .001$); confidentiality, 38% vs. 76% ($t(196) = -8.56$, $p < .001$); capacity, 35% vs. 52% ($t(196) = -3.79$, $p < .001$); structure rest, 37% vs. 51% ($t(196) = -3.01$, $p < .01$); coach, 26% vs. 38% ($t(196) = -2.82$, $p < .01$).

the opening session should be structured, explore whether the parties would be okay being together in the same room and, marginally, assess the participants' ability to communicate civilly.[98]

In cases where pre-session communications occurred *either* prior to *or* on the same day as the first mediation session, there were differences in fewer process actions between the two times. Mediators were less likely to explain mediation confidentiality and, marginally, to explain the mediation process and the ground rules during communications held prior to than on the same day as the first session.[99] Conversely, mediators were more likely to discuss who should or should not attend the mediation and, marginally, to assess the participants' ability to communicate civilly during pre-session communications held prior to than on the same day as the first session.[100]

ii. Family Cases

During communications with the parties and/or their lawyers held *prior to* the day of the first mediation session, between two-thirds and three-fourths of the mediators explained the mediation process, explored whether the parties would be okay being together in the same room, and discussed the information that the parties should submit before the first mediation session (*see* Table 5). Between half and two-thirds of the mediators assessed the parties' capacity to mediate (i.e., cognitive ability, violence, coercive control, or intimidation), explained his or her approach, explained mediation confidentiality, and assessed whether the parties and/or their lawyers could communicate civilly. Just under half of the mediators explained the ground rules and explored who should or should not attend the mediation, and over one-third of the mediators explored options for how to structure the opening session. Around one-fourth of the mediators explored options for structuring the rest of the mediation and coached the parties and/or their lawyers on non-adversarial communications.

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98 Prior to vs. same day: attend: 79% vs. 10% ($t(196) = 19.75$, $p < .001$); structure opening, 64% vs. 41% ($t(196) = 4.61$, $p < .001$); okay together, 61% vs. 49% ($t(196) = 2.29$, $p < .05$); civilly (62% vs. 53%, $t(196) = 1.92$, $p = .06$).

99 Prior to vs. same day: confidentiality, 33% vs. 57% ($t(200) = -2.77$, $p < .01$); process, 42% vs. 60% ($t(200) = -1.96$, $p = .052$); ground rules, 39% vs. 54% ($t(200) = -1.71$, $p = .09$).

100 Prior to versus same day: attend, 60% vs. 16% ($t(200) = 5.10$, $p < .001$); civilly, 47% vs. 30% ($t(200) = 1.88$, $p = .06$). There was no difference in the other actions (p's ranged from .18 to .99).

TABLE 5. ACTIONS MEDIATORS ENGAGED IN REGARDING THE MEDIATION PROCESS ITSELF IN FAMILY CASES

	Prior To	***Same Day***	***At One or Both Times***
Explained the process/mediator's role	76%	85%	90%
Explained my approach	58%	65%	75%
Explained the ground rules	47%	76%	71%
Explained mediation confidentiality	58%	79%	76%
Discussed what information to submit	67%	--	67%
Explored who should or should not attend mediation	46%	12%	43%
Assessed participants' ability to communicate civilly	52%	62%	66%
Assessed the parties' capacity to mediate	62%	61%	75%
Explored whether parties would be okay together	72%	64%	82%
Explored options for structuring the opening session	37%	46%	50%
Coached participants on non-adversarial communications	22%	44%	37%
Explored options for structuring the rest of mediation	25%	46%	42%
Other	2%	3%	--
None of the above	2%	1%	--
Number of respondents	*100*	*72*	--

During pre-session communications held on the *same day as* the first session, a majority of the mediators engaged in most of these actions; almost half explored how to structure the opening session and the rest of the mediation and coached the participants on non-adversarial communications; and few explored who should or should not attend the mediation (*see* Table 5).

At some time during pre-session discussions, between two-thirds and 90% of the mediators in family cases engaged in most of these process actions (*see* the final column in Table 5). Broadly speaking, between one-third and half of the mediators explored

options for how to structure the opening session and the rest of the mediation, discussed who should or should not attend the mediation, and coached the parties and/or their lawyers on non-adversarial communications.

The mediators were less likely to engage in some of the process actions during pre-session communications held prior to versus on the same day as the first session. Mediators who had pre-session communications at *both* times were less likely to engage in the following actions during communications held prior to than on the same day as the first session: explain the ground rules, explain confidentiality, explore options for structuring the rest of the mediation after the opening session, and coach the participants on non-adversarial communications.[101] However, mediators were more likely to explore who should or should not attend the mediation during communications held prior to than on the same day as the first session.[102] Mediators who had pre-session communications *at one time or the other* were less likely during communications held prior to than on the same day as the first session to explain the ground rules, coach the participants on non-adversarial communications and, marginally, explore how to structure the rest of the mediation after the opening session.[103]

iii. Differences Between Civil and Family Cases

During pre-session communications held *prior to* the day of the first session, mediators in civil cases were less likely than those in family cases to explain the mediation process, explain mediation confidentiality, assess the parties' capacity to mediate, and explore whether the parties would be okay being together in the same room (*compare* Tables 4 and 5).[104] By contrast, mediators in civil cases were more likely than those in family cases to explore who should or should not attend the mediation, explore options for how the opening session might be structured and, marginally, discuss

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[101] Prior to vs. same day: ground rules, 40% vs. 77% ($t(46) = -4.10$, $p < .001$); confidentiality, 51% vs. 73% ($t(46) = -3.68$, $p < .01$); structure rest, 21% vs. 47% ($t(46) = -3.59$, $p < .01$); coach, 30% vs. 49% ($t(46) = -2.44$, $p < .05$).

[102] Prior to vs. same day: attend, 60% vs. 11% ($t(46) = 6.64$, $p < .001$). There were no differences in the other actions (p's ranged from .24 to .84).

[103] Prior to vs. same day: ground rules, 49% vs. 81% ($t(64) = -2.55$, $p < .05$); coach, 13% vs. 38% ($t(64) = -2.35$, $p < .05$); structure rest, 24% vs. 48% ($t(64) = -1.91$, $p = .06$). There were no differences in the other actions (p's ranged from .22 to 1.00).

[104] Civil vs. family: process, 43% vs. 76% ($\chi^2(1) = 35.39$, $p < .001$, $V = .27$); confidentiality, 36% vs. 58% ($\chi^2(1) = 16.09$, $p < .001$, $V = .18$); capacity, 26% vs. 62% ($\chi^2(1) = 45.20$, $p < .001$, $V = .30$); okay together, 52% vs. 72% ($\chi^2(1) = 13.31$, $p < .001$, $V = .16$).

the information that should be submitted before the first session.[105] During pre-session communications held on the *same day as* the first mediation session, there were differences between civil and family cases in only three process actions: mediators in civil cases were less likely than those in family cases to assess the participants' ability to communicate civilly, assess the parties' capacity to mediate, and explore whether the parties would be okay being together in the same room.[106]

iv. Differences Depending on Whether the Parties Were Present[107]

In civil cases, mediators were more likely to engage in some of the process actions when one or both parties were present than when neither party was present. During communications held *prior to* the day of the first mediation session, mediators were more likely to explain the process, the ground rules, and mediation confidentiality, and were more likely to assess the parties' capacity to mediate and coach the participants on non-adversarial communications, when one or both parties were present than when neither party was present.[108] A largely similar pattern was seen for pre-session communications held on the *same day as* the first mediation session: mediators were more likely to explain the process, ground rules, mediation confidentiality, and her or his approach, and were more likely to assess the parties' capacity to mediate, when one or both parties were present than when neither party was present.[109]

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105 Civil vs. family: attend, 69% vs. 46% ($\chi^2(1) = 17.84$, $p < .001$, $V = .19$); structure opening, 57% vs. 37% ($\chi^2(1) = 12.23$, $p < .001$, $V = .16$); information, 76% vs. 67% ($\chi^2(1) = 3.13$, $p = .08$, $V = .08$). There were no differences in the other actions (p's ranged from .10 to .71).

106 Civil vs. family: civilly, 49% vs. 62% ($\chi^2(1) = 4.20$, $p < .05$, $V = .11$); capacity, 47% vs. 61% ($\chi^2(1) = 4.32$, $p < .05$, $V = .12$); okay together, 49% vs. 64% ($\chi^2(1) = 4.84$, $p < .05$, $V = .12$). There were no differences in the other actions (p's ranged from .10 to .98).

107 Because the parties' presence was related to whether they had counsel in both civil and family cases, *see supra* notes 89–91 and accompanying text, we did not examine whether there were differences in what was discussed depending on whether the parties had counsel.

108 One or both parties present vs. neither party present: process, 54% vs. 39% ($\chi^2(1) = 6.37$, $p < .05$, $V = .13$); ground rules, 53% vs. 35% ($\chi^2(1) = 8.75$, $p < .01$, $V = .16$); confidentiality, 54% vs. 30% ($\chi^2(1) = 17.06$, $p < .001$, $V = .22$); capacity, 37% vs. 23% ($\chi^2(1) = 6.96$, $p < .01$, $V = .14$); coach, 30% vs. 18% ($\chi^2(1) = 6.18$, $p < .05$, $V = .13$). There were no differences in the other actions (p's ranged from .14 to .85).

109 One or both parties present vs. neither party present: process, 85% vs. 50% ($\chi^2(1) = 21.20$, $p < .001$, $V = .30$); ground rules, 83% vs. 60% ($\chi^2(1) = 8.66$, $p < .01$, $V = .19$); confidentiality, 75% vs. 53% ($\chi^2(1) = 6.08$, $p < .05$, $V = .16$); approach, 74% vs. 57% ($\chi^2(1) = 4.12$, $p < .05$, $V = .13$); capacity, 50% vs. 27% ($\chi^2(1) = 5.63$, $p < .05$, $V = .15$). There were no differences in the other actions (p's ranged from .14 to .94).

In family cases, during pre-session communications held *prior to* the day of the first session, mediators were more likely to engage in most of the process actions when one or both parties were present than when neither party was present. When one or both parties were present compared to when neither party was present, mediators were more likely to: explain the mediation process, her or his approach, the ground rules, and confidentiality; assess the parties' capacity to mediate and whether the parties and/or their lawyers could communicate civilly; and explore whether the parties would be okay being together in the same room, options for how the opening session might be structured, and who should or should not attend the mediation.[110] By contrast, during pre-session communications held on the *same day as* the first session, there were no differences in any of the mediators' actions when one or both parties were present versus when neither party was present.[111]

v. Differences Depending on Whether the Mediators Had a Legal Background

There were few differences between mediators who had only a legal background and those who had a non-legal background (instead of or in addition to a legal background) in the process actions in which they engaged. In civil cases, during pre-session communications held *prior to* the day of the first session, mediators who had only a legal background were less likely than those who had a non-legal background to explore whether the parties would be okay being together in the same room and, marginally, to coach the parties and/or their lawyers on non-adversarial communications.[112] During pre-session communications held on the *same day as* the first session in civil cases, there were no differences between mediators with legal versus non-legal backgrounds in any process actions.[113]

In family cases, during pre-session communications held *prior to* the day of the first session, mediators who had only a legal back-

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[110] One or both parties present vs. neither party present: process, 89% vs. 38% ($\chi^2(1) = 23.99$, $p < .001$, $V = .51$); approach, 74% vs. 10% ($\chi^2(1) = 27.63$, $p < .001$, $V = .54$); ground rules, 56% vs. 19% ($\chi^2(1) = 8.69$, $p < .01$, $V = .31$); confidentiality, 65% vs. 29% ($\chi^2(1) = 8.94$, $p < .01$, $V = .31$); capacity, 72% vs. 33% ($\chi^2(1) = 10.60$, $p < .01$, $V = .34$); civilly, 64% vs. 24% ($\chi^2(1) = 10.54$, $p < .01$, $V = .34$); okay together, 83% vs. 48% ($\chi^2(1) = 11.14$, $p < .01$, $V = .35$); opening structure, 43% vs. 19% ($\chi^2(1) = 3.99$, $p < .05$, $V = .21$); attend, 53% vs. 19% ($\chi^2(1) = 7.47$, $p < .01$, $V = .28$). There were no differences in the other actions (p's ranged from .30 to .99).

[111] p's ranged from .26 to .99.

[112] Legal only vs. all other backgrounds: okay together, 50% vs. 67% ($\chi^2(1) = 4.46$, $p < .05$, $V = .11$); coach, 19% vs. 30% ($\chi^2(1) = 2.80$, $p = .09$, $V = .09$). There were no differences in the other actions (p's ranged from .10 to .95).

[113] p's ranged from .17 to .93.

ground were less likely than those who had a non-legal background to explain the mediation process, coach the participants on non-adversarial communications, and, marginally, explain his or her approach.[114] During communications held on the *same day as* the first session, mediators who had only a legal background were less likely than those who had a non-legal background to explore options for how the opening session might be structured.[115]

G. *Aspects of the Substance of the Dispute the Mediators Discussed*

This section describes the substantive aspects of the dispute the mediators discussed during pre-session communications held prior to and on the same day as the first mediation session, first for civil cases and then for family cases. We examine whether the mediators discussed different substantive items at the two times, as well as in civil versus family cases. We also examine whether the items discussed varied depending on whether the parties were or were not present for pre-session communications, as well as on whether the mediators had a legal background.

i. Civil Cases

During pre-session communications held *prior to* the day of the first mediation session, a majority of the mediators in civil cases explored the issues that needed to be addressed in the mediation, the procedural or litigation status of the case, the status of settlement negotiations, and the parties' legal theories and surrounding facts (*see* Table 6). Around half of the mediators explored the parties' interests, the parties' goals for the mediation, and the obstacles to settlement. One-third of the mediators developed the agenda and around one-fifth explored new settlement proposals for the parties to consider and the costs and risks of litigation. During pre-session communications held on the *same day as* the first mediation session, broadly speaking, between half and two-thirds of the mediators discussed all but one of these substantive matters; only 40% developed the agenda (*see* Table 6).

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[114] Legal only vs. all other backgrounds: process, 69% vs. 87% ($\chi^2(1) = 4.38$, $p < .05$, $V = .22$); coach, 14% vs. 32% ($\chi^2(1) = 4.05$, $p < .05$, $V = .21$); approach, 52% vs. 71% ($\chi^2(1) = 3.15$, $p = .08$, $V = .18$). There were no differences in the other items (p's ranged from .16 to .86).

[115] Legal only vs. all other backgrounds: structure opening, 36% vs.71% ($\chi^2(1) = 5.97$, $p < .05$, $V = .30$). There were no differences in the other items (p's ranged from .20 to .92).

TABLE 6. ASPECTS OF THE SUBSTANCE OF THE DISPUTE THE MEDIATORS DISCUSSED IN CIVIL CASES

	Prior To	***Same Day***	***At One or Both Times***
Explored which issues needed to be addressed	75%	64%	81%
Developed the agenda	33%	40%	46%
Explored the parties' interests	50%	66%	67%
Explored the parties' goals for the mediation	52%	60%	67%
Explored the procedural/litigation status	73%	56%	80%
Explored the parties' legal theories/facts	62%	60%	72%
Explored the status of settlement negotiations	75%	65%	82%
Explored the obstacles to settlement	54%	62%	68%
Explored new settlement proposals	18%	59%	44%
Explored the costs and risks of litigation	20%	68%	50%
Other	1%	0.4%	--
None of the above	6%	5%	--
Number of respondents	*387*	*241*	--

At some time during pre-session communications, two-thirds or more of the mediators in civil cases discussed most of the items regarding the substance of the dispute (*see* the final column in Table 6). Half or somewhat fewer of the mediators discussed the costs and risks of litigation, developed the agenda, and explored new settlement proposals.

There were several differences in the specific substantive items the mediators discussed during pre-session communications held prior to versus on the same day as the first session. In cases where pre-session communications took place *at both times*, mediators were less likely during communications held prior to than on the same day as the first session to explore the parties' interests, the parties' goals for the mediation, the costs and risks of litigation,

and new settlement proposals.[116] But mediators were more likely during communications held prior to than on the same day as the first session to explore the issues that needed to be addressed, the procedural status of the case, and the status of settlement negotiations.[117] By contrast, in cases where pre-session communications occurred *at one time or the other*, there were only two differences in what mediators discussed at the two times: mediators were less likely to discuss the costs and risks of litigation, but they were marginally more likely to discuss the parties' legal theories and surrounding facts, during communications held prior to than on the same day as the first session.[118]

ii. Family Cases

During pre-session communications held *prior to* the day of the first session, two-thirds of the mediators explored the issues that needed to be addressed in the mediation, and almost half of the mediators explored the procedural or litigation status of the case, the parties' interests, and the parties' goals for the mediation (*see* Table 7). Around one-third of the mediators explored the obstacles to settlement and the status of settlement negotiations, while approximately one-fourth developed the agenda. Fewer than one-fifth of the mediators explored the parties' legal theories and surrounding facts or discussed the costs and risks of litigation; even fewer explored new settlement proposals for the parties to consider. During pre-session communications held on the *same day as* the first mediation session, a majority of the mediators in family cases explored the issues that needed to be addressed in the mediation, the parties' interests, and the parties' goals for the mediation (*see* Table 7). Broadly speaking, around half of the mediators developed the agenda and explored the status of settlement negotiations, the obstacles for settlement, the procedural or litigation status of the case, the costs and risks of litigation, and new settlement proposals for the parties to consider. Fewer than one-third explored the parties' legal theories and surrounding facts.

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116 Prior to vs. same day: interests, 59% vs. 73% ($t(190) = -2.88$, $p < .001$); goals, 54% vs. 67% ($t(190) = -2.57$, $p < .05$); costs/risks, 22% vs. 76% ($t(190) = -13.80$, $p < .001$); proposals, 20% vs. 70% ($t(190) = -12.13$, $p < .001$). There were no differences in the other items (p's ranged from .35 to .75).

117 Prior to vs. same day: issues, 79% vs. 62% ($t(190) = 3.70$, $p < .001$); procedural status, 78% vs. 54% ($t(190) = 5.16$, $p < .001$); negotiation status, 80% vs. 65% ($t(190) = 3.15$, $p < .01$).

118 Prior to vs. same day: costs/risks, 18% vs. 37% ($t(250) = -2.52$, $p < .05$); theories, 56% vs. 40% ($t(250) = 1.86$, $p = .06$). There were no differences in the other items (p's ranged from .14 to .99).

TABLE 7. ASPECTS OF THE SUBSTANCE OF THE DISPUTE THE MEDIATORS DISCUSSED IN FAMILY CASES

	Prior To	***Same Day***	***At One or Both Times***
Explored which issues needed to be addressed	66%	71%	71%
Developed the agenda	24%	44%	42%
Explored the parties' interests	42%	62%	58%
Explored the parties' goals for the mediation	48%	60%	62%
Explored the procedural/litigation status	49%	48%	60%
Explored the parties' legal theories/facts	17%	29%	28%
Explored the status of settlement negotiations	31%	53%	49%
Explored the obstacles to settlement	32%	50%	47%
Explored new settlement proposals	6%	47%	30%
Explored the costs and risks of litigation	17%	48%	38%
Other	0	0	--
None of the above	14%	13%	--
Number of respondents	*94*	*68*	--

At some time during pre-session communications, a majority of the mediators in family cases discussed the issues that needed to be addressed in the mediation, the parties' interests, the parties' goals for the mediation, and the procedural or litigation status of the case (*see* the final column in Table 7). Broadly speaking, between one-fourth and half of the mediators discussed the rest of the substantive items.

In cases where pre-session communications occurred *at both times*, mediators were less likely during communications held prior to than on the same day as the first session to explore the parties' interests, the parties' goals for the mediation, the status of negotiations, the obstacles to settlement, the costs and risks of litigation, and new settlement proposals.[119] In cases where pre-session com-

[119] Prior to vs. same day: interests, 43% vs. 73% ($t(39) = -3.12$, $p < .01$); goals, 35% vs. 68% ($t(39) = -3.91$, $p < .001$); negotiation status, 25% vs. 58% ($t(39) = -3.91$, $p < .001$); obstacles, 33%

munications took place *at one time or the other*, there were only two differences in what mediators discussed at the two times: mediators were less likely during communications held prior to than on the same day as the first session to explore new settlement proposals and, marginally, to develop the agenda.[120]

iii. Differences Between Civil and Family Cases

During pre-session communications held *prior to* the day of the first session, mediators in civil cases were more likely than those in family cases to discuss a majority of the substantive items (*compare* Tables 6 and 7). Specifically, mediators in civil cases were more likely than those in family cases to explore the status of settlement negotiations, the parties' legal theories and facts, the procedural or litigation status of the case, the obstacles to settlement, new settlement proposals and, marginally, the issues that needed to be addressed in the mediation.[121] During pre-session communications held on the *same day as* the first session, mediators in civil cases were more likely than those in family cases to explore the parties' legal theories, the costs and risks of litigation and, marginally, the status of settlement negotiations, the obstacles to settlement, and new settlement proposals.[122]

iv. Differences Depending on Whether the Parties Were Present

In civil cases, during communications held *prior to* the day of the first mediation session, mediators were more likely when one or both parties were present than when neither party was present to explore the parties' interests, new settlement proposals, and,

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vs. 53% ($t(39) = -2.73$, $p < .05$); costs/risks, 28% vs. 55% ($t(39) = -2.72$, $p < .05$); proposals, 10% vs. 53% ($t(39) = -5.37$, $p < .001$). There were no differences in the other items (p's ranged from .10 to .38).

120 Prior to vs. same day: proposals: 2% vs. 24% ($t(63) = -2.95$, $p < .01$); agenda, 18% vs. 38% ($t(63) = -1.76$, $p = .08$). There were no differences in the other items (p's ranged from .11 to .95).

121 Civil vs. family: negotiation status, 75% vs. 31% ($\chi^2(1) = 64.84$, $p < .001$, $V = .37$); legal theories, 62% vs. 17% ($\chi^2(1) = 60.76$, $p < .001$, $V = .36$); procedural status, 73% vs. 49% ($\chi^2(1) = 20.99$, $p <. 001$, $V = .21$); obstacles, 54% vs. 32% ($\chi^2(1) = 15.11$, $p < .001$, $V = .18$); proposals, 18% vs. 6% ($\chi^2(1) = 7.53$, $p < .01$, $V = .12$); issues, 75% vs. 66%, $\chi^2(1) = 2.92$, $p = .09$, $V = .08$. There were no differences in the other items (p's ranged from .12 to .53).

122 Civil vs. family: legal theories, 60% vs. 29% ($\chi^2(1) = 20.16$, $p < .001$, $V = .26$); costs/risks, 68% vs. 48% ($\chi^2(1) = 8.74$, $p < .01$, $V = .17$); negotiation status, 65% vs. 53% ($\chi^2(1) = 3.37$, $p = .07$, $V = .10$); obstacles, 62% vs. 50% ($\chi^2(1) = 3.30$, $p = .07$, $V = .10$); proposals, 59% vs. 47% ($\chi^2(1) = 3.03$, $p = .08$, $V = .10$). There were no differences in the other items (p's ranged from .25 to .98).

marginally, the costs and risks of litigation.[123] During pre-session communications held on the *same day as* the first mediation session in civil cases, mediators were more likely when one or both parties were present than when neither party was present to explore the parties' interests, new settlement proposals, the costs and risks of litigation, and, marginally, the parties' goals for the mediation.[124]

In family cases, during pre-session communications held *prior to* the day of the first session, the parties' presence was related to only one item: mediators were more likely when one or both parties were present than when neither party was present to explore the parties' goals for the mediation.[125] During pre-session communications held on the *same day as* the first mediation session, mediators in family cases were more likely when one or both parties were present than when neither party was present to explore the parties' interests, develop the agenda, and, marginally, explore the issues that needed to be addressed and the parties' goals for the mediation.[126]

v. Differences Depending on Whether the Mediators Had a Legal Background

In civil cases, during pre-session communications held *prior to* the day of the first session, mediators who had only a legal background were less likely than mediators who had a non-legal background (instead of or in addition to a legal background) to explore the parties' interests, the parties' goals for the mediation, and, marginally, the obstacles to settlement.[127] During pre-session communications held on the *same day as* the first session, mediators who had only a legal background were more likely than those who had

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123 One or both parties present vs. neither party present: interests, 61% vs. 47% ($\chi^2(1) = 5.53$, $p < .05$, $V = .12$); proposals, 28% vs. 15% ($\chi^2(1) = 7.80$, $p < .01$, $V = .15$); costs/risks, 27% vs. 18% ($\chi^2(1) = 3.51$, $p = .06$, $V = .10$). There were no differences in the other items (p's ranged from .15 to .81).

124 One or both parties present vs. neither party present: interests, 70% vs. 48% ($\chi^2(1) = 5.58$, $p < .05$, $V = .16$); proposals, 63% vs. 32% ($\chi^2(1) = 10.71$, $p < .01$, $V = .22$); costs/risks, 71% vs. 45% ($\chi^2(1) = 8.06$, $p < .01$, $V = .19$); goals, 63% vs. 45% ($\chi^2(1) = 3.50$, $p = .06$, $V = .12$). There were no differences in the other items (p's ranged from .33 to .88).

125 One or both parties present vs. neither party present: 56% vs. 25% ($\chi^2(1) = 6.16$, $p < .05$, $V = .26$). There were no differences in the other items (p's ranged from .19 to .99).

126 One or both parties present vs. neither party present: interests, 72% vs. 11% ($\chi^2(1) = 12.10$, $p < .01$, $V = .44$); agenda, 51% vs. 11% ($\chi^2(1) = 4.93$, $p < .05$, $V = .28$); issues, 74% vs. 44% ($\chi^2(1) = 3.07$, $p = .08$, $V = .22$); goals, 66% vs. 33% ($\chi^2(1) = 3.47$, $p = .06$, $V = .24$). There were no differences in the other items (p's ranged from .20 to .94).

127 Legal only vs. all other backgrounds: interests, 48% vs. 70% ($\chi^2(1) = 7.10$, $p < .01$, $V = .14$); goals, 49% vs. 72% ($\chi^2(1) = 7.84$, $p < .01$, $V = .15$); obstacles, 53% vs. 67% ($\chi^2(1) = 3.16$, $p = .08$, $V = .09$). There were no differences in the other items (p's ranged from .17 to .75).

a non-legal background to explore the issues that needed to be addressed in the mediation and, marginally, the procedural or litigation status of the case.[128] But mediators with only a legal background were less likely than mediators who had a non-legal background to explore the costs and risks of litigation and, marginally, new settlement proposals during pre-session communications held on the same day as the first session in civil cases.[129] In family cases, there were no differences between mediators with a legal and a non-legal background in the substantive matters discussed at either time.[130]

IV. Discussion and Implications for Mediation Practice

The present study shows that a sizeable number of mediators do not have communications with the mediation participants or do not have access to case documents before the first formal mediation session, especially in family cases. Pre-session communications were *not* held in roughly one-third of civil cases and two-thirds of family cases. In some instances, including in almost one-third of family cases, these communications were prohibited or unfeasible. In addition, mediators did *not* have access to any case documents before the first formal mediation session in fewer than one-fifth of civil cases but in almost half of family cases. Thus, it cannot be assumed that mediators and mediation participants have the benefit of pre-session discussions or document submissions to help them prepare for the first mediation session.

The factor that was most strongly related to whether pre-session communications took place when they were not required, prohibited, or unfeasible was how frequently the mediators usually held such communications. Other mediator practice and background characteristics, as well as case characteristics that mediators were likely to be aware of early in mediation, generally had smaller or no relationships with whether pre-session communications took place. Thus, the mediators' usual personal practice with regard to holding pre-session communications, which might in part reflect

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128 Legal only vs. all other backgrounds: issues, 66% vs. 42% ($\chi^2(1) = 5.32$, $p < .05$, $V = .15$); procedural status, 58% vs. 38% ($\chi^2(1) = 3.78$, $p = .052$, $V = .13$).

129 Legal only vs. all other backgrounds: costs/risks, 65% vs. 88% ($\chi^2(1) = 4.87$, $p < .05$, $V = .15$); proposals, 56% vs. 75% ($\chi^2(1) = 3.07$, $p = .08$, $V = .12$). There were no differences in the other items (p's ranged from .11 to .83).

130 Prior to: p's ranged from .18 to .98; same day: p's ranged from .20 to .85.

the common practice in the local mediation or legal culture, appears to play a larger role in whether pre-session discussions are held than do the features of the individual case.

During pre-session communications held prior to the day of the first mediation session, neither party (i.e., the disputants themselves) was present in approximately three-fourths of civil cases and one-fourth of family cases. And when the parties were present, they did not talk at all in around one-third of civil cases but in only a few family cases; they talked a considerable amount in one-third of civil cases and almost two-thirds of family cases. During pre-session communications held on the same day as the first mediation session, neither party was present in fewer than one-fifth of civil and family cases; how much the parties talked during same-day communications was similar to how much they talked during communications held prior to the day of the first session.

The lack of the disputants' presence and participation during pre-session communications, especially in civil cases prior to the day of the first session, indicates that the exchange of information directly between the mediators and the disputants themselves is quite limited, as will be discussed in more detail below. And that lack of direct personal contact with the disputants in civil cases means that many mediators are unable to develop rapport or trust with the disputants themselves before the first mediation session—one of the four main goals for holding pre-session communications.[131] Similarly, the lack of any pre-session discussions in a majority of family cases suggests that most family mediators do not have the opportunity to develop rapport with the disputants or their lawyers before the first mediation session.

Consistent with another of the main goals for pre-session communications—helping the mediation participants gain an understanding of the mediator's approach and the mediation process[132]—a majority of the mediators in both civil and family cases explained her or his approach, the mediation process, confidentiality, and the ground rules at some time during pre-session communications.[133] The mediators generally were more likely to explain aspects of the mediation process when the parties were

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131 *See supra* text accompanying note 8.

132 *See supra* text accompanying note 6.

133 This summary of both the process and substantive information the mediators discussed is a simplified overview of the findings and does not fully reflect their many nuances, such as differences in what was discussed in civil versus family cases and in communications that took place prior to versus on the same day as the first mediation session. For more details, *see supra* Sections III(F)–(G).

present for these communications than when they were not present. But because a majority of parties in civil cases were not present during communications held prior to the first day of the session, and pre-session communications were not held in a majority of family cases, many disputants might arrive at the first mediation session uninformed about the mediation process. Represented parties might (or might not) receive a clear explanation of what to expect during mediation from their lawyers.[134] This would suggest that, despite some arguments to the contrary,[135] mediators' inclusion of an explanation of the mediation process and her or his approach in their opening statements during the first formal mediation session could be the first time many disputants are truly informed about the process.

At some time during pre-session communications, a majority of the mediators in both civil and family cases explored whether the parties would be okay being together in the same room and whether they and/or their lawyers could communicate civilly; fewer than half of the mediators in civil cases but a majority in family cases assessed the parties' capacity to mediate (including cognitive ability, coercive control, and violence). A majority of the mediators in civil cases and half in family cases explored options for how the opening mediation session could be structured; fewer than half of the mediators in both civil and family cases explored options for how the rest of the mediation might be structured or coached the parties and/or their lawyers on non-adversarial communications. A majority of the mediators in both civil and family cases discussed the information to submit before the first mediation session; a majority of the mediators in civil cases but fewer than half in family cases discussed who should or should not attend the mediation. The mediators generally were more likely to assess the parties' capacity to mediate when the disputants themselves were present. And in family cases, the mediators also were more likely to assess the parties on other dimensions and to explore options for structuring the opening session when the disputants were

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134 *See, e.g.*, Folberg, *supra* note 25, at 19 (saying that the lawyer has "probably" educated the client about the process); Thorpe et al., *supra* note 1, at 11, 18, 33 (noting that mediation users "come to mediation with a great variety of understandings and misunderstandings about the mediation process" and stressing the importance that counsel have a clear understanding of the process in order to explain it to their clients); Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L. J. 419, 432 (2010) (reporting that studies have found that represented parties often had misconceptions about the goals of mediation or did not know what to expect).

135 *See, e.g.*, Folberg, *supra* note 25, at 19–20.

present during pre-session communications held prior to the day of the first session.

These findings demonstrate that some mediators explored issues that could help them work with the mediation participants to customize the mediation process to the needs of the individual case—another goal of pre-session communications.[136] However, because a majority of the disputants in civil cases were not present and did not actively participate during pre-session communications held prior to the day of the first session, many civil mediators were not able to assess the disputants directly, get their input on how the initial mediation session should be structured and who should attend, or coach them on a less adversarial presentation and tone for the mediation. Instead, mediators in civil cases would largely obtain this information from the lawyers' perspective, which might be vastly different than that of their clients.[137] And many family mediators would not be able to make informed suggestions or decisions for customizing the mediation process because a majority did not have pre-session communications or the domestic violence screening report before the first mediation session. Overall, the findings suggest that a sizeable number of mediators do not have sufficient information and input from the mediation participants—especially the disputants themselves—when considering how to customize the mediation process to the particular dispute,[138] an approach that is recommended by many in the field and one that mediation users say they want.[139] In cases where the parties have counsel, the tasks of considering the best approach for their client

136 *See supra* text accompanying note 7.

137 For example, lawyers tend to view settlement as the goal of mediation and often underestimate the importance that disputants place on additional goals. *See, e.g.*, John T. Blankenship, *The Vitality of the Opening Statement in Mediation: A Jumping-Off Point to Consider the Process of Mediation*, 9 APPALACHIAN J. L. 165, 172–75 (2010); Thorpe et al., *supra* note 1, at 7–8; TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION 130–31 (Cambridge University Press 2009).

138 For instance, mediators might not know whether the dispute involves violence, intimidation or coercion, or unusually strong emotions, cases in which many recommend that joint opening sessions be avoided—or that the mediation not proceed. *See, e.g.,* ABRAMSON, *supra* note 1, at 251; David A. Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263, 275–76 (2011); Olson, *supra* note 15, at 26, 29; Kelly Browe Olson, *One Crucial Skill: Knowing How, When, and Why to Go into Caucus*, 22 DISP. RESOL. MAG. 25, 32, 33–34 (2016).

139 *See, e.g.,* Lynne S. Bassis, *Face-to-Face Sessions Fade Away: Why Is Mediation's Joint Session Disappearing?*, 21 DISP. RESOL. MAG. 30, 32–33 (2014); Blankenship, *supra* note 137, at 186–87; Folberg, *supra* note 25, at 19–20; Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, 21 DISP. RESOL. MAG. 25, 28 (2014); Hoffman, *supra* note 138, at 303–04; Thorpe et al., *supra* note 1, at 3, 8–9, 12–13.

and coaching them on non-adversarial communications would fall to the lawyers, who may or may not perform these tasks.[140]

With regard to the substantive aspects of the dispute that the mediators discussed at some time during pre-session communications, a majority of the mediators in both civil and family cases explored the issues that needed to be addressed in the mediation, the parties' interests, and the parties' goals for the mediation. Thus, most mediators explored matters that could help them develop a basic understanding of the dispute, another goal of pre-session communications, and consider how to most effectively tailor the mediation process to the parties' interests and goals.[141] Mediators generally were more likely to discuss the parties' interests and goals for the mediation when the parties were present than when they were not present. However, because a majority of the disputants in civil cases were not present and did not actively participate during pre-session communications held prior to the first day of the session, civil mediators were largely unable to obtain this information directly from the disputants, and instead would hear it from the lawyers' perspectives.[142] And many mediators in family cases would not learn any of this information before the first mediation session because pre-session communications did not take place in a majority of cases.

Looking at the other substantive issues discussed at some time during pre-session communications, mediators in a majority of civil cases explored the procedural or litigation status of the case, the status of settlement negotiations and the proposals exchanged, the parties' legal theories and facts, and the obstacles to settlement. In family cases, mediators explored the procedural or litigation status in a majority of cases, but they explored the status of negotiations, the parties' legal theories, and the obstacles to settlement in fewer than half of the cases. Most mediators in civil cases had access to some case information or documents and a majority had mediation

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140 *See, e.g.*, Geigerman, *supra* note 20, at 29; Wissler, *supra* note 134, at 432 (noting that research findings are mixed with regard to whether and how extensively lawyers prepare their clients for mediation).

141 *See supra* text accompanying notes 5 and 7. For example, some mediators and lawyers recommend using a joint opening session if the disputants have shared interests that need to be addressed, if they are seeking an interest-based solution, or if relationship issues or goals are central to the dispute. *See, e.g.*, Bassis, *supra* note 139, at 32; Folberg, *supra* note 25, at 19; FOLBERG & GOLANN, *supra* note 4, at 268.

142 Lawyers might not have a clear understanding of the disputants' interests. *See e.g.*, Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 UNIV. PITT. L. REV. 701, 718–32 (2007); RELIS, *supra* note 137, at 130–36.

memos before the first mediation session; in family cases, by contrast, only about half had some case information and relatively few had mediation memos. Thus, between the pre-session communications and document submissions, many mediators in civil cases appeared to have information about the case to help them prepare for the first mediation session, while many mediators in family cases did not. This suggests that, despite arguments to the contrary,[143] party opening statements during the first formal mediation session are still likely to provide some mediators and mediation participants with new information, especially in family cases.

As is clear from the above findings, there were many differences between civil and family cases in what took place during the early stages of mediation. There were fewer constraints on holding pre-session communications in civil cases than in family cases; even when there were no constraints, pre-session communications were more likely to take place in civil cases. However, the parties were less likely to be present and talked less in civil cases than in family cases. Mediators were more likely to have access to almost all types of case information before the first mediation session in civil cases than in family cases. During pre-session communications, mediators in civil cases were less likely than those in family cases to explain some aspects of the mediation process and to assess the parties on some dimensions. However, they were more likely to discuss the information to submit before the first session, who should or should not attend the mediation, and how the opening session should be structured. And mediators in civil cases were more likely than those in family cases to discuss some aspects of the substance of the dispute.

There also were differences in pre-session communications and document submissions, depending on the case referral source. For example, in both civil and family cases, pre-session communications generally were more likely to be unfeasible and, regardless of any constraints, were less likely to take place in cases referred from state courts than from other sources. And mediators generally were less likely to receive case information before the first session in cases referred from state courts than from most other sources. These differences, however, cannot be attributed to something about "court referrals" more broadly; civil cases referred from federal courts were as or more likely to have pre-session com-

143 *See, e.g.*, Bassis, *supra* note 139, at 31; Folberg, *supra* note 25, at 19; Galton & Allen, *supra* note 139, at 25; Thorpe et al., *supra* note 1, at 33.

munications and document submissions than were cases referred from non-court sources.

Whether the parties had counsel was also related to differences in pre-session practices. When the parties in civil cases had counsel, pre-session communications were more likely to take place, but the parties themselves were less likely to be present and also talked less during communications held prior to the day of the first session. In family cases, whether parties had counsel was not related to whether pre-session communications were held. When parties in family cases had counsel, they were less likely to be present during pre-session communications held prior to and on the same day as the first mediation session, but there was no difference at either time in how much they talked. When the parties had counsel, mediators in both civil and family cases were more likely to have access to case documents before the first mediation session. In addition, in both civil and family cases, whether the parties were present for pre-session communications was related to the specific process actions the mediators engaged in and the particular substantive issues they discussed. And whether the mediators had a legal or non-legal background was not related to whether pre-session communications took place, but it was related to the specific process actions the mediators engaged in and the particular substantive issues they discussed.

V. Conclusion

The present study advances our knowledge of the early stages of mediation far beyond anecdotal reports and the few prior studies that involved a limited number of case types and mediation contexts. The findings show that, before the first mediation session, a sizeable number of mediators do not have communications with the mediation participants or do not have case documents, and many disputants themselves do not participate in pre-session discussions. Accordingly, mediators often do not begin the first formal mediation session informed about the disputants or the dispute, and disputants do not necessarily enter the first session with an understanding of the mediation process. This is contrary to conventional mediation thinking and advice that stresses the importance of preparing for mediation.[144] In addition, the lack of

144 *See supra* text accompanying notes 1 and 2.

pre-session information negatively impacts the ability of mediators and mediation participants to customize the mediation process to the needs of the individual case, which is considered to be one of mediation's advantages.[145] Moreover, blanket assertions cannot be made about what "typically" occurs before the first mediation session, as what takes place varies between civil and family cases, by whether the parties do or do not have counsel, and by the case referral source, among other factors. The present study's findings help lay the groundwork for future empirical research that can deepen our understanding of how mediators and mediation participants can most effectively use pre-session communications and document submissions to prepare for mediation and enhance the quality of the mediation process and its outcomes.

145 *See supra* text accompanying note 139.

THE NEED FOR ADOPTING MASS ARBITRATION WAIVERS IN THE ONLINE SPORTS BETTING INDUSTRY

*Samuel Ditchek**

I. INTRODUCTION

FanDuel and DraftKings, two ascending corporate powerhouses, have been the driving force in online sports betting's surge in popularity. Akin to other online services, both of these providers have featured/currently feature binding arbitration clauses that compel users to settle disputes through arbitration. Though their Terms of Use resemble typical consumer contracts, FanDuel and DraftKings have made a costly error in failing to account for mass copycat arbitration actions.[1] These types of actions are avenues for large groups of consumers to individually file arbitration claims in order to force a settlement.[2] Without the intention of actually pursuing their arbitration claims, consumers are able to overcome what are otherwise adhesive contracts because companies like FanDuel and DraftKings are unwilling to pay exorbitant amounts of money in arbitration filing fees.

This Note will first broadly examine the online sports gambling industry and in Part II, examine how FanDuel and DraftKings conduct their operations. This Note will proceed to analyze certain sections of both companies' user agreements in Part III. In that section, this Note will take an in-depth look at previous major lawsuits and at pending litigation involving the companies' arbitration provisions. Finally, in Parts IV and V, this Note will explore the application of mass arbitration actions in the online sports betting industry, and the need for FanDuel and DraftKings to amend their terms to foreclose the possibility of future mass arbitration claims. Although the ultimate proposal to solve this problem is the

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1 Amir Alimehri, *The Table-Turning Rise of Mass Arbitration*, LOWEY DANNENBERG (Mar. 30, 2020), https://www.lowey.com/blog/the-table-turning-rise-of-mass-arbitration [https://perma.cc/EET3-98BT].

2 *Id.*

implementation of altered user agreements that are far more elaborate and explicit than the agreements that currently exist, this Note still nonetheless evaluates the consumer protection ramifications of adopting such waivers in this context.

II. BACKGROUND

A. *Understanding Fantasy Sports*

As two cornerstones of online sports betting, FanDuel and DraftKings conduct their operations through their sportsbooks and through interactive daily fantasy sports. Aside from their sportsbooks, which allow users to gamble on traditional betting options such as spreads and money-lines,[3] these companies built their success on offering daily fantasy sports ("DFS").[4] DFS consists of online competitions where users draft players in a given sports league to construct a daily lineup. Commonly using real money to participate, users manage a virtual budget to select a team from a pool of players competing that day in actual sporting events. Winners are determined by computing a total score based on real-life statistics and in-game performances.[5] The more talented players cost more virtual currency than the less statistically rewarding players, so a careful selection to effectively manage a user's budget is required.[6]

There are generally two types of daily fantasy contests: cash games and tournaments (also known as "Guaranteed Prize Pools," or "GPPs").[7] Cash games are typically 50/50's (where participants

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[3] *Sportsbook*, DRAFTKINGS, https://sportsbook.draftkings.com/sportsbook [https://perma.cc/N8CG-UCRK] (last visited Nov. 1, 2020); *FanDuel Review*, SPORTS GEEK, https://www.thesportsgeek.com/reviews/fanduel/ [https://perma.cc/FC7W-AVVE] (last visited Nov. 1, 2020).

[4] Drew Harwell, *The Rise of Daily Fantasy Sports, Online Betting's Newest Empire*, WASH. POST (July 28, 2015, 11:24 AM), https://www.washingtonpost.com/news/wonk/wp/2015/07/28/how-daily-fantasy-sites-became-pro-sports-newest-addiction-machine/ [https://perma.cc/6YA8-LQHS].

[5] *Playing Daily Fantasy Sports for Dummies and er....You!*, DAILY FANTASY SPORTS 101, https://www.dailyfantasysports101.com/basics/ [https://perma.cc/2YQP-6CYD] (last visited Nov. 1, 2020).

[6] Michael Nelson, *How to Make a Killer Daily Fantasy Sports Football Roster on DraftKings and FanDuel*, VENTUREBEAT (Sept. 10, 2015, 1:33 PM), https://venturebeat.com/2015/09/10/how-to-make-a-killer-daily-fantasy-sports-football-roster-on-draftkings-and-fanduel/ [https://perma.cc/4T4H-FWZS].

[7] Derek Farnsworth, *Cash Games vs. Tournaments*, ROTOWORLD (Aug. 22, 2015), https://web.archive.org/web/20150903182415/http://www.rotoworld.com/articles/nba/48892/425/cash-games-vs-tournaments.

finishing in the top-50% split the proceeds) and head-to-heads (where only two entrants face off, and the winner collects).[8] In comparison, tournaments commonly feature a larger pool of users and are more selective in distributing their earnings.[9] The tournaments are more selective in the sense that only a few people out of the large group receive a payout, which in turn increases a person's earnings in exchange for an heightened risk. For example, as opposed to the top-50% of users winning money in a cash game, only the best three players would see a payday in a tournament. Through their sportsbooks and daily fantasy services, FanDuel and DraftKings remain the industry's leaders.

B. *FanDuel and DraftKings' Inception and Proliferation*

While daily fantasy has its roots in the 1990s, FanDuel and DraftKings got their starts in 2009 and 2012, respectively.[10] With a mission of providing a short-term experience as an alternative to a traditional year-long fantasy experience—while still being legal—daily fantasy sports gained considerable traction a few years into its contemporary inception. The main difference between year-long fantasy and DFS, aside from the timeframe, is that the former is generally comprised of just one lineup for the entire season, whereas the latter entails selecting from a new pool of players on a daily basis. Although a daily fantasy user is able to restructure a lineup and substitute players throughout the regular season in the year-long setup, the core of a person's team generally remains the same.

FanDuel and DraftKings would come to owe a great deal of their success to the likeable short-term format of daily fantasy, which enticed participants to explore a variety of sports because of the abbreviated commitment required and enhanced mobile compatibility.[11] Separate from the innovative experience being offered, FanDuel and DraftKings also received serious help on the

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[8] *Daily Fantasy Sports: A Complete Guide*, GAMBLING SITES, https://www.gamblingsites.org/daily-fantasy-sports/ [https://perma.cc/8WKB-ZMKB] (last visited Nov. 1, 2020).

[9] *Id.*

[10] *About*, FANDUEL, https://www.fanduel.com/about [https://perma.cc/GP93-EUSA] (last visited Nov. 1, 2020); *Who We Are*, DRAFTKINGS, https://www.draftkings.com/about/who-we-are/ [https://perma.cc/32YW-7E2S] (last visited Nov. 1, 2020).

[11] Eric Fisher, *Daily Fantasy Pushes to Continue Growth Streak*, SPORTS BUS. J. (Mar. 16, 2015), https://www.sportsbusinessdaily.com/Journal/Issues/2015/03/16/Marketing-and-Sponsorship/Daily-fantasy.aspx [https://perma.cc/DX3Q-F68X].

business end. FanDuel and DraftKings realized immediate large-scale investments and advertising deals with cable networks.[12] It is nearly impossible for even casual sports fans to not have seen either a FanDuel or DraftKings advertisement over the course of a game. Not only do their brand promotions appear in commercials, but their logos can also be seen advertised on basketball courts, hockey rinks, and baseball stadium scoreboards. FanDuel has reportedly spent over $100 million on digital, print, and national television advertisements across 250 different media properties in the past few years.[13] DraftKings has even spent $100 million on marketing in the first half of a business year alone.[14] Together, the two industry giants combined for a staggering 4.1 billion impressions from television advertisements in 2020 alone, a year where the entire sports world was put on pause for several months due to the COVID-19 pandemic.[15]

Professional sports associations also began reaching lucrative partnership deals with both FanDuel and DraftKings. Major League Baseball ("MLB") was the first to capitalize by investing in DraftKings back in 2012; it ultimately reached a multi-year extension in August 2020.[16] DraftKings would go on to become the official daily fantasy partner of the National Football League ("NFL"), National Hockey League ("NHL"), and Professional Golfers' Association ("PGA") Tour as well.[17] On the FanDuel side, the company and the National Basketball Association ("NBA")/Women's National Basketball Association ("WNBA") inked a four-year extension in 2018 to make FanDuel an Authorized Gaming Operator and the Official Daily Fantasy Partner, after its initial 2014 agree-

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12 *Id.*; Todd Spangler, *ESPN Teams with DraftKings as Exclusive Daily Fantasy-Sports Partner*, VARIETY (June 24, 2015, 6:58 AM), https://variety.com/2015/digital/news/espn-draftkings-daily-fantasy-sports-1201527028/ [https://perma.cc/T75A-BNP3]; Steven Perlberg, *Are DraftKings and FanDuel Bombarding Fans with Too Many Ads?*, WALL ST. J. (Sept. 17, 2015, 4:09 PM), https://www.wsj.com/articles/are-draftkings-and-fanduel-bombarding-fans-with-too-many-ads-1442520546 [https://perma.cc/V3MK-ERNE].

13 *FanDuel Sportsbook Advertiser Profile*, MEDIARADAR, https://advertisers.mediaradar.com/fanduel-sportsbook-advertising-profile [https://perma.cc/2BS6-G665] (last visited Feb. 9, 2021).

14 Brad Allen, *Brace Yourself: Here Come the Sports Betting Ads as NFL Ramps Up*, LEGAL SPORTS REP. (Sept. 8, 2020), https://www.legalsportsreport.com/43917/sports-betting-ads-nfl-kickoff/ [https://perma.cc/KB9J-T93F].

15 *Id.*

16 *DraftKings Expands Exclusive Partnership with Major League Baseball*, GLOBENEWSWIRE (Aug. 6, 2020, 4:01 PM), https://www.globenewswire.com/news-release/2020/08/06/2074556/0/en/DraftKings-Expands-Exclusive-Partnership-with-Major-League-Baseball.html [https://perma.cc/U46A-9GHC].

17 *Id.*

ment expired.[18] With the exception of the MLB, the terms of these agreements allow individual teams to reach separate sponsorship deals with either FanDuel or DraftKings.[19]

Despite their individual successes, FanDuel and DraftKings had short-lived plans to merge their two companies, dating back to 2017. Nigel Eccles, former FanDuel CEO, thought that a merger between the two would have benefitted consumers and the online sports gambling industry through increased investment and product development.[20] But with the onslaught of legal battles facing the companies, most notably a pending antitrust challenge by the Federal Trade Commission ("FTC"), the merger was called off.[21] The then-Acting Director of the FTC, Markus Meier, dubbed the decision to abandon the merger "a clear win for American consumers," and said that the move was necessary to ensuring market competition in the industry.[22] Although the decision, at the time, may have marked an antitrust victory, FanDuel and DraftKings still maintain a firm stranglehold on the industry.

C. *Fantasy Sports' Economic Impact and Userbase*

It is estimated that roughly sixty million people in the United States and Canada participate in season-long fantasy sports as of 2017, which is twenty-two million more than the 2009 figure.[23] About 67% of the participants were men around the age of thirty.[24] On the daily fantasy side, approximately 95% of participants were

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18 *NBA and FanDuel Expand Innovative Partnership to Include Sports Betting and New Fan Experiences*, FANDUEL (Dec. 18, 2018), https://newsroom.fanduel.com/2018/12/18/nba-and-fanduel-expand-innovative-partnership-to-include-sports-betting-and-new-fan-experiences/ [https://perma.cc/9KTL-JQWV].

19 *See* GLOBENEWSWIRE, *supra* note 16.

20 The Associated Press, *DraftKings and FanDuel Call Off Merger*, N.Y. TIMES (July 13, 2017), https://www.nytimes.com/2017/07/13/sports/draftkings-and-fanduel-call-off-merger.html [https://perma.cc/AWM9-HPRM].

21 Diane Bartz, *FanDuel, DraftKings Scrap Troubled Merger*, REUTERS (July 13, 2017, 3:11 PM), https://www.reuters.com/article/us-fanduel-m-a-draftkings/fanduel-draftkings-scrap-troubled-merger-idUSKBN19Y2KL [https://perma.cc/5TF6-K8WS].

22 David Purdum, *Planned Merger Between DraftKings, FanDuel is Off*, ESPN (July 13, 2017), https://www.espn.com/chalk/story/_/id/20002903/in-abrupt-fashion-draftkings-fanduel-merger-off [https://perma.cc/4674-RSLY].

23 Michael Levenson, *Fantasy Sports Contests are Illegal Gambling, New York Appeals Court Rules*, N.Y. TIMES (Feb. 6, 2020), https://www.nytimes.com/2020/02/06/us/28-Fan-duel-draft-kings-law.html [https://perma.cc/CK44-B6YL].

24 *Id.*

white men, aged twenty-five to thirty-five.[25] And of those roughly sixty million who play season-long fantasy sports, about ten million were registered daily fantasy users.[26] With regard to the economic impact DFS has had, estimates show that the industry produced more than $390 million in revenue in 2019.[27] Moreover, DraftKings reported that it alone accounted for $213 million of that amount in the same year.[28] While reports suggest that total revenues have plateaued, the industry is still nonetheless generating billions of dollars in entry fees.[29] Furthermore, the figures pertaining to fantasy sports' worldwide reach are even more telling. It is estimated that the global fantasy sports market will expand to $48.6 billion by 2027.[30]

In terms of market share, both DraftKings and FanDuel maintain roughly 90% of the industry.[31] Other comparatively smaller players in the market include BetMGM, Yahoo Daily Fantasy, FantasyDraft, Draft, Draftboard, and Boom Fantasy.[32] It is therefore difficult to affirm the aforementioned declaration that the abandoned merger back in 2017 was a true victory for American consumers when evaluating the utter dominance the two companies have in controlling the daily fantasy sports industry.

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25 *The Daily Fantasy Sports Market Has a Demographic Problem*, YAHOO! FIN. (Jan. 10, 2017), https://finance.yahoo.com/news/the-daily-fantasy-sports-market-has-a-demographic-problem-133011359.html [https://perma.cc/5RHY-KUER].

26 *Id.*

27 Levenson, *supra* note 23.

28 Scott Nover, *The Rise of Daily Fantasy and Sports Betting Has Created an Economy of Its Own*, VOX (Jan. 29, 2020, 7:00 AM), https://www.vox.com/2020/1/29/21112491/daily-fantasy-sports-betting-dfs-merch-analysis-weatherman [https://perma.cc/GH23-KK2Q].

29 Dustin Gouker, *New Official Data: Daily Fantasy Sports Generated $335 Million in Revenue in a Year*, LEGAL SPORTS REP. (June 28, 2018), https://www.legalsportsreport.com/21627/ny-dfs [https://perma.cc/99GH-W7PY].

30 Valuates Reports, *Fantasy Sports Market Size is Expected to Reach USD 48.6 Billion by 2027 – Valuates Reports*, CISION PR NEWSWIRE (Oct. 12, 2020, 9:30 AM), https://www.prnewswire.com/news-releases/fantasy-sports-market-size-is-expected-to-reach-usd-48-6-billion-by-2027---valuates-reports-301150193.html [https://perma.cc/Y5XM-N64F].

31 *Daily Fantasy Sports*, LEGAL SPORTS REP., https://www.legalsportsreport.com/daily-fantasy-sports/ [https://perma.cc/N9YR-H8Z3] (last visited Dec. 18, 2021).

32 *Id.*; *see* Matt Rybaltowski, *BetMGM Targets Net Revenue of $1 Billion in 2022, Long-Term Market Share North of 20%*, SPORTSHANDLE (Apr. 23, 2021), https://sportshandle.com/betmgm-investor-day-42321/ [https://perma.cc/7SPT-FACG].

D. *Fantasy Sports and Contemporary Challenges*

Although FanDuel and DraftKings have amassed a great amount of popularity and financial success in recent years, the concept of DFS has been denounced as constituting illegal gambling and being highly addictive.[33] In order to bypass a former federal prohibition on sports gambling nationwide,[34] proponents of DFS have argued that DFS contests are actually games of skill, rather than games of chance.[35] In 2006, Congress enacted the Internet Gambling Prohibition Enforcement Act, which expressly excluded DFS, subject to some conditions, because the term bets or wagers did not include:

> (ix) participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of amateur or professional sports organization . . . and that meets the following conditions: (I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants. (II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events. (III) No winning outcome is based—(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.[36]

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33 Adam Wells, *DraftKings Files Lawsuit in Texas Over Legality of Daily Fantasy Sports*, BLEACHER REP. (Mar. 4, 2016), https://bleacherreport.com/articles/2584456-draftkings-files-lawsuit-in-texas-over-legality-of-daily-fantasy-sports [https://perma.cc/QW9B-YRSB].

34 Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, § 3702, 106 Stat. 4227 (repealed 2018); Alexandra Licata, *42 States Have or are Moving Towards Legalizing Sports Betting – Here are the States Where Sports Betting is Legal*, BUS. INSIDER (Aug. 2, 2019, 1:51 PM), https://www.businessinsider.com/states-where-sports-betting-legal-usa-2019-7 [https://perma.cc/893Y-T6JC].

35 Ryan Rodenberg, *Daily Fantasy Contests 'Are Not Games of Chance,' Researchers Conclude After Losing Every Contest They Enter*, LEGAL SPORTS REP. (Apr. 30, 2018), https://www.legalsportsreport.com/20030/daily-fantasy-contests-chance-vs-skill/ [https://perma.cc/6W52-RZQV].

36 H.R. REP. NO. 4411, at 5–6 (2006).

Even though this Act, coupled with *Murphy v. National Collegiate Athletic Association*, helped solidify the legality of DFS by 2018, it only meant that states could individually decide whether to legalize sports gambling in the sportsbook form and/or daily fantasy.[37] Currently, just six states in the United States prohibit DFS operations, while eleven states permit sportsbook betting as of 2019.[38] Even with the affirmative legalization, resistance inside the courtroom and state legislatures still persists.[39] In addition to the protest against DFS on the grounds that it is arguably far more a game of chance equivalent to gambling than a game of skill, there has been heightened consumer rejection surrounding FanDuel and DraftKings' Terms of Use—specifically, their respective arbitration provisions.[40]

i. Daily Fantasy in New York

Despite following the growing national sentiment toward acceptance, New York has seen contention with its daily fantasy legalization in recent years. In 2016, then Governor Andrew Cuomo authorized an amendment to the Racing, Pari-Mutuel Wagering and Breeding Law, which permitted DFS within the state without violating New York's relatively strong prohibition against gambling.[41] The proponents of the bill argued that fantasy sports are not a form of gambling because teams are selected based upon a person's knowledge, and because users have control over picking their fantasy team.[42] However, one must generally possess a substantial amount of skill, and chance may be somewhat of a factor, in order to win a daily fantasy contest.[43] Research has shown that lineups selected at random were less successful than lineups chosen

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37 Murphy v. NCAA, 138 S. Ct. 1461, 1465–67 (2018) (In this case, the National Collegiate Athletic Association ("NCAA") and three professional sports leagues sued New Jersey's Governor and other government officials for approving a 2012 law that legalized sports gambling schemes in the state. The Court ultimately decided that the Professional and Amateur Sports Protection Act ("PASPA"), which prevented states from organizing sports gambling schemes, violated the anticommandeering rule set forth by the Tenth Amendment.).

38 Licata, *supra* note 34; *What are the States Where You Can Play Daily Fantasy Sports?*, LEGAL SPORTS REP., https://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/ [https://perma.cc/7CFK-S9UT] (last visited Nov. 1, 2020).

39 *See, e.g.*, White v. Cuomo, 181 A.D.3d 76, 78–79 (3d Dep't 2020).

40 *See infra* Section III.

41 Levenson, *supra* note 23.

42 Martin D. Edel & Ling W. Kong, *New York Court Declares Fantasy Sports Betting Unconstitutional*, LEXOLOGY (Aug. 31, 2020), https://www.lexology.com/library/detail.aspx?g=4f81d908-0bfb-4bde-aa8a-55dc652be3d4 [https://perma.cc/MW7C-LMZQ].

43 Anthony Dreyer & Andrew Patrick, *Daily Fantasy Sports Decisions Risk Clouding Legal Landscape*, N.Y. L. J. (Aug. 4, 2020, 10:03 AM), https://www.law.com/newyorklawjournal/2020/

by real participants.[44] It can hardly be said that skill and chance are mutually exclusive, though.[45]

This tension between whether DFS are games of skill or chance has fueled a lawsuit challenging the constitutionality of the 2016 amendment. In *White v. Cuomo*, the plaintiffs were several New York taxpayers who argued that the amendment could not be reconciled with the state constitution's prohibition on gambling.[46] Since the determinative issue was whether or not DFS constituted gambling, the court used a material element test to determine if chance was a material element in the outcome of DFS contests.[47] The Third Department decided that DFS were contests of chance because users could not control real-world games, and consequently, could not control the outcome of the contests in which they participated.[48] Despite this result, DFS operators such as FanDuel and DraftKings can currently continue to offer their services in New York, pending a review by the New York Court of Appeals.[49] The Third Department also found that the New York Legislature is capable of decriminalizing daily fantasy games, even with the state ban on certain methods of gambling.[50]

III. Discussion

A. *Terms and Conditions: Arbitration Clauses*

Generally, in order for an arbitration clause to be enforceable, the clause has to: (1) denote an objective mutual agreement to arbitrate between the parties to the contract; (2) be written with clear and direct language that states that both parties waive the right to bring an action in court; and (3) affirmatively waive the right to a

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08/04/daily-fantasy-sports-decisions-risk-clouding-legal-landscape/?slreturn=20210031145808 [https://perma.cc/TFD3-DCBB].

44 *White*, 181 A.D.3d at 83.

45 *Id.* at 83–84.

46 *Id.* at 78.

47 Dreyer & Patrick, *supra* note 43.

48 *Id.*; *White*, 181 A.D.3d at 84.

49 Edel & Kong, *supra* note 42. As of January 8, 2022, DraftKings' and FanDuel's sportsbooks became fully operational in New York after the New York Gaming Commission legalized sports betting. @SportsLawLust, Twitter (Jan. 6, 2022, 3:03 PM), https://twitter.com/SportsLawLust/status/1479181858478993409 [https://perma.cc/HB7X-AJDR].

50 Rob Rosborough, *New York Daily Fantasy Sports Suit*, N.Y. Appeals, https://nysappeals.com/ny-dfs-suit/ [https://perma.cc/2MXH-DV46] (last visited Jan. 31, 2021).

trial by jury.[51] In terms of the rate that arbitration clauses appear in consumer contracts, "[m]ore than sixty percent of United States retail e-commerce sales are covered by broad consumer arbitration agreements."[52] Moreover, in 2018 alone, at least 800,000 consumer arbitration contracts were active, though estimates suggest that the figure is actually higher.[53] In ascertaining the reason why companies frequently include arbitration provisions, one does not have to look further than the frequent results of consumer arbitration. In consumer arbitration cases, the Economic Policy Institute (an independent nonprofit organization) estimates that consumers win a mere 9% of the disputes against companies.[54] That data point is further exacerbated by the fact that arbitrators in such situations are actually granting relief to companies 93% of the time.[55] Clearly, binding arbitration provisions have been a sincere threat to claimants, given the low rate of consumer success.

i. FanDuel's User Agreement

Prior to participating in FanDuel's online contests, users must first agree to the website's Terms of Use. The user is first made aware of these terms when they seek to create an account.[56] At the create a membership page, by clicking "Play Now," the person signing up for FanDuel affirms to be above a certain age and agrees to FanDuel's Terms of Use and Privacy Policy.[57] In section 15 of FanDuel's Terms of Use, the company sets out a detailed explanation of how disputes are to be settled.[58] While the content behind an individual dispute is not released to the public, it is fair to assume that disputes can arise if the website exhibits a computational error, a winner is incorrectly determined, or a user is not awarded the correct earnings. Section 15.1 explains that an issue arising with FanDuel's service should first be redressed through its cus-

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51 Paul W. Norris, *Enforceability of Arbitration Clause in Construction Agreement*, NAT'L L. R. (Jan. 15, 2020), https://www.natlawreview.com/article/enforceability-arbitration-clause-construction-agreement [https://perma.cc/AJ9G-JFPA].

52 *Fact Sheet: Forced Arbitration Clauses and Class Actions Waivers, By the Numbers*, CTR. JUST. DEMOCRACY (Apr. 23, 2019), https://centerjd.org/content/fact-sheet-forced-arbitration-clauses-and-class-actions-waivers-numbers [https://perma.cc/27SJ-HL65].

53 *Id.*

54 *Id.*

55 *Id.*

56 *Join*, FANDUEL, https://www.fanduel.com/join [https://perma.cc/V7A5-ESEZ] (last visited Nov. 1, 2020).

57 *Id.*

58 *Terms of Use*, FANDUEL, https://www.fanduel.com/terms [https://perma.cc/WR9T-HN2R] (last visited Nov. 1, 2020).

tomer service.[59] If the customer service representative is unable to resolve the situation within thirty days, then either party may initiate binding arbitration in accordance with section 15.2.[60] Section 15.2 directly clarifies that, absent the mandatory provision, consumers would have had the right to sue in court and have a jury trial.[61] Section 15.3 maintains that arbitration can occur in any jurisdiction in the country that is convenient for the consumer, but that participants are conferring personal jurisdiction to New York courts.[62] Most importantly, Section 15.4 states that "[t]he parties further agree that any arbitration shall be conducted in their individual capacities only and not as a class action or other representative action, and the parties expressly waive their right to file a class action or seek relief on a class basis."[63] Notably absent from these terms is an explicit prohibition on mass consumer arbitration actions.

ii. DraftKings' User Agreement

Similar to FanDuel, DraftKings also requires users to consent to its Terms of Use and Privacy Policy, as well as affirm that users are above a certain age, in order to register for an account.[64] While the FanDuel Terms of Use clearly outline specific arbitration procedures, DraftKings' website does not currently display its own mechanisms for arbitrating claims.[65] DraftKings' terms simply indicate that by agreeing to use the service, a user consents to jurisdiction in Suffolk County, Massachusetts, and waives all rights to a jury trial.[66] The reason for this peculiar omission might be because the American Arbitration Association ("AAA") determined that DraftKings' arbitration provision failed to meet consumer protocols because it forced claimants to arbitrate in Boston and disallowed claims for punitive damages.[67] In response to this

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59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Sign Up*, DRAFTKINGS, https://www.draftkings.com/account/sitelogin/true [https://perma.cc/HC43-C6DD] (last visited Nov. 1, 2020).

65 *See Terms of Use*, DRAFTKINGS, https://www.draftkings.com/help/terms [https://perma.cc/B7UN-BVN3] (last visited Nov. 1, 2020).

66 *Id.*

67 Alison Frankel, *FanDuel Wants N.Y. State Court to Shut Down Mass Consumer Arbitration*, REUTERS (Jan. 14, 2020, 5:48 PM), https://www.reuters.com/article/us-otc-fanduel/fanduel-wants-n-y-state-court-to-shut-down-mass-consumer-arbitration-idUSKBN1ZD2SK [https://perma.cc/N5WC-9WXM].

unenforceable provision, and an ensuing lawsuit to be discussed *infra*, DraftKings plans to amend its terms to explicitly prohibit mass arbitration claims.[68] DraftKings believes that its former terms accounted for mass arbitration, stating that "any and all claims shall be arbitrated on an individual basis only and shall not be consolidated, joined or coordinated with or in any arbitration or other proceeding involving a dispute of any other party."[69] The company plans to issue revised Terms of Use, which will explicitly state that users will not be able to bring claims as part of a mass arbitration action.[70] This approach, as this Note will argue in greater detail in the sections to follow, should also be adopted by FanDuel as a means to prevent future mass arbitration actions.

iii. Yahoo's Daily Fantasy Dispute Resolution

Although the focus of this Note is on FanDuel and DraftKings' affairs, it is worth examining Yahoo's daily fantasy Terms of Service and how this corporation handles dispute resolution on these matters. Section 10 of Yahoo's User Agreement addresses how claims are to be resolved; customers are first encouraged to speak with Yahoo's customer care team via an online chat function.[71] If a user's complaint deals with the outcome of a gambling transaction and is not resolved through the online chat function, the complainant is then directed to Yahoo's Independent Adjudication Service ("IBAS") in an attempt to resolve the dispute.[72] When cases are referred to this service, the claimant agrees to be bound by the final result of the adjudication and agrees to "not disclose the existence, nature or detail of any [c]omplaints and [d]isputes to any third party."[73] Neither Yahoo's nor IBAS's respective Terms of Service mention mass arbitration actions or include explicit waivers that would prohibit these types of claims.[74]

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68 Letter from Respondent-Defendant, *In re Daily Fantasy Sports Litigation*, No. 2016-MD-2677, https://static.reuters.com/resources/media/editorial/20200114/fanduel--draftkingsletter12.19.pdf [https://perma.cc/3MXB-4CXA].

69 *Id.*

70 *Id.*

71 *Yahoo Daily Fantasy Terms of Service*, YAHOO!, https://policies.yahoo.com/ie/en/yahoo/terms/product-atos/dailyfantasy/index.htm [https://perma.cc/X663-DFXE] (last visited Jan. 31, 2021).

72 *Id.*

73 *Id.*

74 *Id.*; *Terms of Use*, IBAS, https://www.ibas-uk.com/how-ibas-works/terms-of-use/ [https://perma.cc/Q9CX-YCZA] (last visited Jan. 31, 2021); *see also About Us,* IBAS, https://www.ibas-uk.com/about-us/ [https://perma.cc/GAN9-RXCY] (last visited Feb. 1, 2021) (IBAS is a United Kingdom-based alternative dispute resolution service that is specifically designed to handle

B. *Daily Fantasy Lawsuits Involving Arbitration*

i. The 2019 Multidistrict Litigation

In November 2019, a multidistrict litigation ("MDL") filed against both FanDuel and DraftKings came to an end when a Massachusetts District Court found that the companies' arbitration agreements were valid and enforceable.[75] The plaintiffs consisted of three groups: (1) a large group of both DraftKings and FanDuel users; (2) a group of users of just one of these two sites, but who claimed civil conspiracy against both defendants; and (3) a final group consisting of family members of users asserting illegal gambling claims. The plaintiffs sought money damages, equitable relief, and disgorgement of all ill-gotten gains.[76] The plaintiffs alleged: (1) these services permitted insider trading by allowing employees to compete on the other website to obtain an unfair advantage over ordinary users; (2) DFS violates multiple state gambling laws; and (3) promises by these companies to match user deposits were deceptive and fraudulent.[77] The court ultimately granted the defendants' motion to compel arbitration because the arbitration provisions, at the time, were valid agreements to arbitrate, they were binding on at least some of the plaintiffs (which did not include the family member plaintiffs), the claims came within the scope of the arbitration clause, and the defendants were entitled to invoke the clause.[78]

ii. Ongoing Litigation Related to Daily Fantasy Arbitration

Shortly after the MDL decision in November, two separate groups of plaintiffs filed mass arbitration claims against FanDuel and DraftKings. Beginning with the FanDuel suit, more than 8,000 plaintiffs planned to individually pursue consumer fraud claims in New York.[79] In filing these identical arbitration claims, the plain-

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claims between customers and licensed gambling operators. Since 1998, this service has handled over 75,000 gambling-related disputes.).

75 In re Daily Fantasy Sports Litigation, MDL No. 16-02677-GAO, 2019 U.S. Dist. LEXIS 206689 (D. Mass. Nov. 27, 2019).

76 *Id.*

77 John Holden, *Daily Fantasy Sports Litigation Involving DraftKings, FanDuel (Kinda Sorta) Over*, LEGAL SPORTS REP. (Dec. 10, 2019), https://www.legalsportsreport.com/36287/daily-fantasy-sports-fanduel-draftkings-lawsuit/ [https://perma.cc/G539-HA4P].

78 *Id.*

79 Ex. B, FanDuel v. Badii, No. 650211/2020 (N.Y. Sup. Ct. Jan. 1, 2020) https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=I1hnzWkVYiaWmWsbnneUEQ== [https://perma.cc/773P-5LAQ].

tiffs sought to force FanDuel into a settlement because of the threat of an estimated $30 million in filing fees.[80] In essence, these plaintiffs attempted to use FanDuel's own arbitration clause against itself.[81] In response to these claims, FanDuel argued that it should not be forced to arbitrate; rather, the claims should have been filed in small claims court, due to the small potential damages available and the fact that the plaintiffs exceeded the state's statute of limitations.[82] FanDuel asked the New York Supreme Court to permanently stay the arbitrations, or alternatively, to stay the proceedings pending a court hearing in January 2021.[83] FanDuel has since filed a motion to voluntarily discontinue the proceeding without prejudice and without costs to any party as against the other.[84] One could speculate that FanDuel has discontinued its lawsuit against the named claimants because it reached an out of court settlement with the parties involved.

Similar to FanDuel, DraftKings is facing its own mass arbitration copycat claims in Massachusetts. It plans to push those claims into court and could succeed, because the AAA has already deemed its current arbitration clause unenforceable (as mentioned above).[85] The judge overseeing the potential DraftKings claims—who happens to be the same judge who presided over the MDL litigation—advised DraftKings to first file with the AAA and obtain a ruling, and only then will he decide whether to allow, or disallow, litigation.[86]

C. *Using Mass Arbitration to Force a Settlement*

As alluded to in the previous section, from a corporate perspective, mass arbitration actions pose a serious problem to companies such as FanDuel and DraftKings for several reasons. The

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[80] *Id.*

[81] *See* Frankel, *supra* note 67.

[82] Compl., FanDuel v. Badii, No. 650211/2020 (N.Y. Sup. Ct. Jan. 9, 2020), https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=YQvfEXcfmy_PLUS_g3xP4PPdXgg==[https://perma.cc/JC9C-2FZQ].

[83] Notice of Entry, FanDuel v. Badii, No. 650211/2020 (N.Y. Sup. Ct. July 13, 2020), https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=SIp20EkpsUHSAPJFnbK5SQ==[https://perma.cc/TNT8-C66X].

[84] Notice of Discontinuance, FanDuel v. Badii, No. 650211/2020, (N.Y. Sup. Ct. Jan. 7, 2020), https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=hq0mtJg_PLUS_WxX1Lpf0jzhuxA==[https://perma.cc/KP7N-UPED].

[85] Frankel, *supra* note 67.

[86] *Id.*

main reason is that they effectively serve as a workaround to the generic class-action waiver in traditional terms and conditions. By substantiating a decent amount of leverage, consumers in a mass arbitration action can force companies into settlement or negotiation discussions, in an effort for the company to avoid the costly filing fees. When balancing the cost of individually arbitrating and paying out the requisite arbitration fees against a prospective settlement offer to the group, it is possible that it could be more cost-effective for a company to settle, rather than arbitrate.

The Judicial Arbitration and Mediation Services ("JAMS") charges a $1,750 filing fee for two-party matters and a hefty $3,000 fee for matters involving three or more parties.[87] The AAA utilizes a tiered fee structure to determine the amount each business will pay—depending on the number of cases—while also noting that the business is responsible for administrative fees when it is the filing party.[88] For consumer arbitrations, businesses have to pay—per case—$300 for the first 500 cases; $225 for 501 to 1,500 cases; $150 for 1,501 to 3,000 cases; and $75 for 3,001 cases and beyond.[89] Although these costs are high, corporations can institute a fee-splitting clause in their terms and conditions.[90]

i. Mass Arbitration Posing a Threat in Employment Context

In order to understand the gravity of the threat that mass arbitration actions pose to FanDuel and DraftKings, it is relevant to analyze the impact these claims have had on other service companies. This past February, the food delivery service DoorDash was required to pay almost $10 million in arbitration filing fees to roughly 5,000 workers.[91] Echoing the notion that DoorDash "bargained" for this arbitration provision, Keller Lenkner LLC, the same law firm on the FanDuel case, was able to force DoorDash to pay nearly $2,000 per arbitration case.[92] While this result may seem inequitable, it is important to consider the background of some of the claimants being represented in these mass arbitration

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87 *Arbitration Schedule of Fees and Costs*, JUD. ARB. MEDIATION SERV., https://www.jamsadr.com/arbitration-fees [https://perma.cc/JS2Y-BHTK] (last visited Feb. 5, 2021).

88 *Consumer Arbitration Rules*, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_2.pdf [https://perma.cc/DN6P-9Y96] (last visited Feb. 5, 2021).

89 *Id.* at 3.

90 *See, e.g.*, FANDUEL, *supra* note 58.

91 Nicholas Iovino, *DoorDash Ordered to Pay $9.5M to Arbitrate 5,000 Labor Disputes*, COURTHOUSE NEWS SERV. (Feb. 10, 2020), https://www.courthousenews.com/doordash-ordered-to-pay-12m-to-arbitrate-5000-labor-disputes/ [https://perma.cc/P72Q-3KDJ].

92 *Id.*

actions. For instance, Victoria Dlitz, a single mother living in the Bay Area, was a former DoorDash worker who was trying to make extra money for groceries and gas.[93] Because DoorDash considered her an independent contractor and not an employee of the company, she had no way of challenging her inconsistent pay, other than through arbitration.[94] In her own words, "'[t]hey know we are desperate for cash, so we will do whatever. . . .'"[95]

When considering the perspective of some individual claimants and the adhesive undertones of binding arbitration agreements, it makes sense that judges, such as the judge in the DoorDash case, would not waver in her decision to allow mass arbitration to proceed. Especially considering the blatant power imbalances and the net worth of these corporations, which extends into the range of billions of dollars, it is worth championing a consumer victory. With that in mind, it is even more important to account for these arguments, and for FanDuel and DraftKings to be prepared with a provision that is explicit in prohibiting mass arbitration, or the companies could end up paying $10 million in filing fees, or more.

In a similar case as DoorDash, Chipotle Mexican Grill ("Chipotle") found itself in a predicament where thousands of employees initially sought to pursue wage-theft claims in a class action setting but subsequently brought their cases through mass arbitration.[96] Despite pleading that enforcing its mandatory arbitration waiver would cause Chipotle "irreparable harm," a judge in Colorado denied Chipotle's request to suspend the arbitration filings.[97] These claimants sought payments ranging from roughly $100 to several thousand dollars, yet Chipotle faced a hefty $1,100 per filing.[98] These filing costs, coupled with the tens of thousands of dollars in legal fees, can far exceed potential damages, making mass arbitration claims a serious financial liability.[99] These two exam-

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93 Michael Corkery & Jessica Silver-Greenberg, *'Scared to Death' by Arbitration: Companies Drowning in Their Own System*, N.Y. TIMES (Apr. 6, 2020, 8:25 PM), https://www.nytimes.com/2020/04/06/business/arbitration-overload.html [https://perma.cc/T4U4-U9NF].

94 *Id.*

95 *Id.*

96 Michael Hiltzik, *Column: Chipotle May Have Outsmarted Itself by Blocking Thousands of Employee Lawsuits Over Wage Theft*, L.A. TIMES (Jan. 4, 2019, 7:00 AM), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-chipotle-20190104-story.html [https://perma.cc/2SKD-YUYR].

97 *Id.*

98 *Id.*

99 Dave Jamieson, *Chipotle's Mandatory Arbitration Agreements are Backfiring Spectacularly*, HUFFPOST (Dec. 20, 2018, 3:09 PM), https://www.huffpost.com/entry/chipotle-mandatory-arbitration-agreements_n_5c1bda0de4b0407e90787abd [https://perma.cc/9429-MMSY].

ples suggest that the ultimate goals of mass arbitration actions are to flip the underlying power dynamics in an arbitration provision and to force a settlement—rather than to actually arbitrate. Although this could appear unfair to Corporate America, consumers cannot be blamed for exploiting what was a formerly unbreakable arbitration agreement; it was the companies themselves that chose to include these arbitration clauses in their terms of use in the first place.

ii. Recent Consumer Mass Arbitration Actions

Although there has been no shortage of employee-based mass arbitration claims, consumer-based claims—such as those that DraftKings and FanDuel face—are rarer.[100] A group of 15,107 arbitration demands against the education technology company Chegg, however, is one of those rare examples.[101] The nature of the claim involved a major data breach back in 2018, where Chegg "failed to secure its customers' personal data and failed to provide notice to them after the data was hacked."[102] Despite plaintiffs' counsel not making a global settlement demand, Chegg was facing a $300 nonrefundable fee per claim, or $4.5 million in total.[103] As opposed to paying the massive filing fees to the AAA, Chegg attempted to evade its own user agreement and called for the agreement's termination.[104] Chegg contended that the users seeking arbitration had actually breached the agreed-to user Terms of Use by asserting improper or frivolous demands for arbitration.[105]

Chegg was essentially trying to unilaterally cancel the agreements, even after it had a prior motion to compel arbitration granted in a related class action.[106] Plaintiffs' counsel argued that Chegg had created a Catch-22 for customers: Chegg's user agreement was supposed to shift a portion of the arbitration fees onto the consumer if an improper or frivolous demand was issued.

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100 Alison Frankel, *Mass Consumer Arbitration is On! Ed Tech Company Hit with 15,000 Data Breach Claims*, REUTERS (May 12, 2020, 4:51 PM), https://www.reuters.com/article/legal-us-otc-chegg/mass-consumer-arbitration-is-on-ed-tech-company-hit-with-15000-data-breach-claims-idUSKBN22O33E [https://perma.cc/U4S6-EJYF].

101 *Id.*

102 *Id.*

103 *Id.*

104 Alison Frankel, *Chegg Tries a New Way to Avert Mass Arbitration: Cancel Users' Contracts*, REUTERS (July 2, 2020, 3:52 PM), https://www.reuters.com/article/legal-us-otc-massarb/chegg-tries-a-new-way-to-avert-mass-arbitration-cancel-users-contracts-idUSKBN24333W [https://perma.cc/5YN4-6K7D].

105 *Id.*

106 *Id.*

However, Chegg had already considered the users to have breached the agreement, so an arbitrator never had the opportunity to evaluate whether the arbitration demand was justified.[107] A federal judge will eventually have to determine whether Chegg possessed the sole authority to assess its consumers' demands—particularly, whether the demands were so improper or frivolous that they amounted to a material breach of the agreement.[108] Nonetheless, this mass arbitration action reflects the unpredicted consequence of having a binding arbitration agreement; it was a last-resort effort by Chegg to try to retroactively cancel its consumer contracts.

Intuit, the tax preparation and financial services software company, has also been a target of a consumer mass arbitration action. As the owner of TurboTax, Intuit entered into an agreement with the Internal Revenue Service where it would offer specific taxpayers the ability to file their taxes at no cost.[109] Thousands of plaintiffs, again represented by Keller Lenkner, alleged that Intuit steered them into paying for these services instead.[110] Although this suit began as a class action, Intuit was successful in its motion to compel arbitration back in 2019.[111] After Intuit prevailed on its motion, Keller Lenkner then recruited over 100,000 Intuit customers to file individual arbitration claims against the company.[112] Intuit attempted to reach a class action settlement worth $40 million in response to these claims, but U.S. District Court Judge Charles Breyer refused to grant preliminary approval to the proposal.[113] His reasoning relied on Intuit's apparent hypocrisy in first fighting "vigorously" in seeking to compel arbitration in the face of a class action, and then attempting to discard its own arbitration clause once it realized the enormous financial burden associated with the fees.[114] This hypocrisy is now emerging as a common theme, as

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107 *Id.*

108 *Id.*

109 Jolly v. Intuit, Inc., No. 20-cv-04728-CRB, 2020 U.S. Dist. LEXIS 165983, at *2 (N.D. Cal. Sept. 10, 2020).

110 *Id.*

111 Alison Frankel, *Judge Breyer Rejects $40 Million Intuit Class Settlement Amid Arbitration Onslaught*, REUTERS (Dec. 22, 2020, 5:09 PM), https://www.reuters.com/article/legal-us-otc-intuit/judge-breyer-rejects-40-million-intuit-class-settlement-amid-arbitration-onslaught-idUSKBN28W2M5 [https://perma.cc/94TB-KPEE].

112 *Id.*

113 *Id.*

114 *Id.* (Intuit had already paid $13 million in AAA arbitration fees at the time this article was written and was on course to pay at least $23 million in fees over the following several weeks.).

corporations begin to come to terms with the unforeseen drawbacks of their binding arbitration agreements.

iii. Mass Arbitration Claims Possible Correlation with Declining Arbitration

While mass arbitration claims may not be the sole reason that arbitration appears to be on a downward trend—at least in some contexts[115]—there could potentially be a causal connection. As evidenced by the thousands of claims against FanDuel and DraftKings, and the thousands of claims against Chipotle, DoorDash, Chegg, and Intuit, it could be argued that mass arbitration actions are contributing to companies' reluctance to "rely solely on arbitration."[116] Data produced by JAMS and the AAA indicate that more than a majority of all employment arbitration claims now end with a settlement, and just 10% lead to an arbitrator issuing an award.[117] Further, while 2,000 employment arbitration claims were filed with the AAA in 2016, that figure fell dramatically to only 500 claims by 2018.[118] On a similar trend, JAMS experienced a decline from roughly 750 claims filed in 2016 to an estimated 100 claims in 2018.[119] While these statistics primarily reflect a decline in the number of employment arbitration claims being filed, and may not necessarily reflect other industries' continued reliance on arbitration agreements, some scholars have gone as far as to criticize mass arbitration as corruptive in expediting a decline in arbitration as a medium.[120]

iv. Mass Arbitration Meets Automation

Not only have mass arbitration claims proliferated with the assistance of law firms—most notably Keller Lenkner, which takes on these financially unappealing claims—it has also received an added boost due to a startup company called FairShake. Created by Teel Lidow, a Silicon Valley entrepreneur, FairShake is an auto-

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115 Andrew Wallender, *Corporate Arbitration Tactic Backfires as Claims Flood In*, BLOOMBERG L. (Feb. 11, 2019, 6:06 AM), https://news.bloomberglaw.com/daily-labor-report/corporate-arbitration-tactic-backfires-as-claims-flood-in [https://perma.cc/56ML-XNP8].

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*; *see also* Andrea Cann Chandrasekher & David Horton, Arbitration Nation: Data from Four Providers, 107 CALIF. L. REV. 1, 54 (2019) ("Even as the total number of claims climbed after *Concepcion*, the volume of pro se filings *decreased*. . . . Instead of *pro se* litigants, plaintiffs' lawyers have driven the uptick in arbitrations after *Concepcion*.").

mated system that permits claimants to easily receive legal assistance in their arbitration claims.[121] While FairShake retains a percentage of the commission from each arbitration claim, consumers have received an average payout of $700 from arbitration claims that FairShake has settled.[122] Per FairShake's website, the process for legal assistance is as follows: (1) the claimant selects the company that is responsible for the dispute at issue; (2) the automated system then sends an official legal notice to the company, opening a sixty-day window for negotiating a settlement offer; (3) the claimant then subsequently picks from a series of infractions, which help outline the nature of the claim (for example, the company did not respond to fraud, or the company did not honor a promotion); (4) the website makes clear that if the claimant is awarded over $100, then FairShake will take 20% of the award, but if the award is less than $100, FairShake will only take $20; and (5) finally, the claimant chooses whether they would like to be refunded, or whether they would like to cancel any outstanding debt owed.[123] With five simple steps that can lead to a settlement offer, it is not much of a surprise that companies like DoorDash are "'scared to death'" by the volume of cases that can appear in a single day.[124]

When looking at statistics regarding FairShake's operations, it should be even more concerning to corporations that an automated system propelling mass arbitration actions has been succeeding. For instance, approximately 60% of claims in which FairShake sends a legal notice end in a settlement before arbitration is initiated; roughly 70% of certain claims are settled before a final judgment; and an estimated 25% of claims that make it through arbitration end with the complainant prevailing.[125] With this data as a reference, it is evident that this mass arbitration phenomenon could be accelerated by a program that rapidly conducts arbitration intake, categorizes claims according to the underlying issue and company, and operates on a contingency fee basis.

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121 Corkery & Silver-Greenberg, *supra* note 93.

122 *Id.*; *see also Success Stories*, FAIRSHAKE, https://fairshake.com/success-stories/ [https://perma.cc/JUZ4-THAF] (last visited Jan. 26, 2021) (FairShake has helped claimants reach settlements with companies such as AT&T and T-Mobile.).

123 *Putting Power in Your Hands: What Our Customers Say*, FAIRSHAKE, https://fairshake.com/start/ [https://perma.cc/55U7-7XP7] (last visited Jan. 26, 2021).

124 Corkery & Silver-Greenberg, *supra* note 93; *see also Complaints Forum*, FAIRSHAKE, https://fairshake.com/complaints-forum/ [https://perma.cc/HPZ6-FCGT] (last visited Jan. 26, 2021) (FairShake has reportedly helped over 10,000 users.).

125 Don L, *FairShake – Arbitration Assistance*, DR. CREDIT (Apr. 1, 2020, 11:00 AM), https://www.doctorofcredit.com/fairshake-arbitration-assistance/ [https://perma.cc/K9MW-BHSB].

D. *Plaintiff Hardships in Organizing Mass Arbitration Actions*

Although mass arbitration actions provide a solid platform for individual claimants to overcome what are otherwise adhesive agreements, these actions are not nearly as easy to organize as the traditional class action. At the surface, not many law firms are well-equipped to expend the capital to take on a campaign of organizing mass arbitration filings, finding a large pool of participants willing to file claims is difficult and hard to manage, and administratively, coordinating the sheer volume of claims is an arduous task.[126] With regard to the lack of capital, law firms would understandably be hesitant to organize these actions because they often involve small-value claims and there is not much of a financial incentive to pursue them.[127] In terms of the lack of administration coordination, there is no guarantee that these claims would be brought before the same arbitrator in a short timeframe, nor is there a guarantee that a plaintiff can rely on previous arbitral determinations.[128] Finally, as opposed to merely representing a few class representatives in the traditional case, attorneys would have to individually counsel hundreds, or thousands, of claimants.[129] While these concerns are valid and may serve to diminish the likelihood of a meritorious mass arbitration action, major law firms that are capable of addressing these issues still nevertheless exist, and these firms do continue to undertake these uphill legal battles.

IV. Proposal

A. *FanDuel and DraftKings Should Adopt a Mass Arbitration Waiver*

With its knowledge of the tremendous financial payouts companies have been forced to issue, and with its significant exposure to mass arbitration, FanDuel should make immediate plans to include a mass arbitration waiver in its Terms of Use, while DraftKings should follow through with its own proposal to add such a clause. Considering the current enforceability of class-action waiv-

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126 Wallender, *supra* note 115.

127 Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DePaul L. Rev. 447, 448 (2014).

128 *Id.* at 449.

129 *Id.* at 448–49.

ers in standard consumer contracts, it is reasonable to assume that courts and national arbitration forums would likewise uphold terms and conditions that include a prohibition on mass arbitration actions. As a template, FanDuel should use DraftKings' current proposal:

> D. Combined, Collective or Mass Arbitration. You agree that any action or agreement by you to bring claims or to participate in any claims to resolve any [d]ispute in a combined, collective, coordinated or mass arbitration . . . is contrary to your agreement herein that claims to resolve any [d]isputes will only be brought on an individual basis in an individual arbitration. Without limiting the generality of the foregoing, a claim to resolve any [d]ispute against DraftKings will be deemed to be a "Collective Arbitration" if (1) two or more similar claims for arbitration are filed by or on behalf of one or more claimants; and (2) [c]ounsel for the claimants are the same, share fees, are consistent or coordinated across the arbitration.[130]

The language featured in DraftKings' proposed Terms of Use explicitly accounts for its current situation; had this language been in effect at the time the arbitration demands were filed, the claimants would have been left with little-to-no recourse to arbitrate as a group. Not only does DraftKings' language specifically mention "mass arbitration," but it also directly defines and prohibits collective arbitration.[131] By adopting language either identical or relatively identical, FanDuel could also probably thwart future mass arbitration actions.

i. Defenses to Mass Arbitration Waivers

Arguably, the most compelling defense to the adoption of mass arbitration waivers is their similar legal undertones to class action waivers. In the leading case on class action waivers, *AT&T Mobility LLC v. Concepcion*, the Court first determined that the underlying purpose of the Federal Arbitration Act ("FAA") was to guarantee the enforcement of arbitration agreements to their specific terms. The Court then held that class actions create a scheme that is inconsistent with the "fundamental attributes of arbitration."[132] The Court subsequently described these foundational attributes as arbitration's goals of a streamlined system, where parties can quickly and efficiently participate in dispute resolution

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[130] Letter, *supra* note 68.

[131] *Id.*

[132] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

without having to resort to traditional litigation.[133] Justice Scalia, writing for the majority, ultimately overturned the California law at issue, in part because it permitted plaintiffs in a binding consumer contract to request class wide arbitration *ex post*, and this was deemed to frustrate the objectives of the FAA.[134] On a comparable note, mass arbitration actions also hinder the purpose of the FAA for several reasons: (1) these actions are highly costly for companies like FanDuel and DraftKings; (2) they can be incredibly inefficient, by clogging JAMS's and the AAA's dockets; (3) they can be unmanageable for individual arbitrators; and (4) they target the informal nature of arbitration.[135]

A nearly identical sentiment to the one expressed in *Concepcion* is evinced in a slightly more recent Supreme Court decision. The Court, in *Epic Systems Corporation v. Lewis*, found that an arbitration agreement that included provisions for individual proceedings must be enforced, pursuant to the FAA.[136] The plaintiffs in this case were employees of Epic Systems Corporation ("Epic"), and were seeking to resolve employment-related disputes through a class action.[137] Despite arguing that, under the National Labor Relations Act ("NLRA"), a waiver of class and collective actions was illegal, the Court nonetheless echoed the same rationale it had posited one year earlier, in that collective class actions target the "individualized nature" of arbitration proceedings.[138] In defense of Epic and arbitration as a means of dispute resolution, the Court concluded that these employees specifically contracted to participate in arbitration as individual claimants, and that the FAA will protect this agreement "pretty absolutely."[139]

Taken together, these two cases represent the Court's approval of class action waivers and the individuality that is inherent in arbitration. In light of these decisions, an attempt by FanDuel and DraftKings to adopt a waiver prohibiting mass arbitration is most likely constitutional and warranted by precedent. Moreover,

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133 *Id.* at 344–45.

134 *Id.* at 346.

135 *See id.*

136 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).

137 *Epic Systems Corp. v. Lewis*, OYEZ, https://www.oyez.org/cases/2017/16-285 [https://perma.cc/HA7R-5P6A] (last visited Jan. 26, 2021).

138 Archis Parasharami & Dan Jones, *Symposium: Good News for Employers and Workers, Bad News for Lawyers*, SCOTUSBLOG (May 22, 2018, 12:51 PM), https://www.scotusblog.com/2018/05/symposium-good-news-for-employers-and-workers-bad-news-for-lawyers/ [https://perma.cc/A28K-2DH8].

139 *Epic Sys.*, 138 S. Ct. at 1621.

this attempt is also probably necessary to preserve the fundamental cornerstones of arbitration as a cost-effective, efficient, and manageable legal platform.

ii. Criticisms of Mass Arbitration Waivers

Although mass arbitration waivers seem to be constitutionally permissible, there are many consumer-related concerns and valid criticisms of these provisions. The presumptive consumer-driven rejection of mass arbitration waivers would likely correspond with the rejection of class-action waivers. When the Supreme Court upheld the constitutionality of class-action waivers in validly formed terms and conditions agreements, a major drawback to this decision was that it limited a person's ability to participate in a collective action. In instances where an individual's claim for damages is rather small, plaintiffs have had stronger cases when they aggregate their claims with those of other similarly situated people.[140] Collective actions predictably increase the incentives for companies to settle because the stakes are usually higher with collective actions than with individual claims. Moreover, the likelihood of an individual pursuing a claim that involves a small amount of damages is slim, especially when considering the cost of filing a lawsuit or filing an arbitration claim in these scenarios. To that end, mass arbitration waivers effectively limit the notion that "strength lies in numbers."

Another fairly argued criticism of adopting mass arbitration waivers is that they provide an invitation for corporate wrongdoing.[141] The filing fees associated with mass arbitration claims can serve as a critical check on what is otherwise an adhesive consumer contract. Much like the threat of class actions, the threat of mass arbitration claims can force "prudent corporate decisions."[142] In the face of millions of dollars in filing fees, wiping out mass arbitration actions could be another step in encouraging corporate malfeasance.[143] Again, stemming from an individual's justifiable

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[140] *See* David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1906 n.62 (2002).

[141] Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 378 (2005).

[142] *Id.* at 430; Nicholas M. Engel, Comment, *On Waiving Class Action Waivers: A Critique and Defense of the Consumer Financial Protection Bureau's Proposed Regulations*, 89 TEMP. L. REV. 231, 236 (2016) ("Class action proponents point to the device's value as a deterrent to corporate misconduct, an efficient remedial device for highly similar claims, and an important private enforcement tool to remedy low-value, high-volume injuries.").

[143] *See* Engel, *supra* note 142, at 265.

reluctance to litigate or arbitrate a low-value claim in light of the financial costs, the threat of a collective action may pose a serious constraint on wrongdoing. Therefore, removing mass arbitration actions from the consumer's arsenal of legal weapons may simply exacerbate an already lopsided power imbalance, by eliminating a significant financial incentive for corporations to act in the best interest of their consumers.

B. *A Mediation and Arbitration Alternative: Mass Claims Protocol and Procedure*

Even though the focus of this Note has solely been on arbitration, it is also possible that the fundamental elements of mediation can help inspire practical resolutions to these mass actions. Instead of sending thousands of claimants to binding arbitration, or spending millions of dollars on settlements, a resolution that incorporates mediation could be more consumer-friendly and efficient. Because mediation is a more informal process, claimants and corporations might be more willing to reach a less costly agreement, and could potentially solve disputes by employing mediation principles.[144] Considering the adhesive nature of consumer contracts and the unexpected drawback of mandatory arbitration provisions, mediation could serve as a mutually beneficial avenue.

After a careful consideration of the policy-driven drawbacks to consumers by adopting a mass arbitration waiver, it may be more equitable for FanDuel and DraftKings to instead implement a "Mass Claims Protocol and Procedure." The International Institute for Conflict Prevention and Resolution ("CPR") has been a pioneer in addressing the aforementioned ramifications of mass arbitration actions. CPR was created with the mission of bringing together inside and outside corporate counsel, in an effort to reduce litigation costs and promote forward-thinking alternative dispute resolution ("ADR") services.[145] The Mass Claims Protocol and Procedure is an innovative feature of these services, combining mediation and arbitration. With the intention of creating a comprehensive solution to growing mass arbitration employment

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144 *What are Mediation and Arbitration?*, ALLLAW, https://www.alllaw.com/articles/legal/article9.asp [https://perma.cc/88YA-QYLD] (last visited Feb. 4, 2021).

145 *History*, CPRADR, https://www.cpradr.org/about/history [https://perma.cc/EGT9-JSSV] (last visited Feb. 4, 2021).

claims, while simultaneously facilitating a global resolution,[146] this protocol is triggered:

> Any time greater than 30 individual employment-related arbitration claims of a nearly identical nature are, or have been, filed with CPR against the same Respondent(s) in close proximity one to another. . . . All parties also agree that claims are of a "Nearly Identical" nature if they arise out of a factual scenario and raise legal issues so similar one to another that application of the Protocol to the number of claims at issue will reasonably result in an efficient and fair adjudication of the cases.[147]

This progressive response to the seemingly growing popularity of mass arbitration actions satisfies concerns of efficiency, leveraged settlement offers, and consumer protection.[148] While this protocol is currently applied in the employment context, which is at the center of mass arbitration claims, it could be a viable option for the sports betting industry as well. Even the proponents of the Protocol have acknowledged that CPR developed it for "the broader marketplace, not for any particular matter or party. . . ."[149] The fundamental layout of the Protocol calls for a series of randomly-selected initial arbitration test cases to be resolved through mediation.[150] After the mediator posits a solution for the group of cases, the results are supposed to inform the outcomes of the outstanding arbitration claims, as opposed to having to individually mediate every claim.[151] If a mediation is unsuccessful in resolving a dispute, each remaining claimant is afforded the ability to opt out of the result.[152] The Protocol also permits companies to negotiate the filing fees, which provides a means of avoiding the exorbitant

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146 CPR Staff, *Update on CPR's Employment-Related Mass Claims Protocol*, MEDIATE (Feb. 2020), https://www.mediate.com/articles/zamorky-update.cfm [https://perma.cc/NMU5-XPCV].

147 *What is the Employment-Related Mass Claims Protocol?*, CPRADR, https://www.cpradr.org/dispute-resolution-services/employment-related-mass-claims-documents/emp-mass-claims-protocol [https://perma.cc/DJT8-XDFU] (last visited Jan. 28, 2021).

148 Ken Hagen, *Another Arbitration Service – FEDARB – Establishes New Mass Arbitration Protocol*, FEDARB (Feb. 7, 2020), https://www.fedarb.com/another-arbitration-service-fedarb-establishes-new-mass-arbitration-protocol/ [https://perma.cc/LUS2-DN2N] ("'We adopted a structure that backends the administrative costs, creates a panel of judges who can adjudicate the claims on a fixed cost basis and also created an MDL type procedure to deal with common issues—again, to create consistency and reduce costs.'").

149 CPR Staff, *supra* note 146.

150 *CPR Launches New Mass Claims Protocol and Procedure*, CPRADR (Nov. 6, 2019), https://www.cpradr.org/news-publications/press-releases/2019-11-06-cpr-launches-new-mass-claims-protocol-and-procedure [https://perma.cc/5FZX-RUHG].

151 *Id.*

152 CPRADR, *supra* note 147, at 4 n.8.

costs associated with filing a case.[153] Thus, this Protocol provides incentives for companies like FanDuel and DraftKings, as well as masses of users with claims, to resolve similarly structured disputes.

DoorDash, no stranger to mass arbitration claims, has already made the switch from the AAA to the CPR in November 2019, and has since utilized the Protocol.[154] In *McGrath v. DoorDash*, the district court granted DoorDash's motion to compel arbitration pursuant to CPR's protocol, in part due to the terms of the Protocol appearing fair and that there was little evidence to suggest that there would be any delay in a resolution.[155] In granting the motion to compel arbitration, the court found the Protocol to be enforceable.[156] While the Protocol's usage is in an infancy stage—specifically regarding the number of companies that have adopted it thus far—it can still be a valuable tool going forward, both inside and outside of the employment law arena. FanDuel and DraftKings could view the Protocol as a more consumer-friendly alternative to a blanket prohibition on mass arbitration actions in their respective Terms of Use agreements.[157]

V. Conclusion

Even though it is currently unclear as to why FanDuel discontinued its lawsuit against those claimants who were seeking arbitration, based on precedent, it would not be surprising if FanDuel's decision to abandon its lawsuit was inspired by a possible out-of-court settlement. Still, FanDuel and DraftKings could have more easily prevented these actions—and subsequent litigation that followed—with an elaborate, explicit prohibition against mass arbitra-

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153 Thomas E. Birsic, Elizabeth A. Hoadley, & Wesley A. Prichard, *Mass Arbitration, Más Problems: Class-Action Procedures May Guide Solutions to Issues in Mass Arbitrations*, Nat'l L. Rev. (June 24, 2020), https://www.natlawreview.com/article/mass-arbitration-m-s-problems-class-action-procedures-may-guide-solutions-to-issues [https://perma.cc/48MP-LCUZ].

154 John Lewis, *Food Delivery Driver Opinion Sheds More Light on the FAA Exemption and Use of CPR Arbitration Rules*, Emp. Class Action Blog (Nov. 11, 2020), https://www.employmentclassactionreport.com/arbitration/food-delivery-driver-opinion-sheds-more-light-on-the-faa-exemption-and-use-of-cpr-arbitration-rules/ [https://perma.cc/PK23-D9RZ].

155 McGrath v. DoorDash, No. 19-cv-05279-EMC, 2020 U.S. Dist. LEXIS 207491, at *28 (N.D. Cal. Nov. 5, 2020).

156 Lewis, *supra* note 154.

157 *But see* Ross Todd, *This Retired Judge's Take on Mass Arbitrations: 'A Classic Case of Be Careful What You Wish For'*, Am. L. Litig. Daily (Sept. 22, 2020, 7:30 AM), https://www.law.com/litigationdaily/2020/09/22/this-retired-judges-take-on-mass-arbitrations-a-classic-case-of-be-careful-what-you-wish-for/ [https://perma.cc/24W3-C8FZ].

tion actions. The longer these two corporations wait to amend their Terms of Use to account for this emerging phenomenon, the more exposed they are to substantial costs derived from litigation, arbitration, and most importantly, settlements. An arbitration waiver modeled on DraftKings' proposed changes would probably thwart future mass arbitration claims. Based on the aforementioned findings and analyses, it is this Note's recommendation that FanDuel and DraftKings take immediate action to avoid the possibility of being forced to pay out millions of dollars in the future.

While FanDuel and DraftKings may consider this to be a potential solution to ongoing issues and a successful preventative measure, it would be unsurprising for courts, legislatures, and the general population to greet such a proposal with animus. For several warranted reasons, this proposal is controversial when considering the already adhesive nature of consumer contracts and binding arbitration. Although this counter position has merit, it can hardly be said that mass consumer arbitration promotes legal efficiency, the traditional individual nature of arbitration, or cost-effectiveness. It is for those principal reasons that FanDuel and DraftKings should contemplate the situation at-hand and adopt a straightforward mass arbitration waiver in their respective Terms of Use. Instead of attempting to resolve this issue through reactive measures such as fee stalling,[158] contract cancellation, and small claims court diversion, companies should be proactive in their efforts to reduce the instances of mass arbitration actions.

158 Alison Frankel, *Calif. Judge Upholds State Law Penalizing Companies for Stalling on Arbitration Fees*, REUTERS (Jan. 20, 2021, 7:49 PM), https://www.reuters.com/article/us-otc-postmates/calif-judge-upholds-state-law-penalizing-companies-for-stalling-on-arbitration-fees-idUSKBN29P2S3 [https://perma.cc/MV4A-LT22] (SB-707, a 2019 California law, forces companies to pay arbitration fees within thirty days of filing; otherwise, the consumer or employee can assert their claims in court, where arbitration can be compelled against the company and sanctions can be handed down as well.).

HOOK, LINE, AND SINKER: THE USE OF SUBSIDIES, THE GLOBALIZED SYSTEM OF PREFERENCES, AND ARBITRATION TO SAVE OUR OCEAN'S FISH

*Lindsy Maglich**

I. INTRODUCTION

In the wee hours of the morning, local fishermen from the impoverished West African country of Senegal head out to sea on their hand-hewn canoes, hoping to catch fish to bring home to sell for income.[1] Thirty years ago these fishermen would bring in nets full of fish, yet these days the smaller local fisherman cannot compete with the Chinese megatrawlers sweeping their mile-long nets through the waters off of West Africa.[2] Because Chinese fishing fleets have depleted the seas of fish near their home, China has sent 2,600 fishing vessels across the world to exploit the waters of other countries.[3] These Chinese boats scoop up as many fish in one week as Senegalese boats catch in one year in the waters off of West Africa,[4] and they are not just causing havoc in West Africa, but also in South America and the Northwest Pacific.[5]

It would be nearly impossible for the 200,000 Chinese fishing boats to operate if not for the Chinese government subsidizing the fishing industry—a figure that reached about $22 billion between 2011 and 2015—by paying to build vessels and providing fuel, ice,

* *Managing Editor*, Cardozo Journal of Conflict Resolution (Vol. 23); J.D. Candidate 2022, Benjamin N. Cardozo School of Law. The author would like to thank everyone who made the publication of this Note possible.

1 Andrew Jacobs, *China's Appetite Pushes Fisheries to the Brink*, N.Y. TIMES (Apr. 30, 2017), https://www.nytimes.com/2017/04/30/world/asia/chinas-appetite-pushes-fisheries-to-the-brink.html [https://perma.cc/E29G-9EZL]; Matthew Carney, *China's Super Trawlers are Stripping the Ocean Bare as its Hunger for Seafood Grows*, ABC NEWS (Sept. 29, 2018, 7:28 PM), https://www.abc.net.au/news/2018-09-30/china-super-trawlers-overfishing-world-oceans/10317394 [https://perma.cc/4W8U-9558].

2 Jacobs, *supra* note 1.

3 Carney, *supra* note 1.

4 Jacobs, *supra* note 1.

5 Carney, *supra* note 1; *see also* Jacobs, *supra* note 1 (noting that Chinese ships cost the West African economies $2 billion a year, a Chinese fishing boat was poached in Indonesian waters, Argentine authorities sunk a Chinese boat attempting to ram their coast guard boat, and violent clashes erupted between South Korea and Chinese fisherman, leaving a half-dozen people dead).

and navigational devices.[6] These subsidies are the only thing keeping many Chinese fishermen and their crews solvent,[7] making the difference between profit and loss, while devastating other countries' economies that rely on fishing.[8] China was not alone in providing the estimated $34.5 billion in fisheries subsidies in 2018, though; Japan, Spain, South Korea, and the U.S. all contributed subsidies to their fishing industries.[9] These subsidies are driven by the staggering increase in global demand for fish,[10] with countries like China attempting to keep up with the demand both inside and outside of its country.[11]

Subsidies encourage an exorbitant number of vessels to fish the waters globally, leading our oceans to rapidly run out of fish.[12] As the ocean becomes sparse with fish, vessel captains turn to fishing unsustainably, and sometimes illegally, to meet production.[13] This dreadful chain of causation, currently contributing to 90% of our oceans being overfished,[14] does not mean the end of fish consumption if countries can find a way to fix global fisheries subsidies. The World Trade Organization ("WTO") has been attempting to eliminate some fisheries subsidies for twenty years,[15]

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6 Carney, *supra* note 1. In 2018 alone, Chinese fisheries subsidies were estimated to be $7.2 billion. Ian Urbina, *How China's Massive Fishing Fleet is Transforming the World's Oceans*, SLATE (Sept. 2, 2020, 9:00 AM), https://slate.com/news-and-politics/2020/09/beijing-fishing-fleet-subsidies-north-korea.html [https://perma.cc/J7LY-QSBA].

7 Carney, *supra* note 1.

8 Jacobs, *supra* note 1. Without these subsidies, Chinese distant water fishing fleets would be a fraction of its size, and most of its local fleets would not exist at all. *See also* Urbina, *supra* note 6.

9 Urbina, *supra* note 6.

10 Global per capita fish food consumption has grown about 1.5% per year from 1961 to 2018, leading to a whopping 45.2 pounds ("lbs.") of fish consumed per capita in 2018. FOOD & AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, THE STATE OF WORLD FISHERIES AND AQUACULTURE: SUSTAINABILITY IN ACTION 2–3 (2020), http://www.fao.org/3/ca9229en/ca9229en.pdf [https://perma.cc/4652-GAJ5] (converting 20.5 kilograms to pounds) [hereinafter FAO WORLD FISHERIES 2020].

11 Carney, *supra* note 1. China is the largest seafood exporter in the world, and their "population accounts for more than a third of all fish consumption worldwide." Ian Urbina, *How China's Expanding Fishing Fleet Is Depleting the World's Oceans*, YALE ENV'T 360 (Aug. 17, 2020), https://e360.yale.edu/features/how-chinas-expanding-fishing-fleet-is-depleting-worlds-oceans [https://perma.cc/99KR-D7GE].

12 Urbina, *supra* note 6.

13 *Id.*

14 Mukhisa Kituyi & Peter Thomson, *90% of Fish Stocks are Used up – Fisheries Subsidies Must Stop*, UNITED NATIONS CONF. TRADE & DEV. (July 13, 2018), https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1812 [https://perma.cc/A9Q4-EKFU].

15 *WTO Members Agree on 2020 Work Programme to Advance Fisheries Subsidies Negotiations*, IISD (July 28, 2020), https://sdg.iisd.org/news/wto-members-agree-on-2020-work-programme-to-advance-fisheries-subsidies-negotiations/ [https://perma.cc/MLV6-XGNW] (Prior to the

but if the fisheries subsidies are eliminated, how will the WTO enforce compliance? Better yet, given the current climate of its dispute resolution process, how will it adjudicate a dispute and enforce a judgment? Similarly, United Nations' ("UN") attempts to resolve fisheries disputes through its dispute resolution forums have proven unsuccessful, so how can a country adjudicate their fisheries claims without an authoritarian or reliable forum to bring a dispute?[16] These are global dilemmas that this Note will address.

Part II of this Note will discuss the current overfishing crisis, examining what is presently being done in the UN and the WTO to help with overfishing. Part III will analyze why current organizations and their agreements are unsuccessful, with a focus on their failure in utilizing dispute resolution methods, including their lack of authority and enforcement mechanisms for decisions. In Part IV, this Note proposes a two-step solution for fisheries subsidies. The first step addresses the need to turn the "bad" fisheries subsidies into "good" fisheries subsidies to promote sustainable fishing practices, rather than eliminate fisheries subsidies completely. This step also advocates for the use of the Generalized System of Preferences ("GSP") to incentivize developing countries to comply with fishing subsidies. The second step focuses on using a special arbitration panel in the WTO, composed of both fisheries and economics experts, to not only successfully resolve disputes that should arise over fisheries subsidies, but also to enforce compliance with these subsidies and the decisions the panel makes through trade sanctions.

II. Background

A. *Current Status of Fish and the Impending Crisis for Humans*

As of 2017, the oceans' fish populations are barely surviving, with over 90% of the world's fish populations either fully fished (59.6%) or overfished at biologically unsustainable levels (34.2%).[17] A fish stock is considered overfished when it is caught

COVID-19 pandemic, WTO members were working to conclude the negotiations for fisheries subsidies in June 2020 but have since just "reaffirmed their commitment to work towards achieving an agreement by the end of 2020.").

[16] *See infra* Appendix A for a summary chart of the jurisdiction and parties to disputes within the WTO and the UN.

[17] FAO World Fisheries 2020, *supra* note 10, at 7.

at a faster rate than it can reproduce.[18] Popular fish species, such as red snapper, Pacific bluefin tuna (currently 2.6% of its original size),[19] and bigeye tuna, are listed as overfished stocks by the National Oceanic and Atmospheric Administration ("NOAA") and by Greenpeace, two notable environmental organizations.[20] Soon, items such as tuna sushi or tuna sashimi will become a rarity. Skipjack tuna, which is made into canned tuna because it reproduces quickly and is rather resilient to fishing pressure, will also become overfished if the fisheries are improperly managed.[21] Humans consume almost 500 species of fish,[22] and the tragedy is that if no changes are made to our fishing habits, more than fifty percent of these fish stocks will be considered overfished at biologically unstainable levels by 2050.[23]

Overfishing is most obviously an issue for the eventual demise of fish species, but it also harms the sea environments, as marine ecosystems are closely interconnected.[24] Marine species are killed through bycatch,[25] unsustainable fishing habits,[26] or the destruction

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18 *Overfishing: Overview*, WORLD WILDLIFE FUND, https://www.worldwildlife.org/threats/overfishing [https://perma.cc/4WUH-54ZC] (last visited Dec. 27, 2021).

19 Amanda Nickson, *New Science Puts Decline of Pacific Bluefin at 97.4 Percent*, PEW CHARITABLE TR. (Apr. 25, 2016), https://www.pewtrusts.org/en/research-and-analysis/articles/2016/04/25/new-science-puts-decline-of-pacific-bluefin-at-974-percent [https://perma.cc/6PJQ-Y7QZ].

20 *Overfishing and Overfished Stocks as of September 30, 2020*, NOAA FISHERIES, https://s3.amazonaws.com/media.fisheries.noaa.gov/2020-10/Quarterly%20Map_Q3_9_2020.pdf?null [https://perma.cc/5QES-828C] (last visited Dec. 27, 2021); *Red List Fish*, GREENPEACE, https://www.greenpeace.org/usa/oceans/sustainable-seafood/red-list-fish/ [https://perma.cc/9EVL-XK2N] (last visited Dec. 27, 2021) (The "Red List is a scientifically complied list of 22 marine species that . . . should not be made commercially available . . . [because they] are tied to major concerns for our fisheries . . . .").

21 *Tuna: Facts*, WORLD WILDLIFE FUND, https://www.worldwildlife.org/species/tuna [https://perma.cc/YK47-QM7Y] (last visited Dec. 27, 2021).

22 WORLD WILDLIFE FUND, LIVING BLUE PLANET REPORT: SPECIES, HABITATS AND HUMAN WELL-BEING 7 (2015), https://c402277.ssl.cf1.rackcdn.com/publications/817/files/original/Living_Blue_Planet_Report_2015_Final_LR.pdf?1442242821 [https://perma.cc/DVZ4-GFYA].

23 Fish stocks that were fished at biologically unsustainable levels (overfished) increased from 10% in 1974 to 34.2% in 2017, which is roughly a half percent increase per year. FAO WORLD FISHERIES 2020, *supra* note 10, at 7. If the rate of fishing overfished species continues to increase at 0.5% per year, by 2050, roughly 52% of fish stocks will be fished at biologically unsustainable levels.

24 WORLD WILDLIFE FUND, *supra* note 22, at 8.

25 Bycatch occurs when fishermen "catch and discard animals they do not want, cannot sell, or are not allowed to keep," and it kills fish, dolphins, whales, sea turtles, and seabirds. *What is Bycatch?*, NOAA FISHERIES, https://www.fisheries.noaa.gov/node/251 [https://perma.cc/4L28-HM4U] (last visited Dec. 27, 2021).

26 Overfishing causes a reduced rate of growth, so fishermen are resorting to unsustainable fishing, which includes catching and keeping pregnant fish. This further decreases the species

of their food chain.[27] Every single aquatic plant and animal is vital in the balancing of an ecosystem,[28] especially when it comes to the survival of the dying coral reefs.[29] Overfishing practices wreak havoc on, and destroy, the surrounding marine environment, as well as affect people's day-to-day lives through mislabeling of fish,[30] increasing prices for fish,[31] and relying on fish to survive.[32]

i. Mislabeling of Fish

While fresh tuna or red snapper might be what appears on the menu or what is stocked in the supermarket, it could actually be escolar or tilapia.[33] These seafood substitutions transpire to circumvent overfishing regulations, increasing fishermen's profit margins,[34] and occur in places that import the more expensive fish species, such as the United States, the European Union, and Ja-

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reproductive rate. *Costs of Overfishing*, ECOMERGE, http://overfishingdilemma.weebly.com/costs-of-overfishing.html [https://perma.cc/KWA6-UDFP] (last visited Dec. 27, 2021).

27 Overfishing creates an oceanic imbalance because too many fish are removed from the ocean, eroding the food web and causing loss of other marine life. *Overfishing: Overview*, *supra* note 18; *see also* Krysten Jetson, *Impact of Overfishing on Human Lives*, MARINE SCI. TODAY (Apr. 9, 2014), http://marinesciencetoday.com/2014/04/09/impact-of-overfishing-on-human-lives/ [https://perma.cc/3R2B-PXCR?type=image] (noting a break in any level of the food chain has a domino effect on all organisms in the chain).

28 Jetson, *supra* note 27.

29 Unstainable fishing on coral reef areas can lead to depletion of key reef species. Larger fish are removed so that they cannot reproduce; herbivorous fish are removed by nets or traps, which causes ecosystem imbalance; and fish and reefs are harmed by fishing debris. *How Does Overfishing Threaten Coral Reefs?*, NAT'L OCEAN SERV., https://oceanservice.noaa.gov/facts/coral-overfishing.html [https://perma.cc/3JLG-JTDX] (last visited Dec. 27, 2021).

30 *Oceana Study Reveals Seafood Fraud Nationwide*, OCEANA (Feb. 2013), https://usa.oceana.org/reports/oceana-study-reveals-seafood-fraud-nationwide [https://perma.cc/RD95-WUAW] (last visited Jan. 30, 2021) [hereinafter Oceana Study Comment].

31 CHRISTOPHER L. DELGADO ET AL., THE FUTURE OF FISH: ISSUES AND TRENDS TO 2020 4, INT'L FOOD POL'Y RSCH. INST. (2003), https://cgspace.cgiar.org/bitstream/handle/10568/2039/TheFutureOfFish.pdf?sequence=1&isAllowed=Y [https://perma.cc/WJP2-2QJD].

32 Kituyi & Thomson, *supra* note 14.

33 Due to the complex nature of the fishery sector and the large price differential between lookalike species, the seafood sector is highly vulnerable to fraudulent activity, including seafood species substitution, where lower-priced fish are sold in place of the actual fish. FAO WORLD FISHERIES 2020, *supra* note 10, at 114; KIMBERLY WARNER ET AL., OCEANA STUDY REVEALS SEAFOOD FRAUD NATIONWIDE 5, OCEANA (Feb. 2013), https://usa.oceana.org/wp-content/uploads/sites/4/National_Seafood_Fraud_Testing_Results_FINAL.pdf [https://perma.cc/7TB8-XPJE].

34 Selling a substitute fish makes it appear as if there's compliance with overfishing regulations while also allowing a fisherman to increase profits by selling substitute fish, such as catfish for grouper, for five times the amount paid per pound for catfish. Scott Cohn, *Think that Fish you Just Bought for Dinner is Snapper? It Could be Fake*, CNBC (Aug. 25, 2019, 1:37 PM), https://www.cnbc.com/2018/09/21/the-codfather-why-there-may-be-something-fishy-about-your-seafood.html [https://perma.cc/Z9T8-BY3].

pan.[35] In fact, in a study conducted in the United States, one-third of the 1,215 seafood samples analyzed nationwide were mislabeled, according to United States Food and Drug Administration ("FDA") guidelines.[36] Snapper and tuna were the most commonly mislabeled fish types, and in cities such as Austin, New York, and Washington, D.C., every sushi venue sampled sold mislabeled fish.[37] Similarly, in a coordinated action across European countries, tuna species substitution occurred, with more than fifty-six tons of tuna seized and five criminal cases initiated.[38]

ii. Increasing Fish Prices

With the demand for seafood strong in both developed and developing countries, wherever supply growth is insufficient, there is a sharp increase in price.[39] Because there is no plausible way to increase the supply of fish,[40] the price is rising.[41] In 2019, a Pacific bluefin tuna, whose population has declined by 97.4%,[42] sold in Tokyo for more than $3 million, which is more than $5,000 per

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35 FAO WORLD FISHERIES 2020, *supra* note 10, at 80.

36 Oceana, the largest international ocean conservation advocacy organization, conducted one of the biggest seafood fraud investigations in world, collecting seafood samples from 674 restaurants, sushi venues, and grocery stores in twenty-one states to determine if the fish was honestly labeled. Oceana Study Comment, *supra* note 30; *see also* WARNER ET AL., *supra* note 33, at 2 ("[S]eafood may be mislabeled as often as 26% to 87% of the time for . . . fish such as grouper, cod, snapper, disguising fish that are less desirable, cheaper, or more readily available.").

37 Snapper was mislabeled in 87% of the samples, and tuna was mislabeled in 59% of the samples. Only seven of the 120 red snapper samples were labeled correctly. In New York, NY, and Washington, D.C., every sushi venue sold mislabeled fish. In Austin, TX, every sushi sample was mislabeled. WARNER ET AL., *supra* note 33, at 3–5.

38 FAO WORLD FISHERIES 2020, *supra* note 10, at 114 (converting 51 tonnes to US tons). The European study was conducted by the European Commission, INTERPOL, and Europol across eleven European countries. *Id.* Tuna intended for canning, which is of a much lower quality of fish than sushi tuna, was substituted for sushi tuna. *Id.*

39 *Fish Prices Hit Record Heights in Early 2018 on Tight Wild Supplies and Strong Global Demand*, FOOD & AGRIC. ORG. UNITED NATIONS (Aug. 7, 2018), http://www.fao.org/in-action/globefish/market-reports/resource-detail/en/c/1181786/ [https://perma.cc/3LA2-EGQZ].

40 *See infra* Part III(A) for a discussion on why it is difficult to increase the supply of marine fish.

41 An economist at Australian Bureau of Agricultural and Resource Economics, Jammie Penm, predicted in 2013 that the price of seafood will rise by up to seventy percent by 2050, due to the shortage of supply and continued wage growth. Mark Godfrey, *Seafood Prices to Rise 70 Percent by 2050*, SEAFOODSOURCE (July 2, 2013), https://www.seafoodsource.com/news/supply-trade/seafood-prices-to-rise-70-percent-by-2050 [https://perma.cc/D28Y-2Q4A].

42 Nickson, *supra* note 19 (noting that overfishing caused the decline in population).

pound.[43] Similarly, the price for a consumer for an eight-ounce portion of Chilean sea bass skyrocketed from $15 to $20 between 2012 and 2018,[44] likely due to the increased demand for Chilean sea bass and its low fish stocks. Because the Chilean sea bass is experiencing high levels of exploitation,[45] even with the increase in price, there is a good chance that species substitution occurred and giant perch or Nile tilapia was sold instead.[46]

iii. Fish to Survive

Many people, especially those in least developed countries, not only rely on fish as a food source, but also for income.[47] Fish and fishery products are some of the most highly traded food commodities in the world.[48] If overfishing is not solved, these coastal communities that rely on fish trade for income are in trouble. In 1992, in Newfoundland, about 10,000 fishermen and 30,000 others working within the seemingly inexhaustible cod fishery lost their jobs and incomes when the cod fishery industry collapsed.[49] Nearly thirty years later, Newfoundland has still not recovered.[50] If changes are not made to fishing practices, even fish populations now considered abundant will become exploited, and roughly 200 million individuals will be left jobless.[51]

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43 Francesca Paris, *Threatened Bluefin Tuna Sells for $3 Million in Tokyo Market*, NPR (Jan. 5, 2019, 3:00 PM), https://www.npr.org/2019/01/05/682526465/threatened-bluefin-tuna-sells-for-5000-per-pound-in-tokyo-market [https://perma.cc/9LWH-4X2T].

44 Cliff White, *Supply, Prices Stable for Chilean Sea Bass*, SeafoodSource (Jan. 18, 2019), https://www.seafoodsource.com/news/supply-trade/supply-prices-stable-for-chilean-sea-bass [https://perma.cc/P82B-LRL].

45 Enrique Diaz et al., *Patagonian Toothfish*, Food & Agric. Org. United Nations, http://www.fao.org/3/Y5261E/y5261e09.htm [https://perma.cc/2XNP-2K] (last visited Dec. 27, 2021) (noting that the Patagonian toothfish, also known as the Chilean sea bass, is experiencing high levels of exploitation due to high international demand).

46 Jeanette Settembre, *Your Expensive Red Snapper and Sea Bass May Not be What They Seem*, MarketWatch (Mar. 9, 2019, 6:56 AM), https://www.marketwatch.com/story/consumers-are-getting-ripped-off-by-fish-fraud-2019-03-08 [https://perma.cc/USB7-T35R].

47 Kituyi & Thomson, *supra* note 14 (stating that roughly 200 million jobs in the world are connected with the fisheries sector).

48 FAO World Fisheries 2020, *supra* note 10, at 8 (noting that thirty-eight percent of total fisheries and aquaculture production was traded internationally in 2018).

49 *Bycatch Slows Recovery of Grand Banks Cod,* World Wide Fund for Nature, (Sept. 16, 2011) https://wwf.panda.org/wwf_news/?201689/Bycatch-slows-recovery-of-Grand-Banks-Cod [https://perma.cc/W65E-TRDH].

50 *Id.*

51 Kituyi & Thomson, *supra* note 14 (estimating that 200 million jobs are directly or indirectly connected with the fisheries sector).

B. *Current Actions to Combat Overfishing*

i. The United Nations

The UN, an international organization with 193 Member States, seeks, among other things, to achieve sustainable development to improve global well-being.[52] The UN adopted the Sustainable Development Goals ("SDG") in 2015, which are seventeen integrated goals "to end poverty, protect the planet, and ensure that all people enjoy peace and prosperity by 2030."[53] SDG 14 addresses life underwater, with the overall goal to "conserve and sustainably use the oceans, seas and marine resources."[54] Among the goals within SDG 14, one of the targets seeks to "prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing" and to refrain from introducing new fishing subsidies.[55] The problem with these SDGs is that they are just as they sound: goals. To achieve these goals, specifically the fisheries subsidies goal, the WTO must play a major role in negotiating and enforcing agreements,[56] and as described below, the WTO has yet to negotiate an agreement on fisheries subsidies.

1. The United Nations Convention on the Law of the Sea and Straddling Fish Stocks Agreement

The United Nations Convention on the Law of the Sea ("UNCLOS"), agreed upon in 1982, is the largest multinational agreement of the UN.[57] UNCLOS is divided into parts, sections, and articles, followed by nine Annexes to the Convention.[58] This agreement granted nations exclusive economic zones ("EEZ"),

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52 *Our Work*, UNITED NATIONS, https://www.un.org/en/sections/what-we-do/ [https://perma.cc/X8BF-96BN] (last visited Dec. 27, 2021).

53 *The SDGS in Action*, UNITED NATIONS DEV. PROGRAMME, https://www.undp.org/content/undp/en/home/sustainable-development-goals.html [https://perma.cc/P3QJ-Z3U8] (last visited Dec. 27, 2021).

54 *Sustainable Development Goal 14*, SDG TRACKER, https://sdg-tracker.org/oceans [https://perma.cc/EN7V-E2Ds] (last visited Dec. 27, 2021).

55 *Id.* This target also seeks to eliminate subsidies contributing to illegal, unreported, and unregulated ("IUU") fishing, but this Note will not specifically address IUU fishing.

56 *The WTO's Contribution to Achieving the SDGs*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/coher_e/sdgs_e/wtoachsdgs_e.htm [https://perma.cc/3WL2-PNBU] (last visited Dec. 27, 2021).

57 Austin Dieter, Note, *From Harbor to High Seas: An Argument for Rethinking Fishery Management Systems and Multinational Fishing Treaties*, 32 WIS. INT'L L. J. 725, 728 (2014).

58 *United Nations Convention on the Law of the Sea of 10 December 1982*, OCEANS & L. SEA, https://www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm (last visited Dec. 27, 2021).

which are 200-mile bubbles extending from the coast of the nation into the ocean.[59] EEZs impose an obligation on coastal nations to protect and manage the marine resources within their 200-mile area, which would help reduce overfishing by implementing maritime laws and patrolling fishing vessels within their EEZ.[60] If fishing vessels violate the local maritime law, the coastal nations could prevent the captain and crew from leaving and initiate sanctions against them in their local courts.[61] In practice, UNCLOS is rife with issues.

To address problems inherent in UNCLOS—such as fishing outside EEZs, weak enforcement mechanisms, and vague obligations—the UN adopted the Straddling Fish Stocks Agreement.[62] A few notable changes include special requirements for developing nations that depend on marine resources,[63] enforcement of the agreement against non-parties,[64] and penalties, such as exclusion from fisheries for failure to join regional fisheries organizations.[65] Even though states can attempt to force non-parties to comply with their regional fisheries management standards,[66] this agreement lacks a dispute resolution process to hold non-parties accountable.[67] The Straddling Fish Stocks Agreement dispute resolution process calls for the settlement of disputes first in accordance with the relevant regional or subregional fisheries management agreement.[68] The dispute resolution process of UNCLOS also applies to disputes under this agreement.[69]

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59 *Id.*; *see also* Jon Van Steenis, *Pirates as Poachers: International Fisheries Law and the Bluefin Tuna*, 29 CAP. UNIV. L. REV. 659, 660 (2002).

60 Dieter, *supra* note 57, at 728.

61 *Id.* at 729.

62 Zachary Tyler, Note, *Saving Fisheries on the High Seas: The Use of Trade Sanctions to Force Compliance with Multilateral Fisheries Agreements*, 20 TUL. ENV'T L. J. 43, 54–59 (2006); U.N Conference Straddling Fish Stocks and Highly Migratory Fish Stocks, *Agreement for the Implementation of the Provisions of the U.N. Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, art. 5–7, U.N. Doc. A/CONF.164/37 (Sept. 8, 1995) [hereinafter Fish Stocks Agreement].

63 Fish Stocks Agreement, *supra* note 62, at art. 24, ¶ 2.

64 *Id.* at art. 17.

65 Tyler, *supra* note 62, at 56–57.

66 Fish Stocks Agreement, *supra* note 62, at art. 17, ¶ 1; art. 21, ¶ 2; art. 24; Annex I, art. 2, ¶ d.

67 *Id.* at art. 30.

68 *Id.* at art. 28.

69 *Id.* at art. 30.

2. The United Nations Convention on the Law of the Sea Dispute Settlement Process

Under the UNCLOS dispute resolution process, laid out in UNCLOS Part XV, parties must first attempt to solve their dispute by means indicated in the Charter of the United Nations, which includes negotiation, mediation, and other peaceful means.[70] If the parties do not reach a settlement, under Section 2, any party can request a court or tribunal with jurisdiction to decide the dispute.[71] There are four judicial bodies within UNCLOS Section 2 that render binding decisions: the International Tribunal for the Law of the Sea ("ITLOS"), the International Court of Justice ("ICJ"), an arbitration tribunal, and a special arbitration tribunal.[72] If the parties cannot agree to a court or tribunal, the arbitration tribunal is the default resolution method.[73] Similar to the Straddling Fish Stocks Agreement, if the parties agree to a dispute resolution procedure in another agreement, it may supersede UNCLOS's process.[74] Any decision rendered by a judicial body under Section 2 is only final and binding on parties to the dispute,[75] but Article 297 lists exceptions to settling disputes in accordance with Section 2,[76] which also applies to the Straddling Fish Stocks Agreement.[77]

ii. The World Trade Organization

The WTO is an international organization that deals with trade between nations, allowing member governments to sort out their trade problems with each other.[78] In the WTO, trade agreements are negotiated and signed by members and are binding "legal foundations for global trade."[79] These agreements are

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[70] United Nations Convention on the Law of the Sea art. 279, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

[71] *Id.* at art. 286

[72] *Id.* at art. 287 (The arbitration tribunal is established in accordance with Annex VII and the special arbitration tribunal is established in accordance with Annex VIII.); *see infra* Appendix B for a comparison of the jurisdiction, parties to a dispute, and judgment types of the four UNCLOS dispute resolution forums.

[73] UNCLOS, *supra* note 70, at art. 287, ¶ 5.

[74] *Id.* at art. 282.

[75] *Id.* at art. 296.

[76] *Id.* at art. 297, ¶ 2–3.

[77] Fish Stocks Agreement, *supra* note 62, at art. 32 (applying Article 297(3) exceptions of UNCLOS).

[78] *What is the WTO?*, World Trade Org., https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm [https://perma.cc/2PSM-6MUU] (last visited Dec. 27, 2021).

[79] *WTO in Brief*, World Trade Org., https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm [https://perma.cc/TN6R-7Y7J] (last visited Dec. 27, 2021).

considered contracts, and disagreements, including some disputes over fisheries, are brought into the WTO's dispute settlement process.[80]

1. Jurisdiction for Fisheries Subsidies and Fisheries Subsidies Negotiations

The Agreement on Subsidies and Countervailing Measures ("SCM Agreement") is the WTO's legally binding general rules on subsidies.[81] The SCM Agreement places subsidies into three categories: prohibited subsidies, actionable subsidies, and non-actionable subsidies.[82] Under this agreement, only subsidies that distort trade are prohibited or actionable and can be subject to the WTO dispute settlement procedures.[83] Although agricultural products are exempted from the disciplines under the SCM Agreement, subsidies granted to fish are covered under the SCM Agreement.[84] If a subsidy is considered a governmental measure, though, the WTO also has jurisdiction over that subsidy through its dispute settlement procedure.[85]

As explained in Part I, with the value of fish exports increasing, countries are providing subsidies to foster fish production. Fisheries subsidies are classified as "good" and "bad," with harmful subsidies considered to be those that promote overfishing by encouraging fishing that would not otherwise be profitable.[86] While there is no single consensus on what a fishery subsidy is or how to measure its effect, the harmful subsidies are usually capacity-enhancing subsidies.[87] Fisheries subsidies include subsidies for fuel, boat construction, and renewal and modernization programs.[88]

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[80] *Id.*; *see* Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (decided Oct. 12, 1998) (adopted Nov. 6, 1998); Panel Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R (decided May 15, 1988) (adopted as modified by the Appellate Body Nov. 6, 1998).

[81] Seung Wha Chang, *WTO Disciplines on Fisheries Subsidies: A Historic Step Towards Sustainability?*, 6(4) J. INT'L ECON. L. 879, 880 (2003).

[82] *Id.* at 884 (Prohibited subsidies are export subsidies and import substitution subsidies, and actionable subsidies "cause[ ] adverse effects to the interests of other Members.").

[83] *Id.* at 885.

[84] *Id.*

[85] *Id.* at 884.

[86] Todd Woody, *The Sea is Running Out of Fish, Despite Nations' Pledges to Stop it*, NAT'L GEOGRAPHIC (Oct. 8, 2019), https://www.nationalgeographic.com/science/2019/10/sea-running-out-of-fish-despite-nations-pledges-to-stop/#close [https://perma.cc/R4UC-F7YG].

[87] U. Rashid Sumalia et al., *Global Fisheries Subsidies: An Updated Estimate*, 69 MARINE POL'Y 189, 190 (2016).

[88] *Id.*

Under the SCM Agreement, the WTO has jurisdiction over subsidies and subsidy disciplines, if they cause a trade distortion.[89] With that said, there is a looming question of whether the WTO is the proper forum to address a non-trade goal, such as the environmental goal of curbing overfishing,[90] or if that should be left to the UN.

Recognizing the problem of overfishing, the WTO launched fisheries subsidies negotiations in 2001, with a mandate that was further clarified in 2005 to call for "prohibiting certain forms of fisheries subsidies that contribute to overcapacity and overfishing."[91] The negotiations seek to rid of "harmful" fisheries subsidies, because without them, fishing would not be profitable.[92] Key players in the negotiations submitted proposals for their ideal fisheries subsidy agreement, but the major dilemma is converging these proposals because each key player essentially wants something different.[93] Twenty years later, these prohibited fisheries subsidies have yet to be negotiated into a final agreement.[94]

2. The World Trade Organization Dispute Settlement Process

A country can bring an action to the WTO "when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements or to be a failure to live up to obligations."[95] Although it is preferred that parties resolve the disputes themselves using

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89 Chang, *supra* note 81.

90 *Id.*

91 *Negotiations on Fisheries Subsidies*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm [https://perma.cc/AER2-Q66M] (last visited Dec. 27, 2021) (noting that fishing would decrease if it were no longer profitable).

92 Woody, *supra* note 86.

93 Mark Godfrey, *WTO Fishing Subsidies Deal Pushed to End of Year as Discord Divides Main Players*, SEAFOODSOURCE (Apr. 23, 2020), https://www.seafoodsource.com/news/environment-sustainability/wto-fishing-subsidies-deal-pushed-to-end-of-year-as-discord-divides-main-players [https://perma.cc/N5RK-8WCZ] (Big subsidizers, such as China, the European Union, and Japan, introduced proposals that allow them to keep their current subsidies or re-classify them as good subsidies.); *see also WTO Members Advance Text Negotiations on Fisheries Subsidies*, IISD (Oct. 6, 2020), https://sdg.iisd.org/news/wto-members-advance-text-negotiations-on-fisheries-subsidies/ [https://perma.cc/Y5L7-H936] (noting that members disagree on maintaining current subsidies, banning subsidies for fishing outside regulated waters, and determining which developing countries can maintain subsidies).

94 *WTO Members Agree on 2020 Work Programme to Advance Fisheries Subsidies Negotiations*, IISD (July 28, 2020), https://sdg.iisd.org/news/wto-members-agree-on-2020-work-programme-to-advance-fisheries-subsidies-negotiations/ [https://perma.cc/TK5J-9JSP].

95 *Understanding the WTO: Settling Disputes*, *A Unique Contribution*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm [https://perma.cc/6NDC-93UB] (last visited Dec. 27, 2021).

mediation and consultation, the WTO has a two-step system for solving disputes.[96] If the parties cannot resolve the dispute themselves, then the Dispute Settlement Body, which is made up of all member governments in the WTO,[97] establishes a panel, and the WTO Secretariat proposes nominations for the three-person panel.[98] The WTO Secretariat nominations cannot be opposed, except for "compelling reasons."[99] All parties must agree to the nominations, and if not, the Director-General appoints the panelists.[100]

The panelists hear the dispute through both written submissions and oral arguments and then issue a report,[101] which can be appealed to the Appellate Body.[102] Unlike the original panel, the Appellate Body's seven panelists are appointed solely by a consensus of the Dispute Settlement Body for a four-year term, which can lead to biases.[103] The Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the panel.[104] The Dispute Settlement Body must adopt, and the parties must accept, the

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96 *Id.*

97 *Dispute Settlement Body*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm [https://perma.cc/4ECZ-JP26] (last visited Dec. 27, 2021).

98 *The Process – Stages in a Typical WTO Dispute Settlement Case: 6.3 The Panel Stage*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p2_e.htm [https://perma.cc/W9Q5-K6XL] (last visited Dec. 27, 2021) (If both parties agree, the panel may be composed of five panelists, and the Secretariat nominates the panelists from an "indicative list of governmental and non-governmental individuals nominated by WTO Members, although other names can be considered as well.").

99 *Id.*

100 Joost Pauwelyn & Krzysztof J. Pelc, *Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement*, SSRN 2, 7 n.16 (Sept. 26, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458872 [https://perma.cc/9TVM-269S] (noting that the Dispute Settlement Understanding, the WTO's main agreement on settling disputes, directs the Director-General, who is the head of the WTO Secretariat, to consult with the Chairman of the Dispute Settlement Body and the Chairman of the relevant Council or Committee).

101 *Understanding the WTO: Settling Disputes, The Panel Process*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm [https://perma.cc/42RV-ZZUV] (last visited Dec. 27, 2021).

102 *The Process – Stages in a Typical WTO Dispute Settlement Case: 6.5 Appellate Review*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p1_e.htm [https://perma.cc/V23D-VY2N] (last visited Dec. 27, 2021) (stating that only parties to the dispute can appeal legal questions and panel interpretations).

103 U.N. Conference on Trade and Development, *Dispute Settlement: World Trade Organization, 3.3. Appellate Review*, ¶ 3, 9–10, U.N. Doc. UNCTAD/EDM/Misc.232/Add.17 (2003); *see infra* Part IV(B)(ii) for a discussion of biases.

104 U.N. Conference on Trade and Development, *supra* note 103, at 12–13.

panel or Appellate Body report.[105] The Dispute Settlement Body then issues a recommendation and ruling, in which the "losing" party has thirty days or a reasonable period of time to achieve compliance.[106] If the "losing" party does not comply, the complainant may receive compensation or implement trade sanctions.[107] In 2019, the Dispute Settlement Body did not reach a consensus with regards to appointing new members to the Appellate Body,[108] so there are currently no members on the Appellate Body.[109]

III. DISCUSSION

A. *Simple Solutions Cannot Currently Solve Overfishing*

To meet the increasing worldwide demand for fish while combating diminished fish populations, countries have been raising fish in "farms."[110] It is estimated the world's oceans have enough space to produce "more than 100 times the current global seafood con-

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105 *The Process – Stages in a Typical WTO Dispute Settlement Case: 6.6 Adoption of the Reports by the Dispute Settlement Body*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s6p1_e.htm [https://perma.cc/KYS7-6TK2] (last visited Dec. 27, 2021) (noting that the Dispute Settlement Body can decide by a consensus not to adopt the report within thirty days following its circulation to members).

106 *The Process – Stages in a Typical WTO Dispute Settlement Case: 6.7 Implementation by the "Losing" Member*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s7p1_e.htm [https://perma.cc/JP2G-L6M5] (last visited Dec. 27, 2021) (noting that a reasonable time period is only offered if immediate compliance is not possible).

107 *The Process – Stages in a Typical WTO Dispute Settlement Case: 6.10 Countermeasures by the Prevailing Member (Suspension of Obligations)*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm [https://perma.cc/6KNQ-6DDA] (last visited Dec. 27, 2021).

108 *WTO – Deadlock at the WTO Appellate Body: No Consensual Way Out in Sight*, BAKER MCKENZIE IMP. & TRADE REMEDIES BLOG (Dec. 12, 2019), https://www.internationaltradecomplianceupdate.com/2019/12/12/wto-deadlock-at-the-wto-appellate-body-no-consensual-way-out-in-sight/ [https://perma.cc/P7DJ-BUVD]; *see also* Pauwelyn & Pelc, *supra* note 100, at 3 (stating that the United States has been blocking the appointment of new members, and by the end of 2019, the Appellate Body will only have one member, instead of seven, which is less than the three panelists needed to decide an appeal).

109 *Appellate Body Members*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm [https://perma.cc/85YX-G9AC] (last visited Jan. 11, 2022).

110 Leah Douglas, *The Battle Over Fish Farming in the Open Ocean Heats Up, As EPA Permit Looms*, NPR (Sept. 18, 2019, 3:29 PM), https://www.npr.org/sections/thesalt/2019/09/18/761978683/the-battle-over-fish-farming-in-the-open-ocean-heats-up-as-epa-permit-looms [https://perma.cc/JPF4-JHWA] (noting that human consumption of fish has been growing, and a potential way to meet that demand is through fish farming).

sumption," but only a few countries are producing farmed fish in the oceans.[111] This type of fish farming is a difficult task and is filled with many hurdles. Aquaculture must be managed in a way to achieve sustainable growth, which includes spending more time, money, and effort to manage these farms.[112] There are environmental problems, as well. These include entire stocks contracting parasites or diseases and spreading them to the wild populations, pollution of fecal matter into the ocean, the use of pesticides and antibiotics contributing to bacterial resistance and threatening human health, and even the potential to overfish smaller fish stocks, like anchovies, to feed these fish farms.[113] For these reasons, a larger global solution must be implemented to save the fish.

B. *Failures and Successes of World Organizations' Current Strategies*

i. The United Nations: The United Nations Convention on the Law of the Sea and the Straddling Fish Stocks Agreement

UNCLOS might appear to be an effective solution to overfishing, given that countries can regulate and control activities within their exclusive EEZs, but in fact, UNCLOS has done little to help with overfishing. One problem is the limited 200-mile EEZ range. There is no way to enforce laws or regulations against vessels outside a state's 200-mile area, called the high seas, unless these vessels are flying the flag of the nation seeking to enforce its

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111 Jenny Seifert, *Offshore Farms Could Meet Global Fish Demand*, FUTURITY (Aug. 15, 2017), https://www.futurity.org/coastal-countries-aquaculture-1513892/ [https://perma.cc/6MRR-XK4Q].

112 FAO WORLD FISHERIES 2020, *supra* note 10, at 150 (noting that countries must use effective management of aquatic genetic resources for different stocks); *id.* at 190 (explaining that disease is a serious constraint to aquaculture development, and it takes time for countries to recognize the disease, identify it, confirm the causative agent, obtain global awareness, and establish and implement surveillance and reporting systems); *see also The Further from the Coast, the Higher the Cost*, EUROFISH MAG., https://www.eurofishmagazine.com/sections/aquaculture/item/203-the-further-from-the-coast-the-higher-the-cost [https://perma.cc/2UT6-5JUB] (last visited Dec. 27, 2021) (emphasizing the costliness of offshore farming with the need for more stable cages, more gas, and bigger boats to go out to the farms).

113 Marc Gunther, *Can Deepwater Aquaculture Avoid the Pitfalls of Coastal Fish Farms?*, YALE ENV'T 360 (Jan. 25, 2018), https://e360.yale.edu/features/can-deepwater-aquaculture-avoid-the-pitfalls-of-coastal-fish-farms [https://perma.cc/UVH6-B7MV].

laws.[114] To enforce their regulations, flag nations would need to patrol the seas and find vessels flying their flag, which is expensive and inefficient, especially considering that vessels flying the flag can fish far from the flag nation.[115] UNCLOS also failed to recognize that highly migratory fish stocks, such as tuna, swim between regulated and unregulated areas of the ocean,[116] but this issue was semi-resolved through the Straddling Fish Stocks Agreement.[117] Finally, countries' inability to develop long-term fishing plans for their respective EEZ lead to more fishing fleets and no economic incentives to reduce their catch.[118]

In theory, the Straddling Fish Stocks Agreement was meant to address the key issues of UNCLOS. It provided for broader enforcement mechanisms against other flag nations' ships fishing on the high seas,[119] better cooperation between member states on conservation of straddling fisheries in their EEZs,[120] and stronger conservation goals implemented into the dispute resolution mechanisms.[121] In reality, the Straddling Fish Stocks Agreement is just as weak as UNCLOS, in both enforcement mechanisms and the dispute resolution methods. Under the Straddling Fish Stocks Agreement, parties can enforce their regional or subregional agreements on other nations' fishermen.[122] The problem is that regulating states often ignore complaints of overfishing or illegal fishing, or if a state investigates the complaint, it often turns a blind eye to violations, rather than compel compliance with proper stan-

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114 Dieter, *supra* note 57, at 729–30 (noting that all commercial fishing vessels must fly the flag of a country in order to fish on the high seas, and a vessel can obtain a flag from any country; but those vessel's actions in the high seas are the responsibility of the flag country, so the flag country has the right to set regulations, board the vessel, and place sanctions on the vessel); *id.* at 730, n. 23.

115 *Id.* at 730 (An example is a United States flag vessel fishing the Atlantic Ocean near Iceland.).

116 *Id.* at 731 (finding that fishing vessels fished the outer edges of the EEZ, where they could not be regulated by any country but the one whose flag they fly, and flag countries are not likely to patrol these areas).

117 *See supra* Part II(B)(i)(1).

118 Derek J. Dostal, Comment, *Global Fisheries Subsidies: Will the WTO Reel in Effective Regulations?*, 26 UNIV. PA. J. INT'L ECON. L. 815, 823–24 (2005).

119 Dieter, *supra* note 57, at 732–33.

120 *Id.* at 731–32.

121 Tyler, *supra* note 62, at 57.

122 Dieter, *supra* note 57, at 732–33 (noting that nations are allowed to board another flag nation's ship to check for compliance with a regional or subregional fisheries management organization agreement, and these regional or subregional fisheries make binding determinations of the desired fishing quotas, the minimum standard of conduct on fishing vessels, and the health and virility of the fish stocks within their region).

dards.[123] Even worse, the Straddling Fish Stocks Agreement lacks a remedial system to force member-state compliance.[124] Similar to the scheme under UNCLOS, nations still must patrol both their EEZs and beyond to enforce compliance with their regulations, leading to issues of time, money, and effort, as described above.[125]

Because the Straddling Fish Stocks Agreement relies on regional and subregional fisheries organizations to manage and regulate fish stocks, it also relies on their dispute resolution provisions to first attempt to resolve disputes.[126] Many of these agreements incorporate UNCLOS dispute resolution provisions, "due to its status as a framework convention."[127] If a state attempts to force a non-party to comply with its organization's standards,[128] the dispute resolution method of the regional or subregional agreement would not be binding on it, although the non-party might still be subject to the UNCLOS dispute resolution process.[129] Even if the regional or subregional agreement does not incorporate UNCLOS dispute resolution provisions, under Article 30 of the Straddling Fish Stocks Agreement, parties can still be subject to the UNCLOS dispute resolution process and the exceptions it lists, as discussed below.[130]

If a dispute were to arise under UNCLOS or the Straddling Fish Stocks Agreement, the UNCLOS dispute resolution process does little to help resolve the dispute or enforce the agreement. The 168 parties to UNCLOS, which doesn't include the United States,[131] can use the treaty's dispute resolution process to protect their rights both under UNCLOS and regional or subregional fish-

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123 *Id.* at 733.

124 *Id.*

125 *Id.* at 730.

126 Fish Stocks Agreement, *supra* note 62, at art. 29.

127 Tyler, *supra* note 62, at 59.

128 Fish Stocks Agreement, *supra* note 62, at art. 17, ¶ 1 (noting that a state can take measures consistent with the Straddling Fish Stocks Agreement to deter the non-party's fishing activities).

129 John E. Noyes, *U.S. Policy and the United Nations Convention on the Law of the Sea*, 39 GEO. WASH. INT'L L. REV. 621, 633 (2007) (stating that nations, such as the United States, can accept provisions of UNCLOS dispute settlement through ratification of other agreements that incorporate UNCLOS dispute settlement provisions).

130 Fish Stocks Agreement, *supra* note 62, at art. 30 (Part XV of this Convention refers to UNCLOS Part XV, which is the Dispute Settlement section.); *id.* at art. 32 (stating that the exceptions listed in Article 297 of UNCLOS apply to the Straddling Fish Stocks Agreement).

131 UNCLOS is still awaiting Senate action since the agreement entered force. Roncevert Ganan Almond, *U.S. Ratification of the Law of the Seas Convention*, DIPLOMAT (May 24, 2017), https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/ [https://perma.cc/7XE2-PGPY].

eries management organizations.[132] As discussed in Part II of this Note, if parties fail to settle the dispute by their own peaceful means, they can choose one of UNCLOS's four judicial bodies to resolve their dispute.[133] To reiterate, the options are the ITLOS, the ICJ, the arbitration tribunal, or the special arbitration tribunal.[134]

1. The International Tribunal for the Law of the Sea

Although ITLOS has been the preferred UNCLOS method of dispute resolution, ITLOS mainly adjudicates disputes involving the release of foreign-flagged vessels rather than fisheries disputes.[135] ITLOS prompt release decisions are not always in unity with the goals of fisheries conservation, as demonstrated in the *Volga Case*.[136] In a regional fisheries management agreement—the Commission for the Conservation of Antarctic Marine Living Resources—the members, including Russia and Australia, set a harvest limit on the Patagonian toothfish.[137] Australian authorities, pursuant to the agreement, detained a Russian fishing vessel, the Volga, for illegally harvesting over one-hundred tons Patagonian toothfish.[138] Australia imposed substantial conditions for the release of the Volga and criminal charges pursuant to Australian law.[139]

Russia initiated proceedings before an ITLOS tribunal, arguing that Australia violated the UNCLOS Article 73(2) requirement to promptly release its vessels.[140] ITLOS sided with Russia and found Australia violated Article 73,[141] even though Australia was complying with the conservation of marine fisheries under Articles

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132 *Id.;* Tyler, *supra* note 62, at 59 (noting that many regional fisheries agreements incorporate UNCLOS dispute resolution provisions and bring fisheries disputes before UNCLOS tribunals).

133 Parties can choose from ITLOS, ICJ, arbitration, or special arbitration. UNCLOS, *supra* note 70, at art. 279, 287.

134 *Id.* at art. 287.

135 Douglas W. Gates, Comment, *International Law Adrift: Forum Shopping, Forum Rejection, and the Future of Maritime Dispute Resolution*, 18 CHI. J. INT'L L. 287, 300 (2017) (noting that the reason for this is ITLOS has sole jurisdiction to hear prompt release cases under UNCLOS).

136 *See* The "Volga" Case (Russ. Federation v. Australia), Case No. 11, Judgment of Dec. 23, 2002, ITLOS Reports 2002.

137 Tyler, *supra* note 62, at 62.

138 *Id.*; "Volga" Case, Case No. 11, at ¶¶ 30–35.

139 Tyler, *supra* note 62, at 62–63; "Volga" Case, Case No. 11, at ¶¶ 30–35.

140 Tyler, *supra* note 62, at 63 (referring to UNCLOS Article 73, which states that a state must promptly release a vessel once a "reasonable bond" was posted).

141 "Volga" Case, Case No. 11, at ¶ 89.

61 and 62 of UNCLOS.[142] This decision led to the conclusion that with conflicting values in UNCLOS, such as the protection of marine fisheries, other provisions, such as the prompt release of vessels, have more weight.[143] As a result, ITLOS's failure to enforce the conservation measures of both regional agreements and UNCLOS means "marine fisheries protection provisions are significantly reduced in strength."[144]

2. The International Court of Justice

The ICJ, the court within the body of the UN,[145] has only heard a small number of cases under UNCLOS since 1994.[146] The benefits of choosing the ICJ as a forum include application of other substantive sources of international law besides UNCLOS and application of UNCLOS to non-signatory states.[147] The ICJ jurisdiction only extends to states, so organizations, corporations, and individuals who violate UNCLOS are not subject to the elected judges' decisions.[148] The ICJ has also focused the majority of its UNCLOS work on maritime borders and resolving boundary delimitation, rather than addressing overfishing concerns.[149] In a case related to overfishing between Spain and Canada, the ICJ decided it lacked jurisdiction to adjudicate the case.[150] Canada, attempting to fix the collapse of its cod fisheries,[151] closed the fishery within its EEZ and impounded a Spanish fishing vessel fishing the stock just outside its EEZ.[152] The ICJ found that the dispute arose within the terms of the parties' regional fisheries management agreement,

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142 UNCLOS, *supra* note 70, at art. 61–62 (Article 61 is about the conservation of living resources and Article 62 is about the utilization of living resources.).

143 Tyler, *supra* note 62, at 63–64 (weighing the prompt release with the gravity of the offenses to analyze the reasonableness of the bond, which was AU$3,332,500, and compliance with the regional fishery agreement).

144 *Id.* at 64.

145 *International Court of Justice*, UNITED NATIONS, https://www.un.org/en/model-united-nations/international-court-justice [https://perma.cc/BTL2-4ZKP] (last visited Dec. 27, 2021).

146 Gates, *supra* note 135, at 298 (noting that the ICJ only heard ten cases under UNCLOS through 2017).

147 *Id.*

148 John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L. J. 109, 119 (1999).

149 Gates, *supra* note 135, at 301.

150 Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. 432, ¶ 87 (Dec. 1998).

151 *Bycatch Slows Recovery for Grand Banks Cod*, *supra* note 49 (discussing the collapse of the Canadian cod stock).

152 Jennifer L. Talhelm, *Curbing International Overfishing and the Need for Widespread Ratification of the United Nations Convention on the Law of the Sea*, 25 N.C. J. INT'L & COM. REG. 381, 406 (2000).

which did not include ICJ jurisdiction.[153] Because the ICJ is the judicial arm of the UN,[154] judges' knowledge of specific fisheries' issues might be limited. Given this potential issue, it makes sense that the ICJ was more willing to find a way to divert this overfishing dispute out of its court.

3. The Arbitration Tribunal

The third option—also the default option if parties cannot agree on a method—is the arbitration tribunal.[155] Despite arbitration offering increased confidentially, bars to third-party intervention, and better acceptance by domestic public opinion,[156] parties tend not to choose the arbitration tribunal to resolve their disputes.[157] Rather, the arbitration tribunal resolves most disputes because it is the default option.[158] In the *Southern Bluefin Tuna Case*, Australia and New Zealand brought their dispute against Japan to the arbitrational tribunal to halt Japan's overfishing of the bluefin tuna in accordance with their regional fisheries' management agreement.[159] The arbitration tribunal interpreted the regional fisheries' management agreement to require all parties to consent to the jurisdiction of the arbitration tribunal, and Japan did not meet this requirement.[160] This decision greatly undermined UNCLOS's dispute resolution process, as parties can now easily opt out of UNCLOS-based dispute resolution by adopting their own measures, and unwilling parties can frustrate efforts to resolve disputes.[161]

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153 Spain v. Can., 1998 I.C.J. at ¶ 87.

154 *The Court*, INT'L CT. OF JUST., https://www.icj-cij.org/en/court [https://perma.cc/N6MS-7LD2] (last visited Jan. 11, 2022).

155 UNCLOS, *supra* note 70, at art. 287.

156 Gates, *supra* note 135, at 305–06 (noting the advantages of arbitrations to other venues under UNCLOS).

157 *Id.* at 305 (ITLOS Judge, Tullio Treves, observed that if parties submitted an Article 287 selection, the vast majority opted for a method other than arbitration.).

158 *Id.* at 299.

159 *See generally* S. Bluefin Tuna Case (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, 23 R.I.A.A. 1 (Aug. 4, 2000) (concluding Australia and New Zealand couldn't bring temporary measures to halt Japan's fishing).

160 S. Bluefin Tuna Case, 23 R.I.A.A. ¶ 38, ¶ 57.

161 Tyler, *supra* note 62, at 61 (noting that if a regional fisheries management agreement provides for its own procedures, it condemns a party to that agreement "to an impossible course of action in the face of foot-dragging and delaying tactics by adversaries").

4. The Special Arbitration Tribunal

Although the parties have the fourth option of choosing the Annex VIII special arbitration panel if the dispute involves fisheries, marine scientific research, or protection and preservation of the marine environment,[162] no party has chosen this to resolve a dispute, and only eight UNCLOS parties selected Annex VIII as one of their preferred procedures.[163] Because parties can nominate experts in legal, scientific, or technical aspects of the field to the panel,[164] this forum appears to be the most beneficial in resolving fisheries disputes. Unlike the arbitration tribunal, where panelists are just experienced in maritime affairs, each party here benefits from nominating two experts from a wide range of specialties, which helps diversify the panel.[165]

This forum is not perfect, though. With four out of the five panelists nominated by the parties, the fifth panelist, agreed upon by the parties, would be the deciding factor in the dispute. An additional problem with the special arbitration tribunal is the specificity of disputes it can resolve.[166] Most of the disputes listed under Annex VIII easily fall within Article 297 exceptions to adjudication of a dispute under UNCLOS dispute settlement proceedings. Article 297 expressly provides that a state does not have to accept submission to UNCLOS dispute settlement if the dispute arises out of marine scientific research or fisheries in a state's EEZ,[167] which are two of the four categories the Annex VIII special arbitration panel can hear. This could be a reason why a party might not choose this method when resolving a dispute.

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162 UNCLOS, *supra* note 70, at art. 287, ¶ 1(d); Annex VIII.

163 Gates, *supra* note 135, at 299, n.73 (noting that its inclusion in the procedures was a concession to the then-Soviet bloc).

164 *See* UNCLOS, *supra* note 70, at Annex VIII, art. 1–2.

165 *See id.* at Annex VIII, art. 2, ¶ 2. Panelists are drawn from a list of experts in "fisheries by the Food and Agriculture Organization of the [UN], in . . . protection and preservation of the marine environment by the [UN] Environment Program[ ], in . . . marine scientific research by the Intergovernmental Oceanographic Commission, or in . . . navigation . . . by the International Maritime Organization. . . ." Compare this with the Arbitration Tribunal, which only has a list of arbitrators who are experienced in maritime affairs. *Id.* at Annex VII, art. 2, ¶ 1.

166 *See id.* at Annex VIII, art. 1 (stating that the only disputes this panel can adjudicate relate to fisheries, protection and preservation of the marine environment, navigation, or marine scientific research).

167 *Id.* at art. 297, ¶¶ 2–3.

5. Flaws with the United Nations Convention on the Law of the Sea

There are two major flaws with UNCLOS dispute settlement forums. The first, as stated above, is the list of explicit exceptions in Article 297 of UNCLOS, applicable to all four forums, which provides reasons why parties do not have to submit to the dispute resolution.[168] Among those enumerated, off-limit disputes include those arising out of conduct from research within a state's EEZ and disputes arising out of fisheries within a state's EEZ.[169] A problem with these exceptions is that a country can unilaterally destroy a stock within its EEZ without having to submit to jurisdiction if a dispute arises.[170] Even if an exception does not apply, another dilemma is that countries refused to submit to the jurisdiction of ITLOS, ICJ, or the arbitration tribunal, which significantly reduces their authority and ability to enforce judgments.[171]

In *Arctic Sunrise*, ITLOS determined it had jurisdiction over a dispute between Russia and the Netherlands because the dispute did not fall within Article 297's exceptions.[172] Russia refused to appear in court, and then refused to comply with the ITLOS order.[173] Following the ITLOS judgment in *Arctic Sunrise*, the Netherlands took to the arbitration tribunal, seeking a declaration that Russia violated international law.[174] Again, Russia refused to participate, leaving the Netherlands with an award and a declaration, and the burden of having to retreat back to the arbitration tribunal in 2017 to again order Russia to pay the award.[175] In another fishing dispute, China followed Russia's lead, declining to

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168 Gates, *supra* note 135, at 311.

169 *Id.*; UNCLOS, *supra* note 70, at art. 297, ¶¶ 2–3.

170 An example of a potential dispute would include a regional fisheries management agreement setting terms for fishing a stock, but a country sets contradictory limits within their EEZ and depletes the stock.

171 The special arbitration tribunal hasn't adjudicated any disputes, so it is unclear whether a similar disrespect exists.

172 *See generally* The "Arctic Sunrise" Case (Neth. v. Russ.), Case No. 22, Order of Nov. 22, 2013, ITLOS Rep. 230 (The Netherlands brought case before ITLOS for prompt release of its vessel seized by Russia when it staged a protest of the Russian oil platform.).

173 *Id.* at ¶¶ 30, 32; Gates, *supra* note 135, at 311–12 (noting the order for an immediate release of the vessel and the non-Russian crew members in return for a £3.6 million security bond, pending arbitration).

174 Gates, *supra* note 135, at 312; *see* The Arctic Sunrise Arbitration (Neth. v. Russ.), Perm. Ct. Arb. Case No. 2014-02, Award of Aug. 14, 2015.

175 *See* The Arctic Sunrise Arbitration (Neth. v. Russ.), Perm. Ct. Arb. Case No. 2014-02, Award of Jul. 10, 2017, at ¶ 128. It appears that Russia and the Netherlands reached a settlement agreement in 2019 for much less than the tribunal awarded in 2017. *Russian-Dutch Settlement on Arctic Sunrise is a Recognition of International Law*, RAAM OP RUSLAND (May 22, 2019), https://

submit to the arbitration tribunal's jurisdiction[176] and ignoring the final award supporting the Philippine's position.[177]

It is clear that the UN lacks the power it needs to adjudicate disputes between parties. Global powers can and have ignored jurisdiction of an UNCLOS forum, especially when these decisions have "not been known to yield favorable results for major global powers."[178] Even though UNCLOS can arm a less powerful nation's claim with legitimacy against more powerful nations, UNCLOS lacks enforcement measures and UNCLOS signatories do not apply diplomatic pressure to enforce judgments.[179] This leaves parties with an award, but no way to retrieve it, and countries will have little incentive to bring disputes under a UNCLOS forum. Despite many forums for recourse, UNCLOS fails to provide a strong, reliable dispute resolution option that parties can use when faced with fisheries disputes.

ii. The World Trade Organization

1. Jurisdiction Over Fisheries Subsidies and Current Negotiations for Fisheries Subsidies

Because Part IV will assume that fisheries subsidies offer a solution to overfishing, it is important to briefly discuss the issues that have and will arise with fisheries subsidies in the WTO. WTO member countries disagree over subsidy classification and which governmental actions classify as a subsidy under the SCM Agreement.[180] For example, it is unclear if constructing an artificial reef or providing reduced fees for foreign nationals to access domestic waters are classified as subsidies under the SCM Agreement.[181] One issue that would likely arise is classification of governmental inaction, where the government "fail[s] to take any action to provide appropriate environmental laws or regulations," as an implicit

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www.raamoprusland.nl/dossiers/nederland-en-europa/1297-russian-dutch-settlement-on-arctic-sunrise-is-a-recognition-of-international-law [https://perma.cc/E5QF-J7PL].

176 Gates, *supra* note 135, at 314, 316; *see* The South China Sea Arbitration (Phil. v. China), Perm. Ct. Arb. Case No. 2013-19, Award on Jurisdiction and Admissibility, October 29, 2015, at 149, https://pcacases.com/web/sendAttach/2579 [https://perma.cc/545F-JTP7].

177 Gates, *supra* note 135, at 316.

178 Julia Y. Yang, *Lessons from the South China Sea Ruling: Med-Arb as the Recommended Dispute Resolution Method for Asia's Maritime Disputes Under UNCLOS*, 19 CARDOZO J. CONFLICT RESOL. 783, 795 (2018).

179 *Id.* at 795–96.

180 *See* Godfrey, *supra* note 93.

181 *See* Chang, *supra* note 81, at 894, 899 for a further discussion on the classification of governmental actions involving fisheries.

subsidy.[182] To bring a claim for this inaction, it either must be classified as a subsidy under the SCM Agreement or a governmental measure, subject to the WTO dispute settlement.[183] This dilemma must be addressed in the fisheries subsidies negotiations because this lax law enforcement allows fishing fleets to continue to fish at their current rates.

In addition, a fundamental question is whether the WTO is the appropriate forum to consider environmental matters that do not necessarily have a trade relation.[184] Although fisheries subsidies may cause trade distortions and could fall under the SCM Agreement, the WTO would be providing an environmental judgment and deciding which fisheries subsidies cause over-exploitation.[185] Members of the WTO are currently proposing elimination of "bad" fisheries subsidies,[186] but eliminating fisheries subsidies might not be the best solution considering how heavily fishermen, especially those in developing countries, rely on subsidies to make a living. The businesses of most of these fishermen would not be profitable without subsidies, although removal of these subsidies for large industrial fleets might actually benefit small scale fishermen.[187]

The WTO traditionally has two sets of rules for developed and developing countries. It would not be surprising to see unanimous support for a different subsidy approach for developing countries to facilitate their economic development.[188] There are a multitude of issues with this special and differential treatment for fisheries subsidies, though, including the overall environmental benefit of eliminating the harmful subsidies. Fish in the ocean are not limited by borders and holding some countries to a lower standard would reverse the goal by allowing developing countries to continue to exploit fish populations in the oceans. Additionally, China considers itself a developing country and is a strong proponent of special and differential treatment for subsidies, even though China contin-

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182 *Id.* at 896.

183 *Id.*

184 *Id.* at 915–16.

185 *Id.* at 916.

186 *See supra* Part II(B)(ii)(1) for a discussion of the WTO fisheries subsidies proposals.

187 Alice Tipping & Tristan Irschlinger, *25 Reasons Why the WTO Must End Subsidies That Drive Overfishing*, IISD (Nov. 2, 2020), https://www.iisd.org/articles/25-reasons-wto-stop-funding-overfishing [https://perma.cc/6BGS-YE3C] (It is estimated that most subsidies make up half of the income of industrial fishing vessels rather than small-scale fishermen.).

188 James Bacchus & Inu Manak, *The Fate of the WTO and Global Trade Hangs on Fish*, FOREIGN POL'Y (May 5, 2020, 8:16 AM), https://foreignpolicy.com/2020/05/05/wto-global-trade-fisheries-fishing-subsidies/ [https://perma.cc/V6RR-2Y78].

ues to be a world leader in fish exports.[189] Countries are reluctant to give up subsidies, and an agreement must unanimously be reached by all 164 WTO member countries, including those that are landlocked.[190] Negotiations regarding fisheries subsidies have been ongoing for over twenty years now, and it does not appear that the WTO will come to a resolution by the end of 2021.[191] Failing to successfully conclude fisheries subsidies negotiations will not only be bad for marine fish stocks but will also negatively affect the credibility of the WTO.[192]

2. The World Trade Organization Dispute Resolution

The WTO dispute panel can adjudicate disputes arising under both regional trade agreements and WTO obligations.[193] Although it is beneficial to have a universal dispute resolution process to ensure consistency for all regional trade agreements, the WTO has problems with its ability to resolve these disputes. If a party to a dispute chooses the WTO as the forum, the party may also adjudicate the dispute in another forum at any time, in accordance with its regional trade agreement.[194] This has subjected parties to conflicting binding decisions: one from the WTO and one from the regional trade agreement dispute forum.[195] A WTO member must meet its obligations under the WTO, even if that means non-com-

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189 *Id.*; Carney, *supra* note 1.

190 Bacchus & Manak, *supra* note 188.

191 Tristan Irschlinger, *WTO Members Continue Fisheries Talks as 2020 Deadline Looms*, IISD (Nov. 9, 2020), http://sdg.iisd.org/commentary/policy-briefs/wto-members-continue-fisheries-talks-as-2020-deadline-looms/ [https://perma.cc/T93N-T8TQ] (noting that the last meeting for fisheries subsidies was planned for the week of November 30, 2020, and quick and significant intensification of negotiations was required to reach the 2020 deadline). The 2020 negotiations were postponed to November 30, 2021, and then postponed again due to renewed travel restrictions from the Covid-19 pandemic, and no new date has been set. Frederik Scholaert, *WTO Negotiations on Fisheries Subsidies*, Think Tank Eur. Parliament (Dec. 9, 2021), https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)698842 [https://perma.cc/BT9M-LWW6].

192 World Trade Organization, WTO Contribution to the 2020 High Level Political Forum 2 [¶ 1.12]. (2020), https://sustainabledevelopment.un.org/content/documents/26126WTO_HLPF_Input_2020.pdf [https://perma.cc/A36E-MNTD].

193 Donald McRae & John Siwiec, *NAFTA Dispute Settlement: Success or Failure?*, La Biblioteca Jurídica Virtual de Insituto de Investigaciones Jurídicas de la UNAM 364, 381 (2010), https://archivos.juridicas.unam.mx/www/bjv/libros/6/2904/21.pdf [https://perma.cc/8EQC-VJ43] (noting that the WTO provides an alternative forum for disputes that arose under the North American Free Trade Agreement).

194 *Id.* at 382.

195 *Id.* at 384. For example, in 2007, the WTO Appellate Body issued a decision that placed Brazil in a position where compliance with a ruling of a regional trade agreement tribunal, the Mercosur tribunal, would lead to Brazil violating its WTO obligations. *Id.*

pliance with its obligations under a regional trade agreement.[196] If a regional trade agreement dispute forum issues an unfavorable result, a party can obtain an additional judgment from the WTO,[197] which would trump the regional trade agreement and eventually lead to the demise of these vital regional trade agreements.[198]

Moreover, there are inherent problems with the structure and process of the WTO dispute settlement proceedings. The first is that many members make frequent, extensive use of the ability to oppose nominations of panelists for compelling reasons.[199] When this occurs, there is no review of whether the reasons are truly compelling, but rather, the Secretariat just proposes other names.[200] The full dispute settlement procedure takes a considerable amount of time, during which the complainant continues to suffer economic harm.[201] This can further unnecessarily delay the dispute resolution process by over twenty days, when at that time, the Director-General may appoint the panelists.[202] There is an additional problem with the appointment of panelists. Unlike in the United States Supreme Court, where justices appoint their clerks, in the WTO, the WTO staff, as part of the Secretariat, proposes and appoints panelists.[203] Once in place, the panelists control the WTO staff assisting them, but panelists are well aware that they owe their appointment on the panel, in some part, to the WTO

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196 *Id.* at 384.

197 *Id.*

198 *See* Kathleen Claussen, *Stocktaking and Glimpsing at Trade Law's Next Generation*, 111 AM. SOC'Y INT'L L. PROC. 92, 93 (2017) (noting the importance of regional and bilateral trade agreements, in that they "have eclipsed the WTO in some elements of importance, not all economic."). If the WTO dispute settlement body continues to decide that compliance with WTO obligations is more important, regional trade agreements will become obsolete, even though these agreements benefit the parties, both in economics and policy.

199 *The Process – Stages in a Typical WTO Dispute Settlement Case: 6.3 The Panel Stage*, *supra* note 98.

200 *Id.*

201 *Evaluation of the WTO Dispute Settlement System: Results to Date: 12.3 Strengths and Weaknesses*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c12s3p1_e.htm [https://perma.cc/JF9U-FWXK] (last visited Dec. 27, 2021).

202 *The Process – Stages in a Typical WTO Dispute Settlement Case: 6.3 The Panel Stage*, *supra* note 98 (noting that if there is no agreement between parties on panelists within twenty days after the establishment of the panel by the Dispute Resolution Body, a party can request the Director-General appoint panelists).

203 Pauwelyn & Pelc, *supra* note 100, at 7. The WTO Secretariat, composed of hundreds of staff, proposes the nominations for potential panelists to hear disputes. *WTO Bodies Involved in the Dispute Settlement Process: 3.2 The Director-General and the WTO Secretariat*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s2p1_e.htm [https://perma.cc/V4UX-ZU65] (last visited Dec. 27, 2021).

staff now helping them.[204] Panelists looking to be re-appointed may have an incentive to avoid "ruffling the WTO staff's feathers, and to gratefully receive Secretariat proposals and drafts."[205]

The most vital dilemma facing the WTO right now is the collapse of the Appellate Body. Since 2016, when the United States began vetoing the appointment of Appellate Body panelists, the WTO dispute settlement process has severely weakened its ability to resolve trade disputes among members.[206] Even though the dispute panels can continue to hear cases, appealed cases remain in limbo and panel decisions are unenforceable.[207] This is because a country that loses at the panel stage could forestall any outcome by simply appealing the decision, knowing the Appellate Body lacks the requisite quorum of three panelists to hear their appeals.[208] As of 2021, WTO members have not yet agreed on reforms for the Appellate Body to preserve the appeals process.[209]

Although there are flaws to the WTO dispute settlement process, and although it has been greatly weakened through the lack of an Appellate Body, there are aspects of the WTO dispute resolution process that have been key to its success. A party can never block an entire panel proceeding by delaying the formation of the panel.[210] One party can request intervention by the Director-General to appoint panelists, so the huge hurdle that arises in other international dispute resolution systems of blocking panel nominations is overcome.[211] Another benefit of the WTO is a country's ability to take retaliation measures.[212] These retaliation measures

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204 Pauwelyn & Pelc, *supra* note 100, at 7.

205 *Id.*

206 Ian F. Fergusson, *Dispute Settlement in the WTO and U.S. Trade Agreements*, CONG. RSCH. SERV. (Feb. 1, 2021), https://fas.org/sgp/crs/row/IF10645.pdf [https://perma.cc/3KM8-VGSX].

207 *Id.*

208 Jennifer Hillman, *Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad, and the Ugly?*, INST. INT'L ECON. L. 1, 2 (2018) (noting that when a party appeals, the decision of the panel cannot be affirmed until the appeal is complete).

209 Bryce Baschuk, *Biden's Nominee to WTO Wants to Restore Appellate-Body Function*, BLOOMBERG (Oct. 26, 2021, 11:30 AM), https://www.bloomberg.com/news/articles/2021-10-26/biden-s-nominee-to-wto-wants-to-restore-appellate-body-function [https://perma.cc/FA4Q-QECM].

210 *The Process – Stages in a Typical WTO Dispute Settlement Case: 6.3 The Panel Stage*, *supra* note 98.

211 *Id.* Under the North American Free Trade Agreement, although no longer in force as of 2020, parties could block nominations, leading to the inevitable delay of resolving the dispute. McRae & Siwiec, *supra* note 193, at 373.

212 *Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/

must be approved by the Dispute Settlement Body prior to enactment, but once they are approved, these countermeasures induce compliance.[213]

Additionally, rather than proceed through a lengthy dispute resolution process, the WTO allows for imposition of sanctions in furtherance of an environmental goal, if certain conditions are met.[214] In an instance related to fisheries, the Appellate Body upheld the United States's imposition of an import ban on shrimp if the shrimp were caught in a way that endangered sea turtles.[215] This could be extremely useful for parties seeking to enforce compliance with fisheries subsidies. The WTO also provides arbitration. Arbitrators are available at every stage to adjudicate questions, or are even available as an alternative to adjudication by panels and the Appellate Body. However, arbitration was resorted to in only one dispute and was not used as an alternative to a panel.[216] A party subject to retaliation, such as sanctions, after a panel report is adopted can "request arbitration if it objects to the level or nature of the retaliation proposed" if there is no compliance within a reasonable time period.[217] This is beneficial, as a

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c7s1p1_e.htm [https://perma.cc/3HPF-6TKL] (last visited Dec. 27, 2021) (Retaliation measures can only be taken if the "losing country" does not provide compensation for failure to bring the WTO-inconsistent measure into conformity.).

213 *The Process – Stages in a Typical WTO Dispute Settlement Case: 6.10 Countermeasures by the Prevailing Member (Suspension of Obligations)*, *supra* note 107. An example of a successful retaliation is the United States suspension of $191.4 million per year of tariff concessions to the European Communities for the European Communities' failure to comply with the Appellate Body's decision; European Communities consistently failed to comply with the WTO banana import regime. Robert Read, *The Anatomy of the EU-US WTO Banana Trade Dispute*, 2 ESTEY J. INT'L L. & TRADE POL'Y (2001), https://www.iatp.org/sites/default/files/Anatomy_of_the_EU-US_WTO_Banana_Trade_Dispute_.htm [https://perma.cc/WE56-UM45]; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 3–4, WTO Doc. WT/DS27/AB/RW/USA (adopted Nov. 26, 2008).

214 To be eligible to impose this environmental trade sanction without Dispute Settlement Body authorization, "WTO members must engage in good faith, multilateral negotiations that allow flexibility in arriving at conservation measures among differently situated members." Tyler, *supra* note 62, at 88.

215 *See* Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (decided Oct. 12, 1998) (adopted Nov. 6, 1998); Panel Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R (decided May 15, 1988) (adopted as modified by the Appellate Body Nov. 6, 1998).

216 *Dispute Settlement Without Recourse to Panels and the Appellate Body: 8.2 Arbitration Pursuant to Article 25 of the DSU*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c8s2p1_e.htm [https://perma.cc/V9FU-CVUJ] (last visited Dec. 27, 2021).

217 *WTO Bodies Involved in the Dispute Settlement Process: 3.5 Arbitrators*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s5p1_e.htm [https:/

neutral party gives a binding determination about whether retaliation measures are equivalent to the level of nullification or impairment.[218] These tactics should be used more often, especially when environmental issues are involved.

IV. Proposal

A. *Incentivizing Good Subsidies and Enforcing Compliance Through the Generalized System of Preferences*

Global fisheries subsidies "plainly contribute to the artificial growth of the global fishing industry."[219] Without the broad range of subsidies—from vessel construction to providing ice, fuel, or navigational devices—many fishing fleets would not exist, especially those in China.[220] These subsidies make it less costly and more profitable to fish, removing market forces that naturally solve supply and demand issues.[221] Without these fisheries subsidies, the market forces that normally encourage cutting back on fish catch kick into place, as the fish resources become more scarce and costly to catch and sell.[222] Additionally, with large fishing fleets deprived of harmful fisheries subsidies causing a distorted access to marine resources, local fishermen will be encouraged to fish, as there will be less industrial fleets scooping the fish out of the water.[223]

/perma.cc/YJA4-NY24] (last visited Dec. 27, 2021) (Arbitration can also be requested to establish a reasonable period of time granted to the respondent for implementation of the panel report.).

218 *The Process – Stages in a Typical WTO Dispute Settlement Case: 6.10 Countermeasures by the Prevailing Member (Suspension of Obligations)*, *supra* note 107 (noting that either the original panel that adjudicated the dispute carries out the arbitration or the Director-General appoints an arbitrator so as to avoid delay of decision).

219 Derek J. Dostal, *Conference: The World Trade Organization at a Crossroads: Comment: Global Fisheries Subsidies: Will the WTO Reel in Effective Regulations?*, 9336 U. Pa. J. Int'l Econ. L. 815, 834 (2005).

220 *See supra* Part I.

221 Margaret Borman, *Can Governments Encourage a Reduced Fish Harvest to Allow Global Stocks to Regenerate Their Numbers?*, 15 J. Env't L. & Litig. 127, 140 (2000).

222 *Id.* at 140. Without subsidies, when the supply of fish decreases, the cost of fish increases, as fishermen cannot rely on subsidies for operating costs. In theory, fishermen raise fish prices to cover the new costs, which leads to less consumers buying fish, decreasing demand. Thus, fishermen would catch less fish to prevent waste. Also, reducing fisheries subsidies discourages fishermen from entering the fishing industry and "fishing the same overfished and depleted stock," as profitability will decrease without governmental subsidies. Dostal, *supra* note 219, at 834–35.

223 Tipping & Irschlinger, *supra* note 187.

Because subsidies play such a vital role in the sustainability of the fishing industry, removing subsidies, whether "good" or "bad," would be devasting.[224] Assuming the WTO successfully classifies the subsidies, the fisheries subsidy agreement should not prohibit the "harmful" subsidies, but gradually eliminate them, replacing them with "good" subsidies that incentivize a reduced catch and sustainable fishing practices.[225] This will allow fishermen and those whose jobs revolve around the fishing sector to continue to make a living, while also promoting sustainable fishing practices.[226]

Additionally, developed countries should use the Generalized System of Preferences ("GSP") to incentivize compliance by the 120 developing countries with the WTO fisheries subsidies agreement.[227] In GSP provisions, developed countries grant tariff concessions or zero-tariff market access to certain products originating in developing countries, and in return, developing countries must meet a conditionality requirement to receive the concession.[228] Although each developed country establishes its own "criteria and conditions for defining and identifying developing country beneficiaries,"[229] for fisheries subsidies and unsustainable fishing, countries would be encouraged to follow Japan's GSP program. Under Japan's GSP program, a beneficiary loses GSP benefits for certain products if a regional fisheries management organization finds the beneficiary to be against the conservation of a fish species.[230] With fisheries subsidies, developing countries or territories would be required to report their fisheries subsidies to the president of the special arbitration panel in the WTO.[231] If a developing country or territory does not report, falsely reports, or is not following the WTO fisheries subsidies guidelines, it would lose its GSP status for

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224 *See supra* Part III(B)(ii)(1) for a discussion on the effects of eliminating fisheries subsidies.

225 Borman, *supra* note 221, at 140; *see also* Dostal, *supra* note 219, at 836 (explaining that "completely abolishing subsidies would have an enormously negative impact on the fishing industry. . . .").

226 This Note will not propose classification of the specific subsidies that are "good" and "bad," but rather assume the WTO successfully managed to do this, despite the concerns of the WTO classifying the subsidies.

227 Vivian C. Jones, *Generalized System of Preferences (GSP): Overview and Issues for Congress*, CONG. RSCH. SERV. (Nov. 7, 2019), https://www.everycrsreport.com/files/20191107_RL33663_54e86255d32f4a7f493c44d4174356b3c34e2806.pdf [https://perma.cc/7SBB-Y3GW] (noting that 120 developing countries and territories are GSP beneficiary developing countries).

228 Suyash Paliwal, *Strengthening the Link in Linkage: Defining "Development Needs" in WTO Law*, 27 AM. UNIV. INT'L L. REV. 37, 41 (2012).

229 Jones, *supra* note 227, at 5.

230 *Id.* at 9.

231 *See infra* Part IV(B)(i).

trade. This would incentivize subsidy reporting and compliance with WTO requirements in order to receive these other trade benefits.

The negotiations surrounding the agreement on fisheries subsidies in the WTO are complex, as shown by the fact that the WTO has spent two decades attempting to reach an agreement on fisheries subsidies.[232] Instead of discussing how the WTO can negotiate a solution, this Note will assume that the WTO has successfully reached a multilateral agreement on fisheries subsidies, including a gradual implementation of turning "harmful" subsidies into "beneficial" subsidies and inclusion of the GSPs into the agreement.[233]

B. *A Special Arbitration Panel for Fisheries Subsidies Disputes*

i. A Special Arbitration Panel in the World Trade Organization

The best and most efficient mechanism to solve fisheries subsidies disputes is a special arbitration panel in the WTO. Fisheries subsidies disputes are unique in that they include both environmental and trade aspects. A special arbitration panel comprised of panelists who are knowledgeable on both of these issues is vital in adjudicating these disputes. The WTO has the authority to arbitrate fisheries subsidies disputes because fisheries subsidies not only affect trade, but are also considered a governmental measure.[234] Like the WTO's Director-General, a president appointed by a majority of the WTO members will govern the implementation of the fisheries subsidies agreement, as well as oversee the special arbitration panel. The criteria are lengthy for appointment of the president, including experience working with trade agreements and dispute settlement. Environmental experience is not a requirement, though, as this is a WTO agreement, where experience in trade and dispute settlement is vital to WTO dispute adjudication.

Fisheries subsidies attempt to address overfishing, which is an environmental problem. Therefore, the international organization responsible would be the UN. Because the idea for this special

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232 *See generally* Julia Kindlon, *Can Fish Save the WTO: Current Problems and Potential Outcomes of the WTO Fisheries Subsidies Negotiations*, 28 N.Y.U. ENV'T L. J. 282 (2020) for a discussion on the complexity of the WTO fisheries subsidies negotiations.

233 Multilateral agreements between the WTO member countries create binding obligations for all WTO members. *Id.* at 306, 311.

234 *See* Chang, *supra* note 81.

arbitration forum is based on UNCLOS Annex VIII, this fisheries subsidies special arbitration forum might be placed within the UN, essentially under UNCLOS, adding it as a mandatory forum for fisheries disputes in Part XV.[235] UNCLOS directly addresses the environmental problem of overfishing,[236] which is also an issue that fisheries subsidies hope to address.[237] Because the WTO plays a large role in the implementation of SDG 14,[238] there is a logical connection to placing the special arbitration forum within the UNCLOS framework.

Two major problems arise if this special arbitration forum were placed under the UNCLOS framework. The first is the UN's clear lack of authority and the complete disrespect many countries, especially the major world players, have for this organization.[239] Placing the special arbitration panel within the UN could potentially lead to the same failures the other dispute resolution forums encountered.[240] The second major issue is that the UN has different members than the WTO, and the fisheries subsidies agreement is between WTO members.[241] While the special arbitration panel can address issues with any country, moving the location of the panel to a completely different organization seems illogical.[242] The organization that created the fisheries subsidies agreement should have the forum for dispute resolution.

Because the fisheries subsidies are negotiated within the WTO, the logical conclusion is to also have the dispute resolution process in the WTO, as the parties to the WTO have already agreed to this forum. The WTO addresses disputes based on WTO agreements, as well as disputes based on regional trade agreements, such as the North American Free Trade Agreement ("NAFTA").[243] It is key to choose a forum that can adapt to different types of agreements if this special arbitration panel will re-

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235 UNCLOS, *supra* note 70, at Part XV.

236 *Id.* at Part V (Articles 61, 62, and 65 specifically address aspects of overfishing).

237 Woody, *supra* note 86.

238 *The WTO's Contribution to Achieving the SDGs*, *supra* note 56.

239 *See supra* Part III(B)(i)(5) for a complete discussion about countries such as China, Russia, and the United States blatantly ignoring the authority of UNCLOS and diminishing its power to adjudicate disputes.

240 *See supra* Part III(B) for a complete discussion about UN jurisdictional and enforcement issues.

241 For example, the United States is member of WTO but not a member of UNCLOS.

242 Issues could arise with interpretation of the agreements, including holding different countries accountable, the varying structure, and the procedures in both organizations.

243 McRae & Siwiec, *supra* note 193, at 383 (noting that a regional trade agreement dispute under NAFTA could subsequently be brought before the WTO).

solve all WTO agreement fisheries subsidies disputes and all fisheries subsidies disputes arising from regional agreements. The main concern with implementing this special arbitration forum in the WTO is that the WTO dispute resolution process is crumbling.[244] It is also a concern that WTO members could spend just as long implementing the special arbitration forum as they have spent attempting to reach an agreement on fisheries subsidies.

ii. Panelist Composition and Selection for the Special Arbitration Panel

The special arbitration panel will consist of seven members to avoid one panelist determining the results.[245] Similar to the special arbitration panel in UNCLOS, each party will nominate two members,[246] presumably one economics expert and one fishery/environmental expert. Parties may not veto each other's appointments. Due to the issues with the WTO Secretariat appointing members to the dispute resolution panel, including favoritism and bias, the process and criteria for each party's two panel members will be the same as stated in UNCLOS.[247] Because the UNCLOS process has not been used for selection of specialists under Annex VIII, there is little critique of it.[248]

The president of the special arbitration panel will select three other panel members from a predetermined list of panelists created by a majority of the WTO members. This is similar to the process for nominating panelists in the WTO, but rather than delay the proceeding further with parties objecting to each other's nominations, the president will select the panelists. The list the president chooses from will consist of at least twenty-five potential panelists, all of whom have a mix of environmental and economic backgrounds. The president will choose at least one panelist who is an environmental specialist and one who is an economic or trade specialist. The third panelist can be whomever the president finds is best suited for the dispute. The WTO members will have a list of criteria to select the potential panelists for the predetermined list.

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244 *See supra* Part III(B)(ii)(2) for a discussion on the failures of the WTO dispute resolution forum.

245 *See supra* Part III(B)(i)(1) for a discussion on the difficulty with five panelists in UNCLOS.

246 *See* UNCLOS, *supra* note 70, at Annex VIII, art. 3, ¶ b.

247 *Id.*

248 *See supra* Part III(B)(i)(4) for a discussion of the UNCLOS Special Arbitration Forum; Gates, *supra* note 135, at 316.

Having a structure with these seven panelists—presumptively three economists, three environmentalists, and an extra panelist—allows for all aspects of the dispute to be considered during arbitration, with different opinions and thoughts from the panelists being expressed on each of the areas in which they specialize. It is important that there is enough representation of both environmentalists and economists on this panel, because as stated above, fisheries subsidies have both environmental and economic impacts. Having three panelists that specialize in each area, appointed from three different parties, allows for a complete discussion and analysis of the effects of the subsidies on trade and overfishing, without any bias.

iii. Adjudication of Disputes in the Special Arbitration Panel

Any dispute regarding fisheries subsidies will be brought to the special arbitration panel, including those disputes between parties who are not members of the WTO. This is similar to the UN Straddling Fish Stocks Agreement, but here, countries are accountable for the subsidies obligations in the WTO agreement and there is a dispute resolution process.[249] The reason behind subjecting the parties who are not WTO members to this process is the need for consistency. With the increase in popularity of regional and bilateral agreements,[250] there must be a single body adjudicating disputes over fisheries subsidies. Without one special arbitration panel for all fisheries subsidy disputes, there is the potential for every dispute to have a different outcome, leading to different rules, regulations, and behaviors, as well as no precedent to follow. Similar to UNCLOS, the arbitration panel can arm a less powerful nation with legitimacy against more powerful nations,[251] so all nations can bring claims with ease and confidence.

Given that this panel will be the sole adjudicator of fisheries subsidies disputes, any country or territory with a concern over another's fisheries subsidies will bring a claim to this panel. Claims regarding fisheries subsidies can be brought to a dispute settlement procedure from a bilateral or regional agreement, but this arbitration panel will always supersede any decision made by another forum regarding fisheries disputes. This includes decisions that indirectly supersede another forum's decision, as well as any judgments that are brought to this panel in conjunction with, or in addi-

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249 *See supra* Part II(B)(i)(1) for a discussion of the Straddling Fish Stocks Agreement.

250 Claussen, *supra* note 198, at 94.

251 Yang, *supra* note 178, at 795–96.

tion to, another forum. This solves the possibility of conflicting results.[252]

Every country or territory will be required to report its fisheries subsidies to the president of this special arbitration panel. Unlike the forums in the WTO and under UNCLOS, the president of the special arbitration panel will be authorized to bring a claim against a country or territory for failure to abide by the obligations in the WTO agreement, for failure to report, or for failure to report accurately. If the president brings a claim, they must obtain the support of another country or territory in order to proceed. Once a country or territory agrees to help bring the claim, the matter will proceed as normal, with the two countries or territories choosing the panel members and the president choosing the other members. It is important for the president to have the ability to initiate a claim, because they obtain the fisheries subsidies reports, but it must be a country or territory that is the party to the dispute, in order to ensure consistency with proceedings in the panel.

Unlike in the WTO and under UNCLOS, parties will not be obligated to first resolve their dispute using peaceful means, such as mediation, negotiation, or consultation.[253] Because the effects of overfishing are immediate, the dispute resolution process must be a quick and efficient process. By the time parties would complete negotiations or mediation, if they ever reach a compromise, a fish species could be depleted. This special arbitration panel is the best solution, as it would be able to quickly solve these disputes because its only focus is on fisheries subsidies. Fisheries subsidies have both environmental and economic aspects, so a neutral third panel must adjudicate the dispute—ensuring that there will be experience on this panel on all sides of the dispute. Additionally, if a country is found to be overfishing, immediate action is required. A country can implement trade sanctions as a means of hindering fisheries subsidies, and disputes regarding those sanctions can be brought to this panel for adjudication.[254] A country can also ask the president to set up a panel to review its fisheries subsidies, with the potential to request additional subsidy approval. This will be on a case-by-case basis.

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252 *See supra* Part III(B)(ii)(2) for a discussion on the potential for conflicting results in the WTO and other forums.

253 *See supra* Part II(B)(i)(1) and Part II(B)(ii)(2) for information on how parties are to first resolve their disputes under UNCLOS and in the WTO.

254 This is similar to the *Shrimp-Turtle Dispute* trade sanctions.

iv. Special Arbitration Panel Judgments and Enforcement of Decisions

The panel will follow written guidelines for assessing claims against countries, which will be created by the panel and approved by the WTO members. When claims are brought against a country, organization, or individual, the panel will use the guidelines to assess if the subsidy violates the agreement, the degree the subsidy adversely affects overfishing, and the implications of the subsidy on the local economy and on trade as a whole. Panelists will also use their own expertise to analyze the subsidies. For example, an environmentalist might suggest that the subsidy is harming a fish species, while another might suggest that it is helping an overfished species. The economists will analyze the subsidy in terms of trade benefits, such as deciding if prohibiting the subsidy will increase global trade prices or cause a significant number of people to lose their livelihoods. All of these factors will be analyzed when making a final judgment.

Given the need for consistent results, the special arbitration panel decision cannot be appealed to the WTO Appellate Body or any international appellate body for two important reasons. The first is that the expertise, diversity, and structure of this special arbitration panel will allow for the full adjudication of the fisheries disputes with consideration for all possible options. Similar to the WTO dispute process for trade remedy measures, claims brought for fisheries subsidies must be based on an investigation conducted by investigating authorities in each country, which already establishes a factual record and applicable law that shows whether the subsidies are, or are not, justified.[255] Currently, after arguments from both sides, there is a thorough analysis conducted of all aspects of a fishery subsidy, and a decision is rendered that is binding on both parties and that can be used as precedent in any future case. This panel will only be adjudicating fisheries subsidies disputes, so unlike the WTO and other areas of international law, there will be binding precedents for other disputes with similar questions of law.[256] Also, the panel is acting as a type of appeals

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[255] Hillman, *supra* note 208, at 4–5, 7 (noting that the WTO Appellate Body hears the majority of its complaints relating to trade remedy decisions, which include challenges to anti-subsidy or safeguard measures).

[256] *Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings: 7.2 Legal Status of Adopted/Unadopted Reports in Other Disputes*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm [https://perma.cc/G72Q-MCZN] (last visited Dec. 27, 2021) (stating that WTO panel reports are not binding precedents even though the same questions of WTO law might arise).

court anyway, in reviewing the factual and legal matters from both sides.[257]

The second reason why no appeals are allowed is because of the WTO Appellate Body's crumbling structure and lack of authority.[258] Without a reliable appeals board, decisions of the special arbitration panel must be final; otherwise, these disputes will take on all of the issues the current Appellate Body faces, including the delay of final decisions. Without an appellate division, it is much simpler for the panel to implement, enforce, and monitor a judgment, as well as any sanctions imposed. Given that the fisheries subsidies agreement is negotiated and signed by WTO members, it is binding on the parties.[259] Because of the issues with jurisdiction and enforcement in the UN,[260] almost the same process will be used here as in the WTO for ensuring and enforcing compliance. When a judgment is rendered, the panel, rather than the WTO Dispute Settlement Body, will include suggestions for the losing party to bring itself into compliance with the ruling.[261] The losing party has thirty days to inform the panel and the president of its intentions to implement the recommendations and ruling, followed by the losing party either immediately complying or the panel deciding a reasonable time to comply if immediate compliance is not possible.[262]

Once the compliance period has started, either party can bring a compliance claim to the president of the special arbitration panel, who will then refer the matter to the individuals serving on the original panel.[263] If there is no compliance, the winning party can impose trade sanctions, and the losing party can bring a claim back to the original panel to determine the fairness of the sanctions. Unlike in the WTO, monetary damages will not be offered, as trade sanctions will be more effective for the environmental goal. A benefit of just the special arbitration panel adjudicating these disputes and ensuring compliance with its orders is that one panel

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257 Hillman, *supra* note 208, at 7.

258 *See supra* Part III(B)(ii)(2) for a discussion on the issues surrounding the Appellate Body.

259 *WTO in Brief*, *supra* note 79.

260 *See supra* Part III(B)(i).

261 *The Process – Stages in a Typical WTO Dispute Settlement Case: 6.7 Implementation by the "Losing" Member*, *supra* note 106.

262 *Id.* Given the special arbitration panel is an arbitration panel, it has the same role as the WTO arbitrator in deciding a reasonable time to implement the recommendations.

263 *The Process – Stages in a Typical WTO Dispute Settlement Case: 6.7 Implementation by the "Losing" Member*, *supra* note 106.

deals with the entire dispute, which saves time and resources as the panel will become an expert in this dispute.

V. Conclusion

Overfishing is an urgent, global issue. If no changes are made to our fishing habits, more than fifty percent of fish stocks will be overfished at biologically unstainable levels by 2050.[264] This would leave us not only with little fish to eat but would also wreak havoc on the diversity and sustainability of our oceans. A fisheries subsidies agreement in the WTO is a solution to curbing overfishing, as this will make large industrial fleets less profitable—leading to less fishing—and will allow smaller, local boats to compete to make a living. A special arbitration forum in the WTO to adjudicate fisheries subsidies disputes and hold countries and territories accountable for their fisheries subsidies will help ensure compliance with the agreed-upon obligations. While the UN addresses environmental conflicts, it is not the right body to adjudicate fisheries subsidies disputes, given the complicated economic nature of fisheries subsidies and the UN's lack of authority to render and enforce judgments. Although implementing these solutions will help with overfishing, we, as individuals, must also make changes to our eating habits. As we decrease our demand for fish or become more aware of the source of the fish we eat, we can help rebuild our oceans to a sustainable level.

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264 *See supra* text accompanying note 23.

APPENDIX A

Organization	Jurisdiction	Parties to Disputes
United Nations ("UN")	Any disputes over law between Parties (see Appendix B for further details, specifically ICJ).[265] Jurisdiction to try crimes against humanity through International Tribunals and the International Criminal Court.[266]	Any Member of the UN may bring a dispute or any state may bring a dispute if it accepts in advance the obligations of the UN Charter.[267]
World Trade Organization ("WTO")	Any disputes brought under WTO Agreements, including Multilateral Trade Agreements and Plurilateral Trade Agreements.[268] This includes jurisdiction over subsidies disputes that distort trade under the SCM Agreement.	Only WTO Member governments participate.[269]

Comparison of the jurisdiction and parties in the United Nations and the World Trade Organization dispute settlement processes.

265 *International Law and Justice*, UNITED NATIONS, https://www.un.org/en/global-issues/international-law-and-justice [https://perma.cc/DL8W-7Z66] (last visited Dec. 27, 2021).

266 *Id.*

267 U.N. Charter art. 35.

268 *Introduction to the WTO Dispute Settlement System*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s5p1_e.htm [https://perma.cc/2MHC-5EYV] (last visited Dec. 27, 2021).

269 *Id.*

APPENDIX B

Forum	Jurisdiction	Parties to Disputes	Types of Judgments
International Tribunal for the Law of the Sea ("ITLOS")	Default tribunal for prompt release of vessels.[270] Jurisdiction over all disputes and applications submitted under UNCLOS and all matters in other agreements that provide for jurisdiction.[271]	Parties to UNCLOS or entities other than State Parties if they agreed to jurisdiction.[272]	Final, binding judgment between parties to dispute, with respect to only that particular dispute.[273]
International Court of Justice ("ICJ")	Jurisdiction over disputes of a legal nature submitted by States (any matter Parties consented to the ICJ settling their dispute).[274] Jurisdiction over advisory opinions on legal questions presented by the UN, specialized agencies, or a related organization with advisory jurisdiction.[275]	States that consent to ICJ jurisdiction through UN membership or through agreement, jurisdictional clause, or reciprocal effect of declarations made under the Statute to the Court.[276]	Binding judgments and advisory opinions.[277]

[270] UNCLOS, *supra* note 70, at art. 292, ¶ 1.

[271] *Id.* at Annex VI, art. 21.

[272] *Id.* at Annex VI, art. 20.

[273] *Id.* at Annex VI, art. 33.

[274] *Jurisdiction*, INT'L CT. JUST., https://www.icj-cij.org/en/jurisdiction [https://perma.cc/QV5T-KKFQ] (last visited Dec. 27, 2021).

[275] *Id.*

[276] *International Law and Justice*, *supra* note 264; *How the Court Works*, INT'L CT. JUST., https://www.icj-cij.org/en/how-the-court-works [https://perma.cc/KPS3-ZEZL] (last visited Jan. 30, 2021).

[277] How the Court Works, *supra* note 276.

Forum	Jurisdiction	Parties to Disputes	Types of Judgments
Arbitration Tribunal	Jurisdiction over any dispute concerning interpretation or application of an international agreement related to the purposes of UNCLOS (UNCLOS default provision). Jurisdiction over controversies regarding interpretation or manner of implementation of arbitration tribunal awards.[278]	Any Party to a dispute under UNCLOS.[279]	Final award on dispute subject matter, without appeal, unless parties to dispute agreed in advance to appellate procedure.[280]
Special Arbitration Tribunal	Jurisdiction over interpretation or application of articles of UNCLOS relating to (1) fisheries, (2) protection and preservation of marine environment, (3) marine research, or (4) navigation; pollution from vessels; and dumping.[281]	Any Party to a dispute under UNCLOS.[282]	Final award on dispute subject matter, without appeal, unless parties to dispute agreed in advance to appellate procedure.[283]

Comparison of jurisdiction, parties to a dispute, and judgements renders in the four UNCLOS dispute resolution forums.

278 UNCLOS, *supra* note 70, at Annex VII, art. 12.

279 *Id.* at Annex VII, art. 1.

280 *Id.* at Annex VII, art. 10–11.

281 *Id.* at Annex VIII, art. 1.

282 *Id.*

283 *Id.* at Annex VIII, art. 4 (incorporating award finality from Annex VII, art. 10–11, into Annex VIII).

RANSOMWARE WARFARE: EXPLORING GLOBAL AND PRIVATE NEGOTIATIONS TO HELP U.S. VICTIMS RESPOND TO THE THREAT

*Karina Nad**

I. INTRODUCTION

By weaponizing technology, now more than ever before, cybercriminals are transforming the cyberworld into their new hunting ground.[1] Almost daily, news headlines alert us to a new malicious cyber threat or major data breach.[2] The evolution of cybercrime[3] has created a malicious online environment, or "malspace," that is now inhabited by hacker groups and espionage units from all over the world.[4] As a global concern, the use of powerful online capabilities by hacker groups has led to the "militarization"[5] of cyberspace.[6] Closer to home, critical infrastructure, valuable personal data, and access to medical care has been compromised at

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1 Steve Durbin, *Cybercrime: The Next Entrepreneurial Growth Business?*, WIRED, https://www.wired.com/insights/2014/10/cybercrime-growth-business/ [https://perma.cc/8LFU-DQXN] (last visited Oct. 10, 2021).

2 *Id.*; *Cyber Crime News and Press Releases*, FBI, https://www.fbi.gov/investigate/cyber/news [https://perma.cc/3V66-FJJU] (last visited Feb. 5. 2021); Lindsey O'Donnell, *News Wrap: Barnes & Noble Hack, DDoS Extortion Threats and More*, THREATPOST (Oct. 16, 2020, 9:00 AM), https://threatpost.com/barnes-noble-hack-ddos-extortion-threats/160193/ [https://perma.cc/R5HY-LP7X].

3 Max Steinberg, Note, *Arbitrating with the Mafia: Why Civil RICO Statutes are Improperly Used and How Class Action Arbitration May Provide Just Compensation for Forgotten Victims*, 22 CARDOZO J. CONFLICT RESOL. 97, 100 (2020) (discussing the relationship between old school mafias and a technologically advanced world ("[O]rganized crime has shifted and adapted to both modern times and modern crimes.")).

4 Durbin, *supra* note 1.

5 This Note refers to the militarization of cyberspace as giving cyberspace a military character through cybercriminals' use of offensive cyber operations, regardless of whether or not the attacks are state-sponsored.

6 Daniel Stauffacher, Eneken Tikk, & Paul Meyer, *ICT4Peace Submission to the UN Open Ended Working Group (OEWG) on ICT and International Security*, ICT4PEACE FOUND. (Aug. 4, 2019), https://ict4peace.org/wp-content/uploads/2019/08/ICT4Peace-2019-Submission-UN-Open-Ended-Working-Group.pdf [https://perma.cc/F9Q7-A86U].

alarming rates and high costs.[7] Proving extremely profitable and popular amongst cybercriminals, ransomware is the fastest growing type of cybercrime.[8] Ransomware is designed to encrypt or deny access to a computer system unless a ransom is paid.[9] Today, cities, governments, schools, hospitals, and businesses of all sizes are vulnerable to ransomware attacks and are often left without sufficient defense tools to respond when their systems are held hostage.[10]

Globally, there has been an ongoing dialogue promoting global cooperation and diplomatic relation building to address the misuse of Information and Communication Technologies ("ICTs").[11] Domestically, U.S. victim organizations typically self-remediate ransomware attacks through private mediums such as cyber insurance companies, restoration services, or communication platforms, which can entail negotiations with the cybercriminal.[12] However, the nature of this particular type of cybercrime often makes it difficult to prosecute or obtain civil damages from the perpetrator.

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7 Justine Calma, *The Cybersecurity 'Pandemic' That Led to the Colonial Pipeline Disaster*, VERGE (May 10, 2021, 6:05 PM), https://www.theverge.com/2021/5/10/22429433/colonial-pipeline-cyber-security-ransomware-attack [https://perma.cc/HY4Z-MWC7]; Tawnell D. Hobbs, *Hacker Releases Information on Las Vegas-Area Students After Officials Don't Pay Ransom*, WALL ST. J. (Sept. 28, 2020, 3:56 PM), https://www.wsj.com/articles/hacker-releases-information-on-las-vegas-area-students-after-officials-dont-pay-ransom-11601297930?modHP_lead_pos10 [https://perma.cc/NEV8-45P9]; *see also German Hospital Hacked, Patient Taken to Another City Dies*, ASSOCIATED PRESS (Sept. 17, 2020), https://apnews.com/article/technology-hacking-europe-cf8f8eee1adcec69bcc864f2c4308c94 [https://perma.cc/GW9E-RK3Y].

8 Eric C., *Ransomware Facts, Trends & Statistics for 2021*, SAFETYDETECTIVES (Feb. 3, 2021), https://www.safetydetectives.com/blog/ransomware-statistics/ [https://perma.cc/9CAW-Y82M].

9 *Ransomware*, FBI, https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/ransomware [https://perma.cc/BRH2-LCEE] (last visited Oct. 10, 2021).

10 Nathaniel Popper, *Ransomware Attacks Grow, Crippling Cities and Businesses*, N.Y. TIMES (Feb. 9, 2020), https://www.nytimes.com/2020/02/09/technology/ransomware-attacks.html [https://perma.cc/U4TD-WW8P].

11 Elena Chernenko, Oleg Demidov, & Fyodor A. Lukyanov, *Increasing International Cooperation in Cybersecurity and Adapting Cyber Norms*, RUSS. GLOB. AFF. (Feb. 27, 2018), https://eng.globalaffairs.ru/articles/increasing-international-cooperation-in-cybersecurity-and-adapting-cyber-norms/ [https://perma.cc/9VPK-4KDD]; *see also* Daniel Stauffacher, *International Cyber Security Policy and Diplomacy Capacity Building Program*, ICT4PEACE FOUND. (Jan. 25, 2021), https://ict4peace.org/wp-content/uploads/2021/01/Cybersecurity-Policy-and-Diplomacy-Capacity-Building-25-January-2021-2.pdf [https://perma.cc/9EEF-DLNL].

12 Amrit Singh, *Guide to How to Recover and Prevent a Ransomware Attack*, BACKBLAZE (Apr. 27, 2021), https://www.backblaze.com/blog/complete-guide-ransomware/ [https://perma.cc/2Q2K-92VN]; Limor Kessem & Mitch Mayne, *The Definitive Guide to Ransomware: Readiness, Response, and Remediation*, IBM SECURITY (Nov. 2020), https://www.ibm.com/downloads/cas/EV6NAQR4 [https://perma.cc/6ECU-XFLJ].

This Note examines why the current Computer Fraud and Abuse Act ("CFAA"), designed to combat cybercrime—such as ransomware—is insufficient to address the global issue of ransomware in the long-term. It further explains why a redrafting of the CFAA, though amenable to some issues, does not solve the larger problem, which boils down to global cooperation. In response to the shortcomings, this Note explores international and domestic solutions to provide long-term and immediate resolutions to ransomware victims. This Note first proposes a conflict prevention model that encompasses international negotiations. This model involves negotiations between the U.S. and other major cyber powers—like Russia and China—that seek to create bilateral agreements to reduce ransomware in cyberspace.[13] In addition to the conflict prevention model, this Note explores negotiation between victim organizations and cybercriminals as an individualized remedial option, which can be used immediately following a ransomware attack. This multi-faceted approach is proposed as a flexible remedy to the immediate and long-term effects of ransomware attacks.

Section II of this Note provides a background and history of ransomware attacks and explores the current threat landscape. Section II(B) also details the federal cybercrime statutes designed to combat and protect victims of cybercrime. Section III discusses the gaps in the CFAA that have resulted in a failure to adequately combat ransomware. Section IV divides the multi-faceted proposal into two main subsections: (A) bilateral agreements to prevent ransomware; and (B) the case for private negotiations between the victim organization and cybercriminal. Section V concludes this Note.

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[13] Allison Peters & Anisha Hindocha, *US Global Cybercrime Cooperation: A Brief Explainer*, THIRD WAY (June 26, 2020), https://www.thirdway.org/memo/us-global-cybercrime-cooperation-a-brief-explainer [https://perma.cc/AER3-FELZ].

II. Background on Ransomware and U.S. Cybercrime Laws

A. *Evolution of Ransomware*

Although cybercrime has existed in various forms since the 1970s,[14] the first known U.S. ransomware attack was reported in 1989, with a meager demand of $189.[15] The ransomware—known as the AIDS Trojan—was curated by scientist and AIDS researcher Joseph Popp.[16] During a World Health Organization ("WHO") AIDS conference, he distributed 20,000 floppy disks to AIDS researchers, claiming that the disks contained an AIDS risk assessment questionnaire, but he failed to mention the infected malware that came with it.[17] Popp's motives are unknown for certain; some say he was angered by being rejected for a job at the WHO, while others claim he disagreed with the organization's AIDS education policies.[18] Today's cybercriminals remain largely disconnected from their victims and have simpler motivations: to make money and obtain valuable information with minimal risk of getting caught.[19] In Popp's case, it was clear that he was unlike the ordinary cyber villains we see today.[20] Nevertheless, the AIDS Trojan ransomware became a vehicle for international blackmail,

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14 Kelly White, *The Rise of Cybercrime 1970 through 2010,* at 2 (2013), https://www.slideshare.net/bluesme/the-rise-of-cybercrime-1970s-2010-29879338 [https://perma.cc/7YX8-XXVP].

15 Juliana De Groot, *A History of Ransomware Attacks: The Biggest and Worst Ransomware Attacks of All Time*, Digit. Guardian (Dec. 1, 2020), https://digitalguardian.com/blog/history-ransomware-attacks-biggest-and-worst-ransomware-attacks-all-time [https://perma.cc/62VB-LUU9].

16 *Id.*

17 *Id.*

18 Alina Simone, *The Strange History of Ransomware*, World (May 17, 2017, 11:45 AM), https://www.pri.org/stories/2017-05-17/strange-history-ransomware [https://perma.cc/KQ5Q-6Y54].

19 Joey Tanny, *Cyber Criminals: Who They Are and Why They Do It*, Vircom (Feb. 7, 2018), https://www.vircom.com/blog/cybercriminals-who-they-are-and-why-they-do-it/ [https://perma.cc/LFA8-4DBS]; Danny Palmer, *Ransomware: Big Paydays and Little Chance of Getting Caught Means Boom Time for Crooks*, ZDNet (Nov. 29, 2019), https://www.zdnet.com/article/ransomware-big-paydays-and-little-chance-of-getting-caught-means-boom-time-for-crooks/ [https://perma.cc/3BJ5-KYLY].

20 While standing trial, Popp exhibited strange behavior by putting curlers in his beard to "ward off the threat of radiation," wearing condoms on his nose, and wearing a cardboard box over his head. The Judge ultimately declared him unfit to stand trial. *See* Simone, *supra* note 18.

which set the stage for the sophisticated computer crimes we see carried out today.[21]

Over the decades following the 1990s, ransomware faded and re-emerged with varying frequency, significance, and threat.[22] Since 2013, the frequency and impact of ransomware attacks has increased dramatically, infecting computers at record rates and netting millions of dollars in ransomware revenue for cybercriminals.[23] The record rates of ransomware are due in part to the number of people and devices connected to the Internet today.[24] As of this Note, there are 4.66 billion active Internet users worldwide.[25] Further, Internet-connected wearable devices (e.g., smartwatches, body-worn cameras, Bluetooth headsets, and fitness monitors) heavily contribute to our digital presence.[26] As a result of widespread Internet use, society is unable to keep pace with properly securing the online environment.[27] Another reason for the rise of the ransomware epidemic can be explained by the success of hacking efforts, which, in turn, encourage other cybercriminals to get involved in doing the same.[28] Beyond the exponential reach of ransomware, new variants[29] have proven to be far more damaging, based on their capability to steal sensitive personal information and threaten public health and safety.[30]

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21 *Id.*; *see also* De Groot, *supra* note 15.

22 James A. Sherer et al., *Ransomware – Practical and Legal Considerations for Confronting the New Economic Engine of the Dark Web*, 23 RICH. J. L. & TECH. 1, 3–5 (2017), https://jolt.richmond.edu/files/2019/11/Sherer-Vol-XXIII-Fixed-Manuscript-2.pdf [https://perma.cc/AM8B-6AUP].

23 *Id.*; *see also* Eric Vanderburg, *Part 4: A Timeline of Ransomware Advances*, TCDI BLOG (Dec. 27, 2017), https://tcdi.com/ransomware-timeline/ [https://perma.cc/C4CE-5GPT].

24 Steve Morgan, *2017 Cybercrime Report*, CYBERSECURITY VENTURES, https://1c7fab3im83f5gqiow2qqs2k-wpengine.netdna-ssl.com/2015-wp/wp-content/uploads/2017/10/2017-Cybercrime-Report.pdf [https://perma.cc/2Y52-24E7] (last visited Oct. 18, 2021).

25 Joseph Johnson, *Global Digital Population as of January 2021*, STATISTA (Sept. 10, 2021), https://www.statista.com/statistics/617136/digital-population-worldwide [https://perma.cc/ZF6U-9JT8].

26 *See* Lionel Sujay Vailshery, *Connected Wearable Devices Worldwide 2016-2022*, STATISTA (Jan. 22, 2021), https://www.statista.com/statistics/487291/global-connected-wearable-devices [https://perma.cc/24V2-QRRG]; *see also* Morgan, *supra* note 24, at 4.

27 Morgan, *supra* note 24, at 4–5.

28 Sherer et al., *supra* note 22, at 1–4.

29 Also referred to as malware such as NotPetya, Ryuk, or WannaCry. *See* Courtney Heinbach, *Common Types of Ransomware*, DATTO (Nov. 6, 2020), https://www.datto.com/blog/common-types-of-ransomware [https://perma.cc/7DD2-5DQM].

30 *See* Danny Palmer, *Ransomware Warning: Now Attacks are Stealing Data as well as Encrypting it*, ZDNET (July 14, 2020), https://www.zdnet.com/article/ransomware-warning-now-attacks-are-stealing-data-as-well-as-encrypting-it/ [https://perma.cc/3LMG-4QXN]; *see also German Hospital Hacked, Patient Taken to Another City Dies*, *supra* note 7.

i. How Ransomware Works

In simple terms, ransomware is malicious software that denies access to a computer system or data until a ransom is paid[31] (often through cryptocurrency, such as Bitcoin).[32] A ransomware attack can be carried out through different methods. One common delivery mechanism is to deploy a "phishing attack"—which involves a criminal sending an email, often guised behind a trusted sender and containing malicious attachments or links that, once opened or clicked, activate the ransomware.[33] A second common delivery mechanism of ransomware is through a "drive-by-download" attack, which occurs when a user visits a compromised website or follows a malicious advertisement that triggers the infected software to download onto the user's computer.[34] Another increasingly common delivery mechanism is to use a "botnet" system, which is a network of infected computers centrally controlled by a single source that can facilitate mass attacks at once.[35] The type of malware or infection delivered to the system is usually split into two main categories: crypto and locker ransomware.[36] As it sounds, crypto ransomware functions to encrypt files, making them inaccessible to the user. Locker ransomware functions to lock the victim out of their device, entirely disabling access to the system.[37]

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31 *Ransomware: What It Is and What To Do About It*, U.S. GOV'T INTERAGENCY REP., https://us-cert.cisa.gov/sites/default/files/publications/Ransomware_Executive_One-Pager_and_Technical_Document-FINAL.pdf [https://perma.cc/A9S5-4RF5] (last visited Oct. 18, 2021) [hereinafter *Interagency Report*].

32 Michael Baker, *How Cryptocurrencies are Fueling Ransomware Attacks and Other Cybercrimes*, FORBES (Aug. 3, 2017, 8:00 AM), https://www.forbes.com/sites/forbestechcouncil/2017/08/03/how-cryptocurrencies-are-fueling-ransomware-attacks-and-other-cybercrimes/?sh=6f3f36ef3c15 [https://perma.cc/J4K6-WREB] (defining cryptocurrency as a digital or virtual currency that enables fast, secure, and anonymous global transactions through a decentralized computer network, eliminating the need for third-party financial intuitions to process payment.); Blockgeeks, *What is Cryptocurrency? A Simple Explanation*, YOUTUBE (Nov. 8, 2018), https://www.youtube.com/watch?v=6Gu2QMTAkEU [https://perma.cc/Y3SL-B4TL] (Explaining how cryptocurrency transactions are broadcasted to the entire network and permanently recorded through a blockchain system, which functions as an anti-counterfeit measure. The anonymous and untraceable nature of cryptocurrency, such as Bitcoin, makes it an appealing means of payment for cybercriminals.).

33 Alexander Sevtsov & Clemens Kolbitsch, *Ransomware Delivery Mechanisms [Part 1]*, LASTLINE (Mar. 15, 2017), https://www.lastline.com/labsblog/ransomware-delivery-mechanisms/ [https://perma.cc/JT3G-FQSU].

34 *Id.*

35 *What is a Botnet?*, SENTINELONE, https://www.sentinelone.com/cybersecurity-101/botnets/ [https://perma.cc/T8UL-W569] (last visited Oct. 10, 2021).

36 Andreja Velimirovic, *Ransomware Types and Examples*, PHEONIXNAP (Jan. 13, 2021), https://phoenixnap.com/blog/ransomware-examples-types [https://perma.cc/9D6Y-EA7M].

37 *Id.*

With a basic understanding of how a ransomware attack might occur, it is important to note that the end result is the same: the hacker demands a sum of money from the victim in exchange for a decryption key or code that is to be used to regain access to the locked files or system.[38] Imagine unwittingly clicking an e-mail or link thought to be from a trusted source, and then receiving a message that may look like one of these:

> Your computer was used to visit websites with illegal content. To unlock your computer, you must pay a $100 fine.[39]

> You only have 96 hours to submit the payment. If you do not send money within provided time [sic], all your files will be permanently encrypted and no one will be able to recover them.[40]

> You became the victim of the Petya Ransomware! The harddisks [sic] of your computer have been encrypted with a military grade encryption algorithm. There is no way to restore your data without a special key. You can purchase this on the darknet page shown in step 2.[41]

Cryptic notes like these often display intimidating messages that use false claims about purported illegal user access to illicit websites, false threats of imprisonment, and local law enforcement images to induce payment.[42] The messages may direct a user to follow the instructions or use the provided link to pay the ransom in exchange for the decryption key; however, following the instructions can lead to additional malware infections.[43] A ransom payment does not guarantee a decryption key either, as criminals may just take the money without providing the key.[44]

Adding insult to injury, some ransomware groups (such as Maze and Sodinokibi) have shown a willingness to publish private information, using and making good on threats to publish stolen

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38 Josh Fruhlinger, *Ransomware Explained: How it Works and How to Remove it*, (June 19, 2020, 3:00 AM), https://www.csoonline.com/article/3236183/what-is-ransomware-how-it-works-and-how-to-remove-it.html [https://perma.cc/67XR-RE7P].

39 *Interagency Report*, *supra* note 31, at 2.

40 *Id.*

41 Anastasia, *10 Ransomware Examples to Stay Away From,* SPINBACKUP BLOG (Jan. 22, 2020), https://spinbackup.com/blog/10-ransomware-examples-to-stay-away-from/#2_Petya_and_NotPetya_ransomware [https://perma.cc/PAP5-HTLY].

42 Sherer et al., *supra* note 22, at 13.

43 *Interagency Report*, *supra* note 31, at 2.

44 *Id.* at 5.

data to blackmail victims if they refuse to cooperate.[45] One victim paid after receiving this message: "Would it not be a shame if we leaked all of your internal data about your clients and customers? Sounds to us like a large lawsuit waiting to happen."[46] Ransomware exchanges are designed to "induce guilt or shame in [an] individual" by using "psychological tactics," which exploit people into feeling like they have no other choice except to pay the ransom to overcome the false threat or to avoid a very real and potentially devastating data breach if the information is stolen or leaked.[47] Facing an "unfamiliar world of shadowy criminals," it is no surprise that many organizations say they just want to move on from the crippling attack[48] without involving the authorities.[49]

Based on its past record, ransomware targets victims across various industries and practices, including home users, businesses, and government networks.[50] However, according to recent reports, there are three industries most targeted with ransomware: professional services, healthcare, and technology.[51] From the perspective of an organization faced with paralyzed operations, the rationale behind paying the ransom can often be justified by the potential loss of operations, downtime, cost of restoration, and the like.[52] Another reason that may partly explain why organizations have paid ransom in the past is the concept that it is cheaper and quicker to pay the ransom than to pay to restore an entire system to its original state after a major breach.[53] From the cyber-

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45 Palmer, *supra* note 30.

46 Scott Pelley, *How Cybercriminals Hold Data Hostage. . . And Why the Best Solution is Often Paying a Ransom*, CBS NEWS (Aug. 25, 2019), https://www.cbsnews.com/news/ransomware-how-cybercriminals-hold-data-hostage-why-the-best-solution-is-often-paying-a-ransom-60-minutes-2019-08-25/ [https://perma.cc/RF32-5DZV].

47 Sherer et al., *supra* note 22, at 13.

48 Hobbs, *supra* note 7.

49 *Should I Report Ransomware to Authorities? (Top Reasons/Concerns)*, PROVEN DATA, https://www.provendatarecovery.com/blog/reasons-report-ransomware-cyber-crime/#:~:text=by%20reporting%20a%20ransomware%20attack,criminals%20attacks%20across%20the%20globe [https://perma.cc/YMG8-X4RZ] (last visited Oct. 18, 2021).

50 *Interagency Report*, *supra* note 31, at 2.

51 Sarah Coble, *Ransomware Tops 2020 Threat Ranking*, INFOSECURITY (Oct. 12, 2020), https://www.infosecurity-magazine.com/news/ransomware-tops-2020-threat/ [https://perma.cc/S8EW-TA8J].

52 *The Pros and Cons of Paying the Ransom: When Should I Consider It?*, PROVEN DATA, https://www.provendatarecovery.com/blog/pros-cons-paying-ransomware/ [https://perma.cc/46UA-M962] (last visited Oct. 18, 2021).

53 Scott Shackelford & Megan Wade, *Deal with Ransomware the Way Police Deal with Hostage Situations*, GOV'T TECH. (Mar. 25, 2020), https://www.govtech.com/security/deal-with-ransomware-the-way-police-deal-with-hostage-situations.html [https://perma.cc/SZQ6-TNCW]; *but see* Jessica Davis, *Paying the Ransom Can Double Ransomware Attack Recovery Costs,*

criminal's perspective, compromising a large network that is critical for operation is often the quickest and easiest way to make money.[54]

ii. Current Landscape of Ransomware Attacks Indicates Growing Threats

The "dangerous accelerant" of ransomware is not just today's passing fad.[55] Experts predicted that ransomware could get worse if IT systems were not stronger long before the ransomware attack on the largest U.S. gas pipeline spread panic about gas shortages across the country in May 2021.[56] The Colonial pipeline attack revealed how fragile the security of our infrastructure networks are.[57] In Colonial's case, the lack of basic security hygiene, and not the sophistication of the hackers, was what led to the shutdown of their entire system.[58] The truth is that U.S. businesses and government agencies are and will continue to remain largely unprepared to handle cyberattacks on critical infrastructure, exposing us to serious security vulnerabilities, unless swift and broad action to amplify security systems is taken.[59] Furthering this threat is a trend of hackers with varying levels of sophisticated capabilities joining forces to form "ransomware gangs," opening up the door to coordinate more elaborate future attacks.[60] Accordingly, the issue is not just one of increased volume of ransomware attacks, but also an

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HealthITSecurity (May 15, 2020), https://healthitsecurity.com/news/paying-the-ransom-can-double-ransomware-attack-recovery-costs [https://perma.cc/B8KY-8M7M] ("[N]ew research from Sophos confirms that ransomware payments can actually double the amount of recovery costs and don't ensure an easier path to recovery.").

54 Danny Palmer, *Manufacturing is Becoming a Major Target for Ransomware Attacks*, ZDNet (Nov. 13, 2020), https://www.zdnet.com/article/manufacturing-is-becoming-a-major-target-for-ransomware-attacks/ [https://perma.cc/54GR-R4J5].

55 Jared Greenhill & Tony Cook, *High Impact: The Evolving Ransomware Threat Landscape*, Crypsis (Mar. 20, 2020), https://www.crypsisgroup.com/insights/evolving-ransomware-threat-landscape [https://perma.cc/5K7N-E6A2]; *see also* Should I Report Ransomware to Authorities? (Top Reasons/Concerns), *supra* note 49.

56 Calma, *supra* note 7; *see also* Ellen Nakashima, Yeganeh Torbati, & Will Englund, *Ransomware Attack Leads to Shutdown of Major U.S. Pipeline System,* Wash. Post (May 8, 2021, 6:16 PM), https://www.washingtonpost.com/business/2021/05/08/cyber-attack-colonial-pipeline [https://perma.cc/FCS9-AMMA/].

57 Calma, *supra* note 7.

58 *Id.*

59 *Id.*; Nakashima, Torbati, & Englund, *supra* note 56.

60 Kevin Diffily, *Ransomware Gangs and COVID-19 Cyberattacks Dominate the Threat Landscape*, Intsights (June 24, 2020), https://intsights.com/blog/ransomware-gangs-and-covid-19-cyberattacks-dominate-the-threat-landscape [https://perma.cc/XU88-FMTW].

issue of impact on critical infrastructure that fuels the function of our everyday life.[61]

As mentioned, the main goal for cybercriminals is to maximize profits at any cost. For example, if a ransom goes unpaid, ransom groups threaten to leak stolen data.[62] Other forms of capitalizing on modern crime include mischievous online vendors selling "ransomware as a service kits," or "RaaS," on the dark web.[63] RaaS provides a malicious toolkit of malware, along with instructions on how to launch it, enabling anyone to carry out an attack without possessing much technical knowledge.[64] With bad actors unifying or selling their capabilities on the web, and weak IT defense systems to respond, the risk of more damaging ransomware attacks is inevitable for many organizations.[65] Thus, as it is often said in regard to ransomware, "it's not a matter of *if* it will happen to you, but *when*," and that means being prepared with the right tools to survive the attack.[66]

iii. Today's Ransomware Response Mechanisms

In general, we can divide a victim's response choices into two broader categories: (1) pay the ransom out-of-pocket or via cyber insurance policies (which may provide negotiation resources) to restore the data; or (2) refuse to pay and self-remediate by removing the malware or wiping the system, and attempting to restore the hacked data.[67] Under this first approach, victims can employ "breach coaches" or negotiators to help resolve their data hostage situation.[68] Cyber insurance policies and ransomware recovery companies alike offer emergency response services to assess the breach, deploy a response strategy, negotiate with the hacker, and

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61 *Id.*

62 Palmer, *supra* note 30.

63 *Ransomware-as-a-Service (RaaS): How It Works*, TripWire (May 16, 2018), https://www.tripwire.com/state-of-security/security-data-protection/ransomware-service-raas-works [https://perma.cc/59U2-9CZ3].

64 *Id.*

65 *Id.*

66 Tom Hofmann, *How Organisations Can Ethically Negotiate Ransomware Payments*, 2020 Network Sec. 13, 16 (2020).

67 *Id.*; *see also Your Choices After a Ransomware Attack*, DB Cybersecurity Consulting (Sept. 16, 2020), https://db-c2.com/your-choices-after-a-ransomware-attack/ [https://perma.cc/JU57-HHRD].

68 Steven Melendez, *When Hackers Kidnap their Data, Companies are Increasingly Using 'Breach Coaches' and Negotiators*, Fast Co. (Mar. 31, 2020), https://www.fastcompany.com/90473369/when-ransomware-strikes-companies-are-increasingly-turning-to-breach-coaches [https://perma.cc/PKG6-DCLF].

even cover the cost—if covered under the insurance policy.[69] Coveware, a ransomware remediation company, provides an example of how negotiations can take shape when a victim is targeted.[70] When retained by a client, the company uses skilled negotiators to bargain for a discounted ransom price in exchange for the decryption key.[71] The ransomware negotiation method mirrors that of crisis and hostage negotiation strategies that have been long implemented by law enforcement.[72]

Whether or not an organization pays the ransom will depend on a variety of factors, including, among others, the significance of the encrypted data, the financial circumstances of the organization, potential reputational harm, and any possible long-term vulnerabilities.[73] Still, it is important to keep in mind that the expense of negotiations and paying the ransom can add up to a costly price.[74] Thus, it is unclear whether paying is the "better" choice. And, as the FBI's policy warns, even if a victim pays up, there is no guarantee that the encrypted or locked data will be restored.[75] Section IV(D) of the Proposal further details the steps that remediation companies take on behalf of clients and why cyber insurance and remediation companies can be an important option for ransomware victims to consider.[76]

In comparison, victims who refused to pay, or those who chose to take legal action against their attackers, did not fare better than those who did pay.[77] As an example, the City of Baltimore absorbed eighteen million dollars in recovery and lost operations fol-

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69 *Id.*

70 *Professional & Transparent Incident Response,* COVEWARE, https://www.coveware.com/ransomware-incident-response [https://perma.cc/DG72-L8WC] (last visited Sept. 5, 2021).

71 Melendez, *supra* note 68.

72 Shackelford & Wade, *supra* note 53; *see also* Audiobook: CHRIS VOSS & TAHL RAZ, NEVER SPLITTING THE DIFFERENCE: NEGOTIATING AS IF YOUR LIFE DEPENDED ON IT, at 25:57–32:28 minutes (May 2016) (Law enforcement, specifically the FBI, recognizes that classic bargaining tactics do not work in hostage negotiations and instead focus on implementing psychological and emotional tactics to change the behavior of the hostage taker.); *see also* Rob Masse, *Taking Data Hostage: The Rise of Ransomware*, DELOITTE, at 3, https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/risk/ca-en-risk-Ransomware_POV_noCM_AODA.PDF [https://perma.cc/Z45N-C3BC] (last visited Oct. 18, 2021).

73 Melendez, *supra* note 68; *see also* Should I Report Ransomware to Authorities? (Top Reasons/Concerns), *supra* note 49; *see also* Kris Lovejoy, *Ransomware: To Pay or Not to Pay?*, EY (Apr. 21, 2020), https://www.ey.com/en_us/consulting/ransomware-to-pay-or-not-to-pay [https://perma.cc/GLV5-A7GV].

74 Davis, *supra* note 53.

75 Ransomware, *supra* note 9.

76 *See infra* Section IV(D).

77 Shackelford & Wade, *supra* note 53.

lowing the ransomware attack on its government networks on May 7, 2019.[78] As another example that backfired, the Georgia cable and wire company Southwire reported that it was blackmailed by the ransom group "Maze" in December 2019, after refusing to deliver the ransom payment.[79] At first, Maze published portions of the stolen data online to show that the group was serious about the threats.[80] After Southwire sued Maze (who are anonymous hackers), Maze continued to publish additional confidential stolen data on a public website and spread word of the hack, exposing the company to potential data privacy breaches and resulting lawsuits.[81]

In its complaint against the anonymous hackers, Southwire sought, among other relief, a preliminary injunction to bar the hackers or anyone associated with them from pursuing demands and publishing confidential information online.[82] However, the court's order directing the takedown of the site did not stop Maze from continuing its ransom crusade on other victims, and did not provide recourse for the data losses Southwire suffered as a result of the breach.[83] The outcomes in these cases demonstrate the costly expense of self-remediation and vulnerabilities to potential privacy breach lawsuits—which is not exclusive to victims who refuse to pay. Importantly, Southwire's lawsuit also indicates the gap between today's advanced technological capabilities and the current cybercrime statutes' inability to protect and provide ransomware victims with adequate legal recourse.

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78 *Id.* ("Rather than handing the attackers the $76,000 they demanded, Baltimore paid more than $10 million to purchase new equipment and absorbed more than $8 million in lost revenue from taxes and fees that went unpaid while systems were down."); *see also* Ian Duncan, *Baltimore Estimates Cost of Ransomware Attack at $18.2 Million as Government Begins to Restore Email Accounts*, BALT. SUN (May 29, 2019, 7:45 PM), https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-ransomware-email-20190529-story.html [https://perma.cc/FK2W-BRUF].

79 Tomas Meskauskas, *Stuck Between a Data Breach and a Ransom*, SEC. BOULEVARD (June 17, 2020), https://securityboulevard.com/2020/06/stuck-between-a-data-breach-and-a-ransom/ [https://perma.cc/B8F9-G85W].

80 *Id.*

81 *Id.*

82 The hacker also set up a website listing twenty-seven companies that refused to pay its ransom. *See Southwire Sues Anonymous Hacker for Ransomware Attack*, DAILY REP. (Jan. 2, 2020, 12:43 PM), https://www.law.com/dailyreportonline/2020/01/02/southwire-sues-anonymous-hacker-for-ransomware-attack/?slreturn=20210918112233 [https://perma.cc/L7SU-CP2M].

83 Meskauskas, *supra* note 79.

B. *History and Enactment of the Computer Fraud and Abuse Act*

The primary federal computer crime statute used to prosecute cybercriminals is the CFAA.[84] At least in part, the culmination of the modern CFAA was influenced by a popular 1983 motion picture titled *WarGames*.[85] The thriller depicts a young Matthew Broderick[86] as a high school tech wiz who gains access to a U.S. nuclear defense system with the ability to launch World War III, which he mistakes for a video game.[87] The film's "depiction of the dangers of the computer age" caught the attention of President Ronald Reagan, who, after watching the film, asked his National Security Advisors and Chief of Staff about "whether the plot of the movie was possible" in the context of hack attacks against the U.S.[88] His hunch evolved into reality; today, cyberattacks originating from Russia, China, and Iran continue to penetrate computer systems of U.S. defense agencies and private companies alike.[89] Though *WarGames* may have contributed to the passage of the CFAA,[90] computer crimes were on the radar for Congress since the

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84 PETER G. BERRIS, CONG. RSCH. SERV., R46536, CYBERCRIME AND THE LAW: COMPUTER FRAUD AND ABUSE ACT (CFAA) AND THE 116TH CONGRESS, at 4 (2020), https://crsreports.congress.gov/product/pdf/R/R46536 [https://perma.cc/382P-RZS6] [hereinafter CRS Report].

85 Fred Kaplan, '*WarGames' and Cybersecurity's Debt to a Hollywood Hack*, N.Y. TIMES (Feb. 19, 2016), https://www.nytimes.com/2016/02/21/movies/wargames-and-cybersecuritys-debt-to-a-hollywood-hack.html [https://perma.cc/7N4Y-RNBY]; *see also* Declan McCullagh, *From 'WarGames' to Aaron Swartz: How U.S. Anti-Hacking Law Went Astray*, CNET (Mar. 13, 2013, 4:00 AM), https://www.cnet.com/news/from-wargames-to-aaron-swartz-how-u-s-anti-hacking-law-went-astray/ [https://perma.cc/VD8C-MC5P].

86 *Matthew Broderick,* IMDB, https://www.imdb.com/name/nm0000111/ [https://perma.cc/C6BY-SXU4] (last visited Aug. 29, 2021).

87 *WarGames*, IMDB, https://www.imdb.com/title/tt0086567/ [https://perma.cc/X5DM-8BKJ] (last visited Aug. 29, 2021).

88 CRS Report, *supra* note 84, at 3.

89 Andrew Blake, *NSA, FBI Warn of Russian Military Hackers Using New 'Drovorub' Malware for Espionage Operations*, WASH. TIMES (Aug. 13, 2020), https://www.washingtontimes.com/news/2020/aug/13/nsa-fbi-warn-of-russian-military-hackers-using-new/ [https://perma.cc/LQ4W-WPSU]; *Chinese Military Hackers Charged in Equifax Breach*, FBI NEWS (Feb. 10, 2020), https://www.fbi.gov/news/stories/chinese-hackers-charged-in-equifax-breach-021020 [https://perma.cc/AR9S-BPR9]; *Alert (AA20-259A) Iran-Based Threat Actor Exploits VPN Vulnerabilities*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY (Sept. 15, 2020), https://us-cert.cisa.gov/ncas/alerts/aa20-259a [https://perma.cc/KX5X-K6ZW]; Ahona Rudra, *Iranian Hackers Launch Dharma Ransomware Attack on Global Firms*, KRATIKAL BLOGS (Sept. 9, 2020), https://www.kratikal.com/blog/iranian-hackers-launch-dharma-ransomware-attack-on-global-firms/ [https://perma.cc/84PL-KTWY].

90 Allegedly, "[Congress] even showed a four-minute clip of the movie at a 1983 congressional hearing to help illustrate the threat." Josephine Wolff, *The Hacking Law That Can't Hack*

1970s.[91] Based on the legislative history, Congress recognized a "growing concern about the lack of criminal laws to fight emerging computer crimes."[92] However, it was not until the 1980s, and even more prevalent in the 1990s, that cybercrime exploded, largely due to the globalization of online connectively, e-commerce, and the lack of Internet regulation.[93]

To respond to the dawn of the computer age, Congress first added computer-related provisions to the Comprehensive Crime Control Act of 1984 ("1984 Act").[94] In doing so, Congress added a new statute under 18 U.S.C. § 1030 that prohibited three primary computer-based crimes—with certain exceptions—which made it illegal to: obtain national security information through unauthorized computer access, access financial records or credit histories stored in a financial institution, and trespass into a government computer.[95] The provisions were intended to combat an array of hacking and computer fraud crimes that the existing wire and mail fraud provisions at the time did not address.[96] However, the 1984 Act "faced . . . criticisms over its relatively narrow scope," as it primarily focused on protecting government and institutional computers.[97] Department of Justice ("DOJ") prosecutors also expressed concerns over using the 1984 Act to successfully prosecute computer crimes.[98]

In attempts to address the criticisms, Congress amended § 1030 two years later by passing the Computer Fraud and Abuse Act of 1986.[99] This amendment added three new computer-based crimes, which prohibit: accessing computers with the intent to defraud, intentionally accessing a computer to cause damage, and knowingly trafficking computer passwords with intent to de-

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It, SLATE (Sept. 27, 2016, 11:15 AM), https://slate.com/technology/2016/09/the-computer-fraud-and-abuse-act-turns-30-years-old.html#return [https://perma.cc/GXU9-QWM9].

91 CRS Report, *supra* note 84, at 3.

92 U.S. DEP'T OF JUST., PROSECUTING COMPUTER CRIMES, COMPUTER CRIME AND INTELLECTUAL PROPERTY SECTION, CRIMINAL DIVISION 1 (2010), https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ccmanual.pdf [https://perma.cc/PW5Q-CG7T] [hereinafter DOJ Manual].

93 White, *supra* note 14.

94 Counterfeit Access Device and Computer Fraud and Abuse Act of 1984, Pub. L. No. 98-473, § 2101, 98 Stat. 1837, 2190-92 (1984).

95 *Id.*

96 DOJ Manual, *supra* note 92, at 1.

97 CRS Report, *supra* note 84, at 3.

98 *Id.*

99 *Id.*

fraud.[100] The provision prohibiting accessing a computer with intent to "alter, damage, or destroy data belonging to others . . . was designed to cover . . . the distribution of malicious code [e.g., ransomware] and denial of service attacks."[101] In addition to responding to the criticism, Congress cited that the purpose of the amendments was also to address "the technologically sophisticated criminal who breaks into computerized data files."[102]

Certain offenses of the CFAA also "require that the defendant access a computer 'without authorization' or by 'exceed[ing] authorized access.'"[103] Many employees have questioned whether the CFAA, which provides for criminal charges, applies to the employer-employee context, where an employee misuses their workplace computer access for an improper purpose.[104] The question of whether the term "without or exceeds authorization" applies to employees who misuse their computer access is widely debated. The U.S. Supreme Court most recently addressed the question in *Van Buren v. U.S.*,[105] which presents a discussion beyond the scope of this Note. In sum, the Court in *Van Buren* held that "an individual 'exceeds authorized access' when he accesses a computer with authorization but then obtains information from an area of the computer that is off-limits to him, such as files, folders, or databases."[106] However, obtaining information available to an employee and then misusing that information does not constitute a violation under the CFAA's definition.[107] The Court reversed the Eleventh Circuit's decision to convict the defendant under the CFAA for his improper use of a law enforcement license plate database.[108] Relative to the discussion herein, however, is to point out that the CFAA's use in the employee-employer context is ar-

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100 18 U.S.C. §§ 1030(a)(4)–(6).

101 DOJ Manual, *supra* note 92, at 2.

102 Justin Precht, *The Computer Fraud and Abuse Act or the Modern Criminal at Work: The Dangers of Facebook from Your Cubicle*, 82 UNIV. CIN. L. REV. 359, 360 (2014) (as quoted in H.R. Rep. 99-612, at 3).

103 DOJ Manual, *supra* note 92, at 5.

104 *See e.g.*, United States v. Morris, 928 F.2d 504 (2d Cir. 1991); United States v. Nosal [I], 676 F.3d 854 (9th Cir. 2012) (en banc); United States v. Nosal [II], 844 F.3d 1024 (9th Cir. 2016); hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985 (9th Cir. 2019); *see also* Orin S. Kerr, *Cybercrime's Scope Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. Rev. 1596 (2003).

105 Nathan Van Buren was convicted under the CFAA for running a license plate search for unofficial police purposes in exchange for $5,000 from a friend who was also an FBI informant. *See* Van Buren v. United States, 543 U.S. 1 (2021).

106 *Id.* at 1.

107 *Id.* at 15–16.

108 *Id.* at 20.

guably misplaced, as it is a statute designed for "hackers," and perhaps privacy laws or employer policies are better fit to resolve *Van Buren* and similar cases. As it stands, a criminal charge and conviction under the CFAA can include fines, forfeiture of property, and imprisonment varying from one to ten years, depending on the offense, and up to twenty years for a second offense.[109]

Congress also carved out a civil provision under 18 U.S.C. § 1030(g) that provides a private right of action to any person who suffers damage or loss due to a CFAA violation.[110] Under the provision, a plaintiff can bring suit against a violator and seek compensatory damages, injunctive relief, or other equitable relief.[111] To bring a civil action, the violation must result in "physical injury, a threat to public health or safety, damage to 10 or more protected computers within the span of a year," or certain losses aggregating to at least $5,000 in value.[112] As it stands, the civil provision provides relief for only certain losses resulting from violations of the CFAA.[113] However, civil lawsuits may be ineffective at recovering losses from criminals residing outside of the U.S., which is often the case with ransomware attackers.[114]

Since its inception, Congress has amended the CFAA several times to account for advancements in technology.[115] Congress amended the CFAA in 1988, 1989, 1990, 1994, 1996, 2001, and 2002; the most recent substantial change in language was added in

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109 CRS Report, *supra* note 84, at 20–23; *see also* DOJ Manual, *supra* note 92, at 3.

110 18 U.S.C § 1030(g).

111 CRS Report, *supra* note 84, at 23.

112 *Id.*

113 Section 1030(g) allows victims to bring a civil cause of action for violations of the statute, but only if the violation results in the kind of loss described in 1030(c)(4)(A)(i)(I)–(V):

> (I) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value;
>
> (II) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;
>
> (III) physical injury to any person;
>
> (IV) a threat to public health or safety;
>
> (V) damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security; or
>
> (VI) damage affecting 10 or more protected computers during any 1-year period.

See Cong. Research Serv., 97-1025, Cybercrime: An Overview of the Federal Computer Fraud and Abuse Statute and Related Federal Criminal Laws 22–23 (Oct. 15, 2014).

114 Stewart D. Personick & Cynthia A. Patterson, Critical Information Infrastructure Protection and the Law: An Overview of Key Issues 43 (2003).

115 CRS Report, *supra* note 84, at 3–4.

2008, in an attempt to address the gaps in the statute and broaden the scope of prohibited conduct.[116] Importantly, the 2008 amendments expanded the scope of covered computers to include not just government computers, but any computers "used in or affecting interstate or foreign commerce or communication."[117] Courts have construed this phrase broadly to include any computer connected to the Internet—including wearable devices—as sufficient to meet the interstate or foreign commerce requirement.[118] The changes most relevant to the ransomware landscape include provisions that prohibit: certain extortionate threats, such as threats to cause damage or disclose confidential information unless paid,[119] and the transmission of viruses or worms, which thereby intentionally cause damage to a protected computer.[120] Against the backdrop of the CFAA exist numerous comprehensive state computer crime laws; however, the CFAA is the main overarching federal computer crime statute which is the primary concentration of this Note.[121] Despite its breadth, the rapid pace of technological advancement and volume of cybercrime continue to present new legal challenges to the CFAA.[122]

III. Discussion

While Congress has increased the CFAA's reach and broadened prosecutors' ability to prosecute cybercrimes, including ransomware attacks, the CFAA's effectiveness in deterring and combatting increasingly sophisticated ransomware in our country is

116 DOJ Manual, *supra* note 92, at 2.

117 CRS Report, *supra* note 84, at 5.

118 *See, e.g.*, United States v. Trotter, 478 F.3d 918, 921 (8th Cir. 2007) ("[The defendant]'s admission. . . [that the computers were connected to the Internet] demonstrate[d] that . . . the computers fall within the statutory definition of a 'protected computer.'"); NCMIC Finance Corp. v. Artino, 638 F. Supp. 2d 1042, 1060 (S.D. Iowa 2009) (concluding computers qualified as protected computers because they were connected to the Internet); Cont'l Group, Inc. v. KW Prop. Mgmt., LLC, 622 F. Supp. 2d 1357, 1370 (S.D. Fla. 2009) ("A connection to the internet is 'affecting interstate commerce or communication.'"); DOJ Manual, *supra* note 92, at 113; *see also* CRS Report, *supra* note 84, at 5.

119 CRS Report, *supra* note 84, at 18; *see also* 18 U.S.C. § 1030(a)(7).

120 CRS Report, *supra* note 84, at 14; *see also* 18 U.S.C. § 1030(a)(5).

121 CRS Report, *supra* note 84, at 4, n.32; *see also Malware, Ransomware, and Digital Extortion*, Crim. L. Virtual Context, https://virtualcrimlaw.wordpress.com/2018/04/07/malware-ransomware-and-digital-extortion/ [https://perma.cc/CZE7-2UU2] (last visited Oct. 18, 2021).

122 *See generally* CRS Report, *supra* note 84.

debatable.[123] One could argue that the CFAA is ineffective at combatting ransomware. For one, cybercriminals continue to infiltrate our critical infrastructure through ransomware with near impunity, and the CFAA does not go far enough to prevent attacks.[124] Secondly, because a redrafting of the current CFAA does not solve the global issue of ransomware, this alone is insufficient. Subsections A and B examine the statutory gaps in the CFAA and identify attribution and physical jurisdiction as issues that are beyond the CFAA's scope and reach. Subsection B examines the arguments for and against negotiating with cybercriminals and discusses the practical need for negotiation as a private forum to address threats of ransomware.

A. *The CFAA Fails to Reach Cybercriminals Beyond U.S. Borders*

Because ransomware transcends national borders, there is both an identification issue and a jurisdiction issue that is beyond the CFAA's reach.[125] In regard to identification, cybercriminals utilize anonymous communications, encrypted sources, or untraceable malware to conceal their identities.[126] Apart from the anonymous nature of ransomware, many victims do not report attacks to law enforcement, making the identification issue worse.[127] In the past, victims have opted to quietly pay off their attackers to avoid public scrutiny.[128] According to a recent threat assessment report conducted by Europol, some victims expressed that they did not approach authorities because they did not think law enforcement

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123 Shawn Tuma, *Business Cyber Risk: Will Changes to the CFAA Deter Hackers?*, BUS. CYBER RISK (May 13, 2016), https://shawnetuma.com/2016/05/13/will-changes-to-the-cfaa-deter-hackers/ [https://perma.cc/ML2D-CHKJ].

124 Roger A. Grimes, *Why It's So Hard to Prosecute Cyber Criminals*, CSO (Dec. 6, 2016, 3:00 AM), https://www.csoonline.com/article/3147398/why-its-so-hard-to-prosecute-cyber-criminals.html [https://perma.cc/U7PK-5V7C].

125 Malware, Ransomware, and Digital Extortion, *supra* note 121.

126 *Id.*; *see also* Frank Bajak, *How the Kremlin Provides a Safe Harbor for Ransomware*, ASSOCIATED PRESS (Apr. 16, 2021), https://apnews.com/article/business-technology-general-news-government-and-politics-c9dab7eb3841be45dff2d93ed3102999 [https://perma.cc/T6C6-RT4L] ("The criminals hide behind pseudonyms and periodically change the names of their malware strains to confuse Western law enforcement.").

127 Danny Palmer, *Ransomware Victims Aren't Reporting Attacks to Police. That's Causing a Big Problem*, ZDNET (Oct. 5, 2020), https://www.zdnet.com/article/ransomware-victims-arent-reporting-attacks-to-police-thats-causing-a-big-problem/ [https://perma.cc/TF5G-NSF9].

128 Popper, *supra* note 10.

could do anything to help.[129] Contrary to this belief, reporting helps law enforcement better attribute ransomware to hackers and build a case against them.[130] Providing an accurate picture of the threat also allows law enforcement to prioritize its resources and private sector partnerships toward the problem.[131]

In regard to jurisdiction, the issue is one of global scope.[132] Since malicious computer activity can originate from other countries, we often must rely on the cooperation of international governments through Mutual Legal Assistance Treaties ("MLATs") or informal cooperation agreements[133] to assist with investigations and prosecutions.[134] To clarify, the issue is not that the CFAA does not create jurisdiction where offenders are located outside of the U.S. In fact, Congress amended § 1029(h) to explicitly include "extraterritorial jurisdiction" over defendants located outside the U.S. who engage in an act that would constitute an offense under the statute, so long as the offense involves a financial institution, account issuer, credit card system member, or other entity organized under U.S. laws.[135]

Despite the legal jurisdiction Congress intentionally provided,[136] U.S. agents cannot simply walk onto foreign soil without the foreign country's cooperation to extradite an indicted defendant.[137] Russia is particularly uncooperative with extradition.[138] Russian-based hackers responsible for cyberattacks on the West are rarely caught because of the "constitutional protection against

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129 Palmer, *supra* note 127.

130 Should I Report Ransomware to Authorities? (Top Reasons/Concerns), *supra* note 49.

131 Joel DeCapua, *Feds Fighting Ransomware: How the FBI Investigates and How You Can Help*, YouTube (Feb. 25, 2020), https://www.youtube.com/watch?v=LUxOcpIRxmg&ab_channel=RSAConference [https://perma.cc/EWR3-35VQ].

132 Malware, Ransomware, and Digital Extortion, *supra* note 121.

133 "Informal cooperation is crucial and does not require lengthy treaty processes. But it is uncertain. In the absence of an official treaty framework, many nations do not provide adequate cooperation." *See* Personick & Patterson, *supra* note 114.

134 Malware, Ransomware, and Digital Extortion, *supra* note 121; *see also* T. Markus Funk, *Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges*, Fed. Jud. Ctr.: Int'l Litig. Guide (2014), https://www.fjc.gov/sites/default/files/2017/MLAT-LR-Guide-Funk-FJC-2014.pdf [https://perma.cc/NSN8-5D37].

135 DOJ Manual, *supra* note 92, at 115.

136 *Id.*

137 *Amid a Ransomware Pandemic, Has Law Enforcement Been Left for Dust?*, Tech Monitor (June 22, 2020), https://techmonitor.ai/techonology/cybersecurity/ransomware-criminals-law-enforcement [https://perma.cc/9WBJ-QW8G]; *see also* Funk, *supra* note 134.

138 Amid a Ransomware Pandemic, Has Law Enforcement Been Left for Dust?, *supra* note 137.

extradition" that the Russian government provides them.[139] This unwritten rule of impunity is generally a one-way street in that it only applies if a Russian-based cybercriminal attacks the West.[140] Russian insider codes of conduct also support the notion that Russian territory is off limits to hacking if a hacker expects Russia's "protection."[141] As a result of the jurisdictional disconnect, U.S. intelligence and law enforcement agencies often "play second fiddle" in the wider geopolitical and diplomatic issues surrounding cooperation in cybercrime prosecution.[142]

As an example of the jurisdiction problem, we can look to the DOJ's recent indictment of six Russian Intelligence Officers for violations under the CFAA and related wire fraud statutes.[143] That operation involved the "NotPetya" ransomware and other destructive computer system invasions.[144] In the span of four years, the operation disrupted systems worldwide—ranging from Pennsylvania to the Korean Peninsula—that collectively caused billions of dollars in operational losses and impaired public health and safety.[145] Unsurprisingly, Russia denied that any Russian intelligence officers were involved in any hack attacks in recent years.[146] Consequently, and similar to prior ransomware cases, Russia has been uncooperative in talks about extraditing the six defendants,

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139 *Id.*; *see also* Paul Ducklin, *Russian Cybercrime Suspect Arrested in $1m Ransomware Conspiracy*, NAKED SEC. (Aug. 27, 2020), https://nakedsecurity.sophos.com/2020/08/27/russian-cybercrime-suspect-arrested-in-1m-ransomware-conspiracy/ [https://perma.cc/K5N7-TBGN]; *see also* Bajak, *supra* note 126.

140 Amid a Ransomware Pandemic, Has Law Enforcement Been Left for Dust?, *supra* note 137.

141 Bajak, *supra* note 126 ("Russian authorities have a simple rule. . . . 'Just don't ever work against your country and businesses in this country. If you steal something from Americans, that's fine.'"); *but see* Hofmann, *supra* note 66, at 14–15 (discussing the "ethical divide in the underground," where a majority of cybercriminal groups condemned attacks on U.S. hospitals as "reckless and unacceptable," while the minority saw it as just another place that guaranteed payment).

142 Amid a Ransomware Pandemic, Has Law Enforcement Been Left for Dust?, *supra* note 137.

143 U.S. v. Andrienko, No. 20-316 (W.D.Pa.) (Indictment filed Oct. 15, 2020), https://www.justice.gov/opa/press-release/file/1328521/download [https://perma.cc/3YPH-QNQB].

144 Dustin Volz, *U.S. Charges Six Russian Intelligence Officers With Hacking*, WALL ST. J. (Oct. 20, 2020, 8:17 AM), https://www.wsj.com/articles/u-s-charges-six-russian-intelligence-officers-with-hacking-11603126931 [https://perma.cc/K6N2-23C7]; *see also Six Russian GRU Officers Charged in Connection with Worldwide Deployment of Destructive Malware and Other Disruptive Actions in Cyberspace*, U.S. DEP'T JUST., (Oct. 19, 2020), https://www.justice.gov/opa/pr/six-russian-gru-officers-charged-connection-worldwide-deployment-destructive-malware-and [https://perma.cc/C8V9-7UW6].

145 Volz, *supra* note 144.

146 *Id.*

all believed to be residents of Russia.[147] Thus, though an indictment may seem meaningful on paper, the CFAA does not go far enough to bring victims the justice they deserve, nor does the indictment create a safer cyberspace.

B. *The CFAA is Ill-Suited to Combat the Sale of Infected Software*

There is evidence to suggest that the CFAA is ill-suited to combat malware crimes.[148] While the provisions in the statute prohibit knowingly transmitting malware with the "intent to damage"[149] and "trafficking any passwords or similar information,"[150] it is unclear whether the statute outlaws the *sale* or *rental* of infected malware, such as "botnets"[151] or RaaS (ransomware as-a-service) toolkits.[152] The language in the provisions reveals the gap. For example, § 1030(a)(6) covers only password trafficking or related information—not the sale of infected software.[153] The other relevant provision, § 1030(a)(5), which prohibits the sale of infected malware, requires that the defendant act with *the intent to damage* a protected computer.[154] However, those selling or buying infected software may simply intend to profit or are unaware of how the botnet will be used, making it difficult for prosecutors to prove the intent requirement.[155] In 2015, the DOJ conducted an undercover sting operation to "buy" a botnet consisting of thousands of victim computers from a seller; however, prosecutors could not bring

147 *Id.*

148 Marcelo Triana, *Is Selling Ransomware A Federal Crime?*, 93 N.Y.U. L. Rev. 1311, 1311 (2018).

149 18 U.S.C. § 1030(a)(5).

150 18 U.S.C. § 1030(a)(6).

151 Botnets are defined as "network[s] of compromised computers, 'often programmed to complete a set of repetitive tasks' without 'the owner's knowledge or permission.'" *See* CRS Report, *supra* note 84, at 24. Botnets are also described as "network[s] of infected computers under the attacker's control." *Id.* at 24, n.220.

152 The RaaS business model, where cybercriminals write ransomware code and then sell/rent it to other cybercriminals, is similar to the business model of selling botnets—neither of which are expressly prohibited by the CFAA. *See* Edward Kost, *What is Ransomware as a Service (RaaS)? The Dangerous Threat to World Security*, UpGuard (Nov. 2, 2021), https://www.upguard.com/blog/what-is-ransomware-as-a-service [https://perma.cc/687L-2D54].

153 18 U.S.C. § 1030(a)(6).

154 CRS Report, *supra* note 84, at 28.

155 Triana, *supra* note 148, at 1315 ("Since hackers selling malware more clearly intend to profit off of their skills, they likely do not meet the mens rea requirement of 'intentionally' causing 'damage.'").

CFAA charges "because it was unclear whether he had created the botnet or was simply selling it."[156] As a result, the current form of the statute does little to "police the black market of malware"—including RaaS.[157] This creates a linguistic loophole for cybercriminals to capitalize on buying or selling RaaS with impunity. A legislative redrafting to specify botnet trafficking in the statute has been proposed and discussed in congressional research material[158] and should be implemented.[159]

However, even a successful redrafting of CFAA language will not solve the problem of identifying and extraditing defendants in Russia; in other words, an amendment that criminalizes the buying and selling of infected malware would make little difference to the original identification and jurisdiction issues mentioned above.[160] As demonstrated by the CFAA's current unsuccessful efforts to prevent ransomware, it is unable to keep up with the pace of cybercrime, and organizations will need to consider additional actions to counteract the inevitable threat of ransomware.[161] As such, more will be demanded of not only victim organizations, but also the government, to help better protect U.S. security interests.[162]

IV. Long-Term and Immediate Proposals to Respond to Ransomware Attacks

This section explores alternative solutions to the inadequacies of the current formal and informal response mechanisms discussed. Given the global scope of ransomware attacks and devastating consequences, it is necessary to explore solutions that span beyond our borders and regulate cyberspace. To do this, we can look to ex-

156 "The creation of botnet and the use of a botnet to commit crimes generally violates the CFAA." *See* CRS Report, *supra* note 84, at 26–27.

157 Triana, *supra* note 148, at 1319.

158 CRS Report, *supra* note 84, at 27.

159 Congressional research does not specifically touch on the sale of ransomware but scholarly discussion of the CFAA's failure to address the sale of "infected malware" gives rise to the assertion that the CFAA does not prohibit ransomware sales, and similarly should. *See* Triana, *supra* note 148, at 1327 ("Malware is commonly classified by its functionality and is often labeled a virus, worm, Trojan, rootkit, ransomware, spyware, backdoor, or botnet. Malware today is often a hybrid of these types and has multivariate functionality.").

160 *See supra* Section III(A).

161 Durbin, *supra* note 1.

162 *Id.* at 3 ("Establishing cybersecurity alone is not enough . . . . Organizations must . . . put in place cyber resilience programs that anticipate uncertainty" and that implement a comprehensive rapid response plan.).

isting global treaties and efforts that seek to address the militarization[163] of Information and Communication Technologies ("ICTs"), and learn from what has and has not worked in the past to answer the future threat of ransomware.[164]

To date, the 2001 Budapest Convention ("Convention") is the only binding international treaty on cybercrime.[165] Drafted by the Council of Europe—a regional human rights organization—the Convention aims to reduce computer-related crime by "(1) harmonizing national laws . . . [on cybercrime]; (2) supporting the investigation of these crimes; and (3) increasing international cooperation in the fight against cybercrime."[166] With five ratifications since it first passed, a total of sixty-six countries, including the U.S., have signed it.[167]

However, major cyber powers like Russia and China have consistently refused to join and have advanced efforts to replace the current Convention because it is at odds with their authoritarian government regimes.[168] The underlying principles of the Budapest Convention, supported by Western nations like the U.S., seek to make the Internet a universally accessible and peaceful space for citizens.[169] On the opposite end, Russia and China oppose the treaty as their regimes want to preserve traditional state sovereignty with respect to control over their citizens' use of the In-

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163 *See supra* note 5.

164 Peters & Hindocha, *supra* note 13; Stauffacher, *supra* note 11.

165 Peters & Hindocha, *supra* note 13.

166 Jennifer Daskal & Debrae Kennedy-Mayo, *Budapest Convention: What is it and How is it Being Updated?*, CBDF (July 2, 2020), https://www.crossborderdataforum.org/budapest-convention-what-is-it-and-how-is-it-being-updated [https://perma.cc/KM4M-2HVG]; *see also Treaties & International Agreements on Cyber Crime*, GEO. L. LIBR., https://guides.ll.georgetown.edu/c.php?g=363530&p=4821478 [https://perma.cc/72GW-C335] (last visited Nov. 16, 2021); *see also Convention on Cybercrime*, Nov. 23, 2001, E.T.S 185 https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680081561 [https://perma.cc/BL89-M452].

167 *Chart of Signatures and Ratifications of Treaty 185: Convention on Cybercrime*, COUNCIL EUROPE, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?module=signatures-by-treaty&treatynum=185 [https://perma.cc/36K9-79PX] (last updated Oct. 11, 2021).

168 Allison Peters, *Russia and China Are Trying to Set the U.N.'s Rules on Cybercrime*, FOREIGN POL'Y (Sept. 16, 2019), https://foreignpolicy.com/2019/09/16/russia-and-china-are-trying-to-set-the-u-n-s-rules-on-cybercrime/ [https://perma.cc/6G9D-Q6PN].

169 Fen Osler Hampson & Michael Sulmeyer, *Getting Beyond Norms: New Approaches to International Cyber Security Challenges*, CTR. INT'L GOVERNANCE INNOVATION 1 (2017), https://www.cigionline.org/sites/default/files/documents/Getting%20Beyond%20Norms.pdf [https://perma.cc/CB4Q-FR67].

ternet.[170] The differing views concerning Internet freedom and appropriate regulation are at the heart of the divide when it comes to a binding international treaty.[171] One important lesson from the Budapest Convention informs us that in order to facilitate international ransomware resolutions, major powers need to come to the table.[172] Although a simple idea, this is a critically missing piece to achieving a reduction in ransomware attacks.

A. *Bilateral Agreements to Prevent Ransomware*

To bring global cyber powers to the table, this Note proposes bilateral agreements that are limited in scope as a viable option. By drawing on the working aspects of the Budapest Convention and recommendations of international policy reports, the U.S. can negotiate non-binding, informal agreements on reducing the ransomware threat as an achievable resolution.[173] In this context, a bilateral agreement would involve at least two parties, the U.S. and Russia and/or the U.S. and China, agreeing to a set of limited terms concerning the prevention of ransomware attacks.

In terms of the scope of an agreement, the U.S. can utilize policy reports by the International ICT4Peace Foundation ("ICT4Peace"), a leading international policy and action-oriented organization on cyber peace and safety, for a model of negotiating the content of such agreements.[174] Looking to recent ICT4Peace

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[170] James Andrew Lewis, *Revitalizing Progress in International Negotiations on Cyber Security*, *in* GETTING BEYOND NORMS: NEW APPROACHES TO INT'L CYBER SECURITY CHALLENGES, SPECIAL REPORT 13, 16 (Fen Osler Hampson and Michael Sulmeyer ed., 2017), https://www.cigionline.org/sites/default/files/documents/Getting%20Beyond%20Norms.pdf [https://perma.cc/CB4Q-FR67]; *see also* Mark A. Barrera, *The Achievable Multinational Cyber Treaty: Strengthening Our Nation's Critical Infrastructure*, AIR UNIV. 1, 2–3 (2017), https://media.defense.gov/2017/Jun/19/2001764798/-1/-1/0/cpp_0003_barrera_multinational_cyber_treaty.pdf [https://perma.cc/94SE-WV4A].

[171] François Delerue, Frédérick Douzet, & Aude Géry, *The Geopolitical Representations of International Law in the International Negotiations on the Security and Stability of Cyberspace*, IRSEM/EU CYBER DIRECT 13, 17–18 (Nov. 2020), https://eucd.s3.eu-central-1.amazonaws.com/eucd/assets/EOETDUfd/report-75-delerue-et-al-v2.pdf [https://perma.cc/4R2G-SFM6].

[172] Joyce Hakmeh & Allison Peters, *A New UN Cybercrime Treaty? The Way Forward for Supporters of an Open, Free, and Secure Internet*, COUNCIL FOREIGN REL. (Jan. 13, 2020, 11:35 AM), https://www.cfr.org/blog/new-un-cybercrime-treaty-way-forward-supporters-open-free-and-secure-internet [https://perma.cc/59S2-BYAM].

[173] Delerue, Douzet, & Géry, *supra* note 171; *see also* Chernenko, Demidov, & Lukyanov, *supra* note 11.

[174] *About Us*, ICT4PEACE FOUND., https://ict4peace.org/about-us/mission/ [https://perma.cc/AP53-VUCQ] (last visited Oct. 10, 2021).

publications, the scope of terms can be limited to, for example: non-targeting of critical infrastructure, including a common definition as to what constitutes such infrastructure; refraining from offensive state-sponsored cyber operations that should similarly be defined for common understanding; and a provision on jurisdictional arrangements.[175] Following suit with the purpose of MLATs,[176] a jurisdictional provision can create a reciprocal arrangement for each country to assist one another in the investigation and prosecution of known cybercriminals located in either party's jurisdiction.[177]

i. Negotiating Terms

As with most international agreements, the exact terms of a bilateral agreement on ransomware will develop from a culmination of negotiations and dialogue among the involved parties.[178] With respect to international negotiations, there are no formal "rules of play," as they are typically conducted under ad hoc procedures that are established by each participating party to the bilateral agreement.[179] That said, there are still informal principles of international negotiation by which parties will want to abide, especially within the context of a historically contentious subject matter concerning the regulation of cyberspace.

From the perspective of the U.S., the objective in bilateral negotiations is twofold: (1) reduce malicious ransomware attacks via non-targeting of critical infrastructure and cooperation protocols; and (2) promote a sustainable international dialogue on cyber

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175 Stauffacher, Tikk, & Meyer, *supra* note 6, at 2.

176 *See* PERSONICK & PATTERSON, *supra* note 114.

177 Funk, *supra* note 134, at 2.

178 *See, e.g.*, *Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offense Arms (New START)*, NUCLEAR THREAT INITIATIVE (last updated Feb. 25, 2021), https://www.nti.org/learn/treaties-and-regimes/treaty-between-the-united-states-of-america-and-the-russian-federation-on-measures-for-the-further-reduction-and-limitation-of-strategic-offensive-arms/ [https://perma.cc/YBB2-W4FU]; *see also Top International Negotiation Examples: The East China Sea Dispute*, HARV. L. SCH.: PROGRAM NEGOT. (July 22, 2019), https://www.pon.harvard.edu/daily/international-negotiation-daily/top-10-international-negotiations-of-2013-the-east-china-sea-dispute/ [https://perma.cc/8Y7P-LQJ5].

179 Charles B. Craver, *How to Conduct Effective Transnational Negotiations Between Nations, Nongovernmental Organizations, and Business Firms*, 45 WASH. UNIV. J. L. & POL'Y 69, 71 (2014), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1815&context=law_journal_law_policy [https://perma.cc/U5RM-ZREZ].

peace and norms in cyberspace.[180] From Russia's perspective, this proposal does not directly undermine its views on Internet control, unlike with a binding cyber norm treaty, and can be a way to revive the dialogue between Russia and the U.S. on cyber issues.[181] In the past, the U.S. has initiated similar limited cyber peace-keeping agreements with China and Russia.[182] After the 2015 hack attacks allegedly supported by the Chinese government, former President Barack Obama and Chinese President Xi Jinping engaged in a dialogue on cyber issues that led to a cyber economic espionage agreement.[183] Though its effectiveness is somewhat debated,[184] the agreement has curtailed China-based cyberattacks on the U.S. and, at the very least, increased communication between the two countries.[185] As applied to the U.S.-Russia context, the path forward is to similarly be flexible in negotiations for bilateral agreements on ransomware prevention while remaining centered on the importance of establishing sustainable cybersecurity.[186]

1. A Closer Look at U.S.-Russian Talks to Reduce Ransomware

The 2021 U.S.-Russia summit in Geneva was the first step toward a real conversation with our adversary about ransomware attacks on the U.S.[187] During the summit, which lasted for approximately three hours, President Joseph Biden and Russian President Vladimir Putin discussed the recent ransomware attacks and the interests of both countries' attention to cybersecurity.[188] In their post-summit addresses, both world leaders described their

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180 James Andrew Lewis, *Sustaining Progress in International Negotiations on Cybersecurity*, CSIS (July 25, 2017), https://www.csis.org/analysis/sustaining-progress-international-negotiations-cybersecurity [https://perma.cc/56RN-8SCC].

181 Chernenko, Demidov, & Lukyanov, *supra* note 11.

182 *Id.*

183 The agreement was meant to prevent economically motivated cyber espionage between the two countries, particularly the theft of intellectual property and trade secrets. *See* Celia Louie, *U.S.-China Cybersecurity Cooperation*, UNIV. WASH. (Sept. 8, 2017), https://jsis.washington.edu/news/u-s-china-cybersecurity-cooperation/ [https://perma.cc/ZSR6-ZRVV].

184 *Id.*

185 Chernenko, Demidov, & Lukyanov, *supra* note 11.

186 Lewis, *supra* note 180.

187 Holly Ellyatt, *Biden and Putin Conclude High-Stakes Diplomacy at Geneva Summit*, CNBC (June 16, 2021, 12:04 PM), https://www.cnbc.com/2021/06/16/putin-biden-summit-in-geneva-2021.html [https://perma.cc/L857-UXFM].

188 Vladimir Soldatkin & Steve Holland, *Far Apart at First Summit, Biden and Putin Agree to Steps on Cybersecurity, Arms Control*, REUTERS (June 16, 2021), https://www.reuters.com/world/wide-disagreements-low-expectations-biden-putin-meet-2021-06-15/ [https://perma.cc/EM32-N5HW].

conversation using words such as "productive," "positive," and "concrete," and described the atmosphere as one that encouraged an open and non-hostile conversation.[189] As far as substance, however, it is unclear as to how much was actually accomplished.[190] For the U.S., President Biden proposed a list of sixteen specific critical infrastructure sectors that should be off-limits to ransomware attacks.[191] On the Russian side, President Putin denied that Russia was behind any ransomware attacks against the U.S., despite ample evidence that many of these attacks come from the Russian region, leading many to question progress on talks when Russia's leader failed to take accountability in the first place.[192] What can be ascertained from the talks is that the two leaders agreed to set up a working group on cyberattacks, and both reinstated their ambassadors back to each other's capitals.[193] While the meeting was a far cry from a bilateral agreement, the progress made at the summit indicates, at the very least, that there is room for conversations that can lead to negotiations on bilateral agreements in the long term.

2. Key Players and the Future of Negotiations

Meaningful change in the reduction of ransomware attacks on the U.S. will require the U.S. to continue to project a unified national position in subsequent negotiations on the global stage.[194] At the 2021 summit, President Biden took the position of creating "predictability" and "stability" moving forward in the relationship between the U.S. and Russia, specifically as to the conversation surrounding cybersecurity.[195] The key players to enforce this position include each countries' ambassador, both of whom are ex-

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189 NBC News, *Full Speech: Biden Delivers Remarks After Putin Summit in Geneva*, YouTube (June 16, 2021), https://www.youtube.com/watch?v=rRX35-my8vE/&ab_channel=NBCnews [https://perma.cc/9FAA-Q7UW]; *see also* Gerald F. Seib, Wall Street Journal, *Takeaways From Biden-Putin Summit: Atmospherics vs. Substance*, YouTube (June 17, 2021), https://www.youtube.com/watch?v=QYFxPYs-5no&_channel=WallStreetJournal [https://perma.cc/MW6X-ZZNT].

190 Seib, *supra* note 189.

191 Soldatkin & Holland, *supra* note 188; *see also Critical Infrastructure Sectors*, Cybersecurity & Infrastructure Sec. Agency (CISA), https://www.cisa.gov/critical-infrastructure-sectors [https://perma.cc/2TU7-W22J] (last visited Nov. 16, 2021) (for a list of the sixteen critical infrastructure sectors).

192 NowThis News, *Vladimir Putin Holds Press Conference After U.S.-Russia Summit*, YouTube (June 16, 2021), https://www.youtube.com/watch?v=qcrWDhSYHeo&ab_channel=NowThisNews [https://perma.cc/LQ8F-ZLEA]; *see also* Ellyatt, *supra* note 187.

193 Seib, *supra* note 189.

194 Craver, *supra* note 179, at 74.

195 Ellyatt, *supra* note 187.

pected to return to their posts in Moscow and Washington, D.C., following a brief recall period.[196] Indeed, U.S. ambassador John Sullivan and Russian ambassador Anatoly Antonov are expected to hold future talks on cyber-security and diplomatic ties.[197]

Another key diplomatic player is the U.S. Secretary of State, who is tasked with serving as the President's chief foreign affairs advisor, and given the responsibility of conducting negotiations on treaties and agreements.[198] The current U.S. Secretary of State, Antony J. Blinken, announced in October of 2021 the approval of a new bureau of Cyberspace and Digital Policy ("CDP") to address diplomatic stressors in cybersecurity.[199] Earlier efforts by the former Trump Administration to establish a similar bureau were met with criticism from lawmakers for being too narrowly focused on cybersecurity without consideration to "economic interest and internet freedoms."[200] The new CDP will have three divisions: (1) international cybersecurity focusing on deterrence, negotiations and capacity building; (2) international digital policy for Internet governance and trust in global telecom systems; and (3) digital freedom concerning human rights and engagement between the private sector and society.[201] Moving forward, CDP, in collaboration with the Office of the Coordinator for Cyber Issues[202] under the State Department, will likely serve as the formal conduit of communications on cyber policy between nations.

In general, however, negotiations on foreign affairs can and do often take place via "back channels," or informal conversations between global leaders or ambassadors.[203] Regardless of which diplomatic channel of communication is selected, American agents must remember and appreciate that they are always "acting in an official

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196 Ilya Arkhipov & Jennifer Jacobs, *Putin Says U.S., Russia to Return Ambassadors After Summit*, BLOOMBERG (June 16, 2021), https://www.bloomberg.com/news/articles/2021-06-16/putin-says-u-s-and-russia-will-return-ambassadors-after-summit [https://perma.cc/9C33-CXVQ].

197 *Id.*

198 *Duties of the Secretary of State*, U.S. DEP'T STATE, https://www.state.gov/duties-of-the-secretary-of-state/ [https://perma.cc/897X-ULVU] (last visited Oct. 10, 2021).

199 Samantha Schwartz, *State Department to Add Cyber Bureau, Tackle Tech Diplomacy*, CYBERSECURITY DIVE (Nov. 9, 2021), https://www.cybersecuritydive.com/news/state-department-blinken-cyber-bureau-diplomacy/609697/ [https://perma.cc/YF7E-WY8T].

200 Shannon Bugos, *State Review Plans for New Tech Bureau*, ARMS CONTROL ASS'N (Apr. 2021), https://www.armscontrol.org/act/2021-04/news/state-reviews-plans-new-tech-bureau [https://perma.cc/QYF2-G3BJ].

201 Schwartz, *supra* note 199.

202 *Office of the Coordinator for Cyber Issues*, U.S. DEP'T STATE, https://www.state.gov/bureaus-offices/secretary-of-state/office-of-the-coordinator-for-cyber-issues/ [https://perma.cc/ZNX3-URNE] (last visited Nov. 16, 2021).

203 Craver, *supra* note 179, at 71.

capacity."[204] As such, agents representing the U.S. in negotiations must behave and communicate in a manner consistent with enhancing the country's underlying interests, which is to reduce ransomware and promote a sustainable dialogue on cyber norms.[205]

Moving forward with future negotiations, it is in the best interest of each party to engage in (1) confidence building measures, (2) open dialogue about each country's interests, and (3) good faith bargaining principles.[206] Given past geopolitical tensions on regulating cyberspace, confidence building measures—which seek to establish mutual trust—are especially critical to enable the parties to move forward with their objectives.[207] Importantly, an open dialogue will allow each party to uncover potential trade-offs on terms that may result in an amenable agreement.[208]

As mentioned earlier, Russian cooperation with the U.S. in extradition proceedings of cybercriminals has been unsuccessful,[209] indicating that this provision may require further negotiation for agreeable terms. Demanding unliteral concessions from Russia may not go far in helping the parties reach an agreement on ransomware prevention in the negotiation context. Rather, the U.S. and Russia should focus on terms that provide corresponding benefits to make both parties feel like they are walking away with something for their countries' best interests. For the U.S., a reduction in ransomware attacks on U.S. companies and assurances of security are of utmost importance. Accordingly, negotiations that aim to develop "reduced scope" cyber agreements serve as a realistic compromise to achieve preventative ends.[210]

ii. Why Bilateral Agreements Will Complement the Budapest Convention

Bilateral negotiations should not hinder or compete with the progress of the Budapest Convention's goal of obtaining international cooperation to combat cybercrime, so long as the conversation on how to best address the threat of cybercrime continues with global input.[211] Bilateral nonbinding agreements can eventually

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204 *Id.* at 73.

205 *Id.* at 74.

206 Top International Negotiation Examples: The East China Sea Dispute, *supra* note 178.

207 Craver, *supra* note 179, at 76.

208 Top International Negotiation Examples: The East China Sea Dispute, *supra* note 178.

209 *See generally* Section III; *see also* Amid a Ransomware Pandemic, Has Law Enforcement Been Left for Dust?, *supra* note 137.

210 Chernenko, Demidov, & Lukyanov, *supra* note 11, at 4.

211 Peters & Hindocha, *supra* note 13.

serve as a vehicle to transform the current contentious geopolitical conversation into a productive global effort to instill cyber norms and create cohesive international law on cybercrime.[212] At the very least, negotiations can revive the conversation between the U.S. and Russia—a relationship that is critically important for the whole ecosystem of cyber policy and diplomacy.[213]

On the global level, the best way to connect the conversation is to utilize neutral forums to encourage open debate on cyber policy.[214] The United Nations General Assembly provides this forum through two parallel working groups, the Group of Governmental Expert ("GGE") and the Open-Ended Working Group ("OEWG"), which were created for purposes of global discussion and negotiations on ICT issues in the context of international security.[215] Though the composition of each group differs (GGE is composed of twenty-five selected governmental representatives, whereas OEWG includes all interested states and stakeholders, such as businesses), the focus of their issues remains largely similar.[216] Furthermore, the leaders of the two parallel groups express the ambition that they can be complementary to one another, in the goal of achieving international cooperation on cyber norms.[217] In similar fashion, the bilateral agreements with Russia and China can be complementary to the global discussions, and can create a path forward in achieving international law on cybercrime. Though the Convention is far from perfect, it is an operational treaty that can be amended.[218] In the meantime, conversations with Russia through informal negotiations can serve as a mechanism to attract Russia to the Convention, which may encourage China to follow.

B. *The Case for Negotiations with the Cybercriminal Despite Ethical and Regulatory Opposition*

While there are considerable arguments against negotiating and ultimately paying a ransom, engaging with the criminal is often

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212 Delerue, Douzet, & Géry, *supra* note 171, at 57.

213 Chernenko, Demidov, & Lukyanov, *supra* note 11, at 5.

214 Hakmeh & Peters, *supra* note 172.

215 *UN GGE and OEWG*, DIGIT. WATCH, https://dig.watch/processes/un-gge [https://perma.cc/4R9W-8EZR] (last visited Oct. 10, 2021).

216 *Id.*

217 Delerue, Douzet, & Géry, *supra* note 171, at 22.

218 Hakmeh & Peters, *supra* note 172.

considered as a last resort option,[219] and paying the ransom can come down to a "business-decision."[220] The primary concerns against paying the ransom include: the risk of inadvertently funding other criminal activity, emboldening attackers, and enabling the ransomware industry to grow.[221] These concerns also imply an ethical dilemma about whether victims should or should not pay the ransom when weighing the costs to their organization and operations against the harm of rewarding and encouraging the cybercriminal.[222] Practically speaking, there is no objective calculation of ethical choices because each victim's costs of ransomware will vary, as will the relevant factors contributing to that decision.[223] For many, the ultimate decision rests on what is being held for ransom (critical infrastructure, personal data, life-saving devices, etc.).[224] For others, paying is the safer strategy because of the belief that the data and systems will be restored upon payment[225]—which, as mentioned, is not always the case.[226]

C. *The Case for Negotiations with the Cybercriminal Despite Ethical and Regulatory Opposition*

In addition to the ethical dilemma of paying ransom, there are legal considerations a victim must be aware of before deciding to negotiate.[227] For example, victims must ensure that they are not running afoul of any state or federal regulations against paying ransoms if they choose to negotiate and pay.[228] Generally speaking,

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219 *The Pros and Cons of Paying the Ransom: When Should I Consider It?*, *supra* note 52.

220 Larry Dignan, *Ransomware Attacks: Why and When it Makes Sense to Pay the Ransom*, ZDNET (June 27, 2019), https://www.zdnet.com/article/why-and-when-it-makes-sense-to-pay-the-ransom-in-ransomware-attacks/ [https://perma.cc/28P3-SQTE].

221 Cindy Wisner, *Dancing with the Devil: Responding to a Ransomware Attack*, 2018 AHLA SEMINAR PAPERS 44 (Feb. 5, 2018), https://1.next.westlaw.com/Document/I48e341fd495d11e992ce970172fed839/View/FullText.html?transitionType=SearchItem&contextData=(Sc.Search) [https://perma.cc/5GKS-4UKA].

222 *Should I Pay Ransomware? Let's Discuss*, SENTINELONE (Oct. 30, 2019), https://www.sentinelone.com/blog/ransomware-to-pay-or-not-to-pay-lets-discuss [https://perma.cc/3DY5-YLLE].

223 *Id.*

224 Hofmann, *supra* note 66, at 13.

225 *Id.*

226 *See* Davis, *supra* note 53 (Based on a new study conducted by Sophos, one percent of respondents said that paying the ransom did not lead to the data being decrypted, which rose to five percent for public sector organizations.).

227 Should I Pay Ransomware? Let's Discuss, *supra* note 222.

228 Seetha Ramachandran, Nolan M. Goldberg, & Hena M. Vora, *Regulatory Crackdown on Ransomware*, NAT'L L. REV. (Dec. 15, 2020); *see also Legislation Seeks to Ban Ransomware*

there is no federal blanket ban on paying ransomware—but this does not mean it is unregulated by the U.S. government.[229] In 2020, the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC")[230] issued an advisory concerning potential sanctions on U.S. organizations. U.S. organizations must now consider two important questions before deciding to negotiate and/or pay the ransom: (1) Who is the hacker or hacker group you intend to pay?; and (2) Is the hacker or hacker group on OFAC's sanctioned list?[231] If the hacker or group is sanctioned by OFAC, victims are prohibited from paying, with a few exceptions.[232] As a result, victim organizations and individuals must be prudent to rule out any risk of OFAC sanctions and/or state regulations to avoid additional penalties, as discussed below.[233]

i. The Effect of OFAC Regulations on Negotiations

Victims of ransomware may risk potential civil penalties for facilitating ransomware payments to sanctioned hacker groups, individuals, or countries.[234] OFAC imposes sanctions on cybercriminal actors and others who "materially assist, sponsor, or provide financial, material, or technological support for these activities."[235] According to the advisory, any victim or third party acting on behalf of the victim, such as a financial institution, a cyber insurance firm, or a company involved in digital forensics and incident response, risks violating OFAC regulations. The one excep-

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Payments from NY State Municipalities, PROVEN DATA, https://www.provendatarecovery.com/blog/legislation-seeks-to-ban-ransomware-payments-from-ny-state-municipalities/ [https://perma.cc/4VWB-QAJK] (last visited Nov. 16, 2021).

229 Ramachandran, *supra* note 228; *see also* Bruce Sussman, *U.S. Government Warning on Ransomware Payments: What Does It Mean?,* SECUREWORLD (Oct. 5, 2020, 4:00 AM), https://www.secureworldexpo.com/industry-news/is-paying-ransomware-illegal-guidelines [https://perma.cc/R6TW-ULZK].

230 OFAC is responsible for administering and enforcing economic and trade sanctions based on U.S. foreign policy and national security goals. *See Office of Foreign Assets Control: Sanctions Programs and Information*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information [https://perma.cc/URC9-A9N6] (last visited Oct. 10, 2021).

231 *Advisory on Potential Sanctions Risks for Facilitating Ransomware Payments*, U.S. DEP'T TREASURY (Oct. 1, 2020), https://home.treasury.gov/system/files/126/ofac_ransomware_advisory_10012020_1.pdf [https://perma.cc/FS2D-T5DF] [hereinafter OFAC Advisory].

232 *Id.*

233 *Id.*

234 *Id.*; *see also Treasury Department Issues Ransomware Advisories to Increase Awareness and Thwart Attacks*, U.S. DEP'T TREASURY (Oct. 1, 2020), https://home.treasury.gov/news/press-releases/sm1142 [https://perma.cc/B5QP-V7JL].

235 OFAC Advisory, *supra* note 231, at 2.

tion is if a company or its associated third parties obtain a special license that allows them to engage in transactions with the sanctioned hacker group, namely negotiating to pay a lower ransom; however, approval for an OFAC-issued license "will be reviewed by OFAC on a case-by-case basis with a presumption of denial."[236] Generally, enforcement of OFAC sanctions will depend on various factors, including the extent and nature of a company's risk and compliance programs, to determine an appropriate response to an apparent violation.[237] Importantly, OFAC will consider self-initiated reporting as a mitigating factor to appropriate remedial options if there appears to be a sanctions nexus.[238] As such, it is imperative for U.S. companies to remain vigilant to potential sanctions should they become exposed to a ransomware attack and implement risk-based compliance programs to mitigate exposure to sanctions-related violations.[239]

The implications of potential sanctions risks are illustrative through the ransomware attack on sports and fitness company Garmin.[240] This attack was headed by an OFAC sanctioned hacker group, Evil Corp, which demanded a $10 million ransom.[241] After a five-day outage, Garmin obtained the decryption key, putting its operations back online.[242] Although Garmin reported that it "did not directly make a payment to the hackers," there is speculation as to whether it paid the $10 million ransom "indirectly" through a cyber insurance carrier or other third party.[243]

The Garmin incident demonstrates several key takeaways. First, it shows the difficulties of navigating the dilemma of whether a company can or should negotiate with a sanctioned cyber-group, and at what costs. Further, it indicates the need for individualized

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236 *Id.* at 4.

237 *Id.* at 3.

238 *Id.* at 4.

239 *Id.*

240 Garmin is best recognized for its digital smartwatches but also provides aviation navigation and route-planning services. *See* Josephine Wolff, *The Cyberattack on Garmin Poses a Complicated Question for the U.S. Government*, SLATE (July 28, 2020, 4:45 PM), https://slate.com/technology/2020/07/garmin-cyberattack-ransomware-payment.html [https://perma.cc/T92N-CMRR]; *see also* Zack Whittaker, *Garmin Confirms Ransomware Attack Took Down Services,* TECHCRUNCH (July 27, 2020, 12:57 PM), https://techcrunch.com/2020/07/27/garmin-confirms-ransomware-attack-outage/ [https://perma.cc/9TUV-7QJZ].

241 Wolff, *supra* note 240.

242 *Id.*

243 *Id.*; *see also* Alexander Martin, *Garmin Obtains Decryption Key After Ransomware Attack*, SKY NEWS (July 28, 2020, 6:41 AM), https://news.sky.com/story/garmin-obtains-decryption-key-after-ransomware-attack-12036761 [https://perma.cc/MQ6Z-RSVP].

resolutions for each ransomware victim. In Garmin's case, the attack caused a massive disruption to its online services that impacted millions of users and took out "flyGarmin," its aviation services. On balance, this major disruption to critical operations outweighed the potential sanctions risk and ethical dilemma. This points to a practical need for organizations trapped in a similar situation to at least consider all of its options—including making the payment.

ii. Implications of Potential State Bans on Paying Ransom

In response to cyberattacks targeting government agencies and municipalities, some legislatures took a stricter stance against ransomware payments.[244] At least two states, New York and Iowa, have introduced bills that would prohibit local and state governments from paying ransom.[245] In general, the overarching purpose behind the bills is the same, in that the bills seek to promote good public policy against paying ransomware and eliminate financial incentives for criminals to target entities that are banned from paying.[246] Though, in theory, the proposal sounds promising, a blanket ban may impose challenges for state-run healthcare facilities and municipalities with little resources.[247]

Eliminating the option to pay means that an organization's only option is to have a solid backup and continuity plan—a critical component that many underfunded and understaffed municipalities and local hospitals simply lack.[248] Furthermore, making it illegal for government entities to pay does not necessarily imply that cybercriminals will be less likely to deploy attacks against these entities.[249] In the short term, a ban may increase ransomware attacks, as cybercriminals will seek to test the resolve of these organizations when their data becomes encrypted (or further extorted).[250]

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244 Jenni Bergal, *Ransomware Attacks Prompt Tough Question for Local Officials: To Pay or Not to Pay?*, PEW TRUSTS (Mar. 3, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/03/03/ransomware-attacks-prompt-tough-question-for-local-officials-to-pay-or-not-to-pay [https://perma.cc/Q63Z-K57F].

245 *Id.*

246 *Id.*

247 Catalin Cimpanu, *New York State Wants to Ban Government Agencies from Paying Ransomware Demands,* ZDNET (Jan. 23, 2020), https://www.zdnet.com/article/new-york-state-wants-to-ban-government-agencies-from-paying-ransomware-demands/ [https://perma.cc/ZVW9-Y6A4].

248 *Id.*; *see also* Legislation Seeks to Ban Ransomware Payments from NY State Municipalities, *supra* note 228.

249 Cimpanu, *supra* note 247.

250 *Id.*

Though the bills are still up for consideration in their respective committees, these are important factors for policymakers to consider before enacting them. Likewise, government entities and cybersecurity professionals working with state and local facilities will need to pay close attention to these bills, and in the meantime, focus on upgrading their internal cybersecurity posture.

iii. Private Negotiations: What You Need to Know Before Negotiating with Cybercriminals

Negotiations between the victim organization and cybercriminal are serving—and should continue to serve—as an available individualized remedial tool. As demonstrated by the examples of ransomware incidents, victims face high-stakes losses that may require them to make a difficult business decision—paying the ransom. If resources provide, victims facing a ransomware attack can turn to professional negotiation services to assist them in this process.[251] Many organizations with cyber insurance policies can be connected with ransomware negotiators or "breach coaches"—if provided by the carrier.[252] The role of a negotiator or professional ransomware remediation company is similar to that of a breach coach in that they both can help organizations navigate their response and recovery.[253] The main difference is that a breach coach is an attorney specializing in cyber security events,[254] whereas a negotiator does not require a legal background. Essentially, there is a skills and services trade-off between the two roles. Most often, however, negotiators work hand-in-hand with breach coaches to resolve the ransomware attack, making them complementary to one another.[255] In fact, some remediation companies that provide negotiators will only work with clients who have retained legal counsel if there is a data breach issue.[256]

However, breach coaches, or simply outside legal counsel, may be preferred to lead the ransomware response effort because they

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251 *Ransomware Negotiation & First Responder*, CyberSecOp, https://cybersecop.com/ransomware-negotiation-services [https://perma.cc/FLW7-XYUN] (last visited Oct. 10, 2021).

252 Melendez, *supra* note 68.

253 Travelers Risk Control, *What Is a Data Breach Coach and How Do I Get One?*, Travelers, https://www.travelers.com/resources/cyber-security/what-is-a-data-breach-coach [https://perma.cc/C9UC-U6QJ] (last visited Oct. 10, 2021).

254 *Responding to a Data Breach Takes a Team*, Travelers, https://www.travelers.com/resources/business-topics/cyber-security/responding-to-a-data-breach-takes-a-team [https://perma.cc/P3B6-G9A7] (last visited Oct. 10, 2021).

255 Melendez, *supra* note 68.

256 *Id.*

can centrally coordinate all relevant issues and provide appropriate countermeasures.[257] Breach coaches are often equated to general contractors for an organization because they provide guidance on the company's disclosure obligations to customers or regulators, coordinate with computer forensic and IT firms to assess extent of damage, work with remediation companies that provide negotiators, and, importantly, handle notification requirements.[258] Organizations that host Personally Identifiable Information ("PII") or Protected Health Information ("PHI") are ones that typically require legal counseling specific to data breach issues, though legal counsel also advises on OFAC regulations relevant to all organizations.[259] If an organization suffers a data security compromise, legal counsel can take steps to investigate and properly respond, which includes: making timely disclosures to affected individuals, regulators, and other third-parties as required by law, and, if necessary, representing the organization in any privacy breach claims.[260] Furthermore, having a law firm lead the response provides the advantage of attorney-client confidentiality, which enables candid conversations about what went wrong.[261] These conversations allow counsel to understand the full extent of the situation and, if there was a breach, determine the appropriate next steps. Thus, with several correlating issues, it is beneficial to have one central person or team coaching the organization's response.

Conversely, if an organization elects to seek independent remediation expertise, it should pay close attention to the negotiator's credentials. As it stands now, ransomware negotiation is an industry with no certifications or professional associations, allowing anyone to claim themselves as a ransomware negotiator.[262] Broadly speaking, organizations should look for the following credentials in a negotiator: (1) as with any professional service, documented experience with successful negotiations; (2) demonstrated understanding of various threat actors and syndicates; (3) an understanding of the critical corporate issues at play; and (4) an abil-

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257 *Id.*

258 What Is a Data Breach Coach and How Do I Get One?, *supra* note 253.

259 Responding to a Data Breach Takes a Team, *supra* note 254.

260 Mullen Coughlin, *Services: Breach Response*, MULLEN COUGHLIN, https://www.mullen.law/services/breach-response/ [https://perma.cc/GX38-FWVB] (last visited Jan. 11, 2022).

261 Melendez, *supra* note 68.

262 Kurtis Minder, *Consider These Credentials When Hiring a Ransomware Negotiator*, SEC. MAG. (Dec. 8, 2020), https://www.securitymagazine.com/articles/93919-consider-these-credentials-when-hiring-a-ransomware-negotiator [https://perma.cc/8BZK-CAR4].

ity to coordinate effective corporate crisis response.[263] Many professional ransomware recovery services provide transparency about their incident response process, expected down time, and success rates of recovery, based on the ransomware variant.[264] Importantly, some recovery services run sanctions compliance checks, while others may rely on the client to retain legal counsel to ensure compliance.[265] Alternatively, an organization can elect to pay the ransom on its own and have its internal security staff run a Do-it-Yourself, or "DIY," ransomware recovery, with due consideration to regulatory compliance.[266] The range of capabilities each service offers is helpful to inform an organization's decision in selecting the right service provider for its situation.[267]

Once an organization understands its options, the best approach is to establish an incident response plan before the attack.[268] First, identify the response team leaders who will coordinate all of the necessary players and establish a relationship with them.[269] Second, create an offline communication channel to ensure a way to contact your team if email and phones are taken offline.[270] Third, develop a plan for how to pay cryptocurrency ransom should it become necessary.[271] Fourth, develop and follow an internal policy that specifies parameters to be considered in a

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263 *Id.*

264 *Rely on the Data. Ransomware Analytics Enable a Better Recovery*, COVEWARE, https://www.coveware.com/ransomware-analytics [https://perma.cc/Z28H-38KP] (last visited Oct. 10, 2021); *see also Ransomware Recovery Process*, PROVEN DATA, https://www.provendatarecovery.com/data-recovery-services/ransomware-data-recovery/ [https://perma.cc/324R-YSZL] (last visited Oct. 10, 2021).

265 *Our History of Ransomware & Compliance*, PROVEN DATA, https://www.provendatarecovery.com/blog/proven-data-ransomware-history-compliance/ [https://perma.cc/CFQ6-D3E6] (last visited Oct. 10, 2021).

266 *What Does it Cost to Recover from Ransomware? A Breakdown of Fees & Expenses*, PROVEN DATA, https://www.provendatarecovery.com/blog/ransomware-cost-expenses-fees/ [https://perma.cc/JTM2-JM2V] (last visited Oct. 10, 2021); *see also* CyberSavvy Media, *How to Recover Your System from a Ransomware Attack*, YOUTUBE (Jan. 10, 2017), https://www.youtube.com/watch?v=kJuibb9QaWk&ab_channel=CSO [https://perma.cc/ERS5-WFAZ] (for a DIY).

267 Thomas Fuhrman, *Ransomware: Remove Response Paralysis with a Comprehensive Incident Response Plan,* MARSH (2020), https://www.mmc.com/content/dam/mmc-web/insights/publications/2020/november/ransomware-incident-response.pdf [https://perma.cc/5ZUN-W6MG].

268 *Id.*

269 Christopher E. Ballod, Frank J. Gillman, & Sean B. Hoar, *Ransomware: Recommendations for Preparation and Response*, LEWIS BRISBOIS (Jan. 3, 2019), https://lewisbrisbois.com/blog/post/ransomware-recommendations-for-preparation-and-response [https://perma.cc/2TWG-XN22].

270 *Id.*

271 Fuhrman, *supra* note 267, at 1.

ransomware situation, including "the cost of the ransom vs. the estimated cost of restoration, the likelihood of successful restoration whether the ransom is paid or not, regulatory implications, [ ] and the criticality of the data."[272] This policy should be approved by the organization's board or shareholders; the policy is likely to become discoverable if an organization is sued over its handling of a ransomware event.[273] Organizations should familiarize themselves with regulatory implications (in addition to counseling from legal players).[274] Most important for any organization is to establish internal cybersecurity procedures that include a system of data back-up and restoration measures, anti-virus monitors, and personnel training on cyber safety.[275]

In addition to this non-exhaustive list of pre-incident steps, organizations should tap into insurance policy coverage and review any ransomware-specific services that the carrier may offer.[276] Policyholders will want to look carefully at the fine print—many policies do not cover state-sponsored attacks[277]—which are increasingly more common.[278] Some cyber insurance carriers may cover costs related to retaining professional services, such as "data breach coach/privacy counsel, IT forensic investigations, call center and credit monitoring/identity theft monitoring, crisis management and public relations, and ransom demand negotiation."[279] Further, if an organization decides to pay the ransom, it is critical to follow the insurer's payment protocol to maximize the coverage.[280] Organizations will also need to conform to the insurance reporting guidelines.[281] Together with their professional team, organizations can create a sound crisis response plan and retain all the necessary players so that *when* a ransomware attack hits, the organization will know the exact next steps to follow.[282]

So, your computer is encrypted with ransomware and your back-ups failed. What next? For *any* victim, U.S. government agencies recommend to immediately isolate the infected computer

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272 *Id.*

273 *Id.* at 2.

274 *Id.*

275 Ballod, Gillman, & Hoar, *supra*, note 269.

276 Fuhrman, *supra* note 267.

277 Durbin, *supra* note 1.

278 Blake, *supra* note 89.

279 Fuhrman, *supra* note 267.

280 *Id.*

281 *Id.*

282 Responding to a Data Breach Takes a Team, *supra* note 254.

from the network to prevent ransomware from spreading to other networks or share drives.[283] Secondly, isolate or power-off devices that are not yet completely corrupted.[284] Third, secure backup systems by taking them offline.[285] The FBI also recommends that victims collect and secure any ransomed data that might exist.[286] In general, all victims are encouraged to contact law enforcement to report the attack, as it can provide further assistance in this type of situation.[287]

For *victims with an incident response plan* in place, follow immediate isolation steps and contact the person leading the response plan. Once your plan is activated, your response team will take over from hereon. Typically, before deciding whether to engage in negotiations, the recovery expert will identify the ransomware variant and determine the likelihood of data recovery, based on past patterns.[288] Based on this evaluation and analysis of recovery, the victim organization will decide whether to proceed with negotiations.[289]

For illustrative purposes, say the victim agrees to negotiate. The negotiator will first want to request "proof of life."[290] Put differently, they will want to see some form of proof of the hacker's ability to decrypt and restore the data (e.g., proof of a decryption key).[291] If none is provided, the organization risks paying on a total bluff.[292] To mitigate this risk, one option is to negotiate with the hackers to pay a portion of the ransom to recover a limited number of files, which will help verify that the attackers actually can decrypt the files.[293] The alternative is to simply bargain for a lower price and pay the ransom based on the expected likelihood of acquiring the key from the variant group, and take on the risk of nonrecovery.

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283 *Interagency Report*, *supra* note 31, at 4.

284 *Id.*

285 *Id.* at 5.

286 *Id.*

287 *Id.*

288 Professional & Transparent Incident Response, *supra* note 70; *see also What is a Ransomware Recovery Evaluation? (Reasons, Process, Costs)*, PROVEN DATA, https://www.provendatarecovery.com/blog/ransomware-recovery-evaluation/ [https://perma.cc/LUV9-WVHF] (last visited Oct. 10, 2021).

289 What is a Ransomware Recovery Evaluation? (Reasons, Process, Costs), *supra* note 288.

290 Ransomware Negotiation & First Responder, *supra* note 251.

291 Masse, *supra* note 72.

292 Ransomware Negotiation & First Responder, *supra* note 251; *see also* Melendez, *supra* note 68.

293 Melendez, *supra* note 68.

On a higher level, the main objective for the negotiator is to talk the ransom demand down while minimizing operational downtime and recovery costs.[294] Achieving the desired results may involve a variety of techniques. One negotiator says that appealing to the hacker's altruism can be helpful.[295] As an example, a negotiator can mention the good work done by a non-profit client-victim, to trigger some human connection to the situation.[296]

In addition to psychological tactics,[297] negotiators should identify both their own and the other party's weaknesses and strengths, which can be leveraged to lower the ransom cost for the victim. For example, if a hacker group has a reputation of delivering faulty decryption keys, then the negotiator can use this information to lower the ransom, buy time, or refrain from further negotiations.[298] The same is true for leveraging data about the cost of restoration to the victim, the importance of the encrypted system, the ability to self-remediate without paying ransom, and, practically, the willingness and ability to pay.[299]

Another negotiation technique can include giving a lowball counteroffer with the added incentive of almost immediate payment.[300] For example, if the ransom demand is $1 million or more, a negotiator can counteroffer with delivering $100,000 in an hour.[301] This alternative may prove more attractive to hackers looking to make a quick buck as opposed to waiting days or weeks for cyber insurance payments to come through.[302] Presumably, insurance processing can also buy time for the victim organization to restore operations, which can help avoid making payment at all. In general, the techniques employed will depend on an assessment of threat actors and the victim's circumstances.[303]

To demonstrate a negotiation, we can look at how negotiators handled a seven-figure ransom on behalf of the University of Cali-

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294 *Id.*; *see also* Professional & Transparent Incident Response, *supra* note 70.

295 Melendez, *supra* note 68.

296 *Id.*

297 VOSS & RAZ, *supra* note 72.

298 Masse, *supra* note 72, at 3.

299 Bruce Sussman, *Watching a 7-Figure Ransomware Negotiation*, SECUREWORLD (July 2, 2020, 4:53 PM), https://www.secureworldexpo.com/industry-news/how-do-ransomware-negotiations-work [https://perma.cc/2BD5-KM37].

300 Rob Wright, *Ransomware Negotiations: An Inside Look at the Process*, TECHTARGET, https://searchsecurity.techtarget.com/feature/Ransomware-negotiations-An-inside-look-at-the-process [https://perma.cc/7L8Y-QLSH] (last visited August 12, 2021).

301 *Id.*

302 *Id.*

303 *Id.*

fornia-San Francisco ("UCSF"). In this ransomware attack, the hackers encrypted UCSF servers containing important academic work within its School of Medicine.[304] As a warning, the hackers stole some of the information and posted it online, threatening to leak more if the school refused to pay the originally demanded $3 million ransom.[305] Here is how the negotiation played out after UCSF negotiators asked the hackers to take down information they had posted:

> [Netwalker hackers]: Done, your data is hide [sic] from our blog. Now let's discuss.
>
> [Hackers explained that UCSF had more than $5 billion in annual revenue, so a $3 million ransom seemed reasonable.]
>
> The University responded by offering $780,000 and explained that the coronavirus had been very costly to the university.
>
> [Netwalker hackers]: How can I accept $780,000? is [sic] like, I worked for nothing. You can collect money in a couple of hours. You need to take is [sic] seriously. If we'll [sic] release our blog, student records data, I am 100% sure you will lose more than our price what we asked. We can agree to an [sic] price, but not like this, because I'll take this as insult. Keep that 780,000 to buy McDonalds for your employees. Is [sic] very small amount for us.
>
> Negotiations spanned for another day before the University came up with an offer: $1.02 million, to which the hackers responded:
>
> [Netwalker hackers] I speak with my boss. I sent him all messages and he can't understand how a university like you: 4–5 billions [sic] per year. Is really hard to understand and [realize] you can get $1,020,895. But okay. I really think your accountant / department can get $500,000 more. So we'll accept $1.5m and everyone will sleep well.[306]

UCSF made a final offer of $1,140,895, which the hackers eventually accepted.[307] In a hindsight analysis, the hackers accepted 62% less than their initial $3 million ransom demand, while the University paid 46% more than its $780,000 starting offer.[308]

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304 Sussman, *supra* note 299.
305 *Id.*
306 *Id.*
307 *Id.*
308 *Id.*

Here, given the important academic research data at stake, paying the ransom was the lesser of two evils for the University—namely, saving the critical medical research trumped having to pay the criminal. In fact, paying 62% less than the original demand in light of the information at stake weighed in favor of paying. On the cost side, this payment may signal to other hackers a cyber vulnerability in the University system, and the University's willingness can make them susceptible to future attacks. On balance, this situation similarly demonstrates that individualized negotiations, which incorporate an assessment of importance of the data and future risk threats, should remain a viable option.

If negotiations lead to the release of a decryption key, there are still careful steps victims must take to recover and secure their data following the ransomware attack.[309] Because decryption keys could be a trap to another malware attack on a computer system, it is wise to run the decryption software in a "sandboxed" environment, where it is isolated from other data.[310] Once the data is safely restored, the organization together with its response team should work to cover its vulnerabilities, to ensure it is not victimized in the future.[311] Insurers and remediation companies will often work with victims to increase system security and update their policies post-recovery.[312] Learning from the attack by identifying system weaknesses—and in response, hardening system protections—will reduce the chances of being struck again.[313] In other words, it is insufficient to deal with the hackers and not do anything to keep them from coming back.[314]

V. Conclusion

To avoid a potential cyberwarfare as dramatized in the *WarGames* motion picture, governments and citizens alike must take proactive steps to address the current and future threat of ransomware. This Note took a broad examination of ransomware attacks on U.S. victims and explored currently available remedial mechanisms. Through examples of ransomware targeting busi-

309 Melendez, *supra* note 68.
310 *Id.*
311 *Id.*
312 *Id.*; *see also* Fuhrman, *supra* note 267.
313 Fuhrman, *supra* note 267.
314 Melendez, *supra* note 68.

nesses, schools, and critical infrastructure, it is clear that ransomware is broad-reaching and possesses a danger beyond monetary losses. This Note points out that amendments to the CFAA alone will be insufficient to combat cybercrimes like ransomware, which are rapidly evolving. In response, this Note first proposed global negotiations that seek to reduce and prevent ransomware as a forward-looking approach. In conjunction to this, it details the use of private negotiations between a victim and cybercriminal as an immediate response mechanism to provide victims with flexible solutions. This research can offer instrumental points to global policy discussions on ransomware and better inform private and government organizations about practical solutions to this threat.