

Remote Justice

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Courts across the country are in the midst of pandemic planning. At the outset, pandemic closures were treated like other emergency court closures. In times of inclement weather, for example, courts temporarily close and reconstitute. Continuity of operations planning is a standard annual effort in most courts throughout the United States. However, a pandemic that rages on months, nearly a year, after it first raised concern, calls for far different efforts. Reconstituting is not an option. At least, reconstituting in-person is not an option. Doing nothing is also not an option. Access to justice is a fundamental right of all citizens and in some instances access that right also requires access to swift justice. To respond to this need, courts are considering and implementing a myriad of options. One of those options is looking to remote justice solutions. This talk will look at some of those remote justice options and explore the constitutionality of the remote jury trial. We will end with attempting to understand impacts on representative sample in the jury pool context and marginalization of communities to access justice in a new medium.

Constitutionality of a Remote Jury Trial

The federal right to a jury trial comes from the Article III Section 2 and the Sixth Amendment of the Constitution. Article III Section 2 states that “the trial for all crimes... shall be by jury; and such trial shall be held in the state where the said crimes have been committed.”² The Sixth Amendment similarly states that “in criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed.”³ The Court incorporated the Sixth Amendment speedy trial right to the states in *Klopfer v. State of N.C.*, and the Sixth Amendment impartial jury trial right in *Parker v. Gladden*.⁴

Despite the language of the sources granting the right to a jury trial, federal courts have declined to extend this right to all types of criminal cases, mainly cases involving petty offenses.⁵ Before Congress codified the definition of a “petty offense” in 18 U.S.C. § 19, judges looked to the severity of the maximum authorized penalty of a crime to determine if it was a non-petty offense worthy of a jury trial.⁶ In *Baldwin v. New York*, the Court decided that a jury trial was required for any offense with a possible prison sentence of more than six months.⁷ Now, according to the current statute, petty crimes unworthy of jury trials include class B or C misdemeanors, and infractions where the fine is no greater than \$5000.⁸

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² U.S. Const. Art. III § 2.

³ U.S. Const. Amend. VI.

⁴ *Klopfer v. State of N.C.*, 386 U.S. 213 (1967); *Parker v. Gladden*, 385 U.S. 363 (1966).

⁵ See *Duncan v. State of La*, 391 U.S. 145, 159 (1968); *District of Columbia v. Clawans*, 300 U.S. 617 at 628; *Schick v. United States*, 196 U.S. 65, 70 (1904); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968).

⁶ *District of Columbia v. Clawans*, 300 U.S. 617 at 628.

⁷ *Baldwin v. New York*, 399 U.S. 66, 66 (1970).

⁸ 18 U.S.C. § 19.

Courts are seemingly able to rely on remote justice in instances where a jury trial is not guaranteed or a right afforded by the Constitution. Bench trials, with the judge serving as the trier of fact, are simpler to constitute and because they are low-level crimes, there are often not witnesses involved that invoke the confrontation clause right. But, if we have witnesses to cross-examine, the defendant's right to confront is invoked and that begs the question, is that right a right to confront merely in the presence of defendant or does that right to confront in-person also require the trier of fact to witness that confrontation in-person? And further, while in-person was clear perhaps when the Constitution was drafted and even in opinions interpreting this right recently, but has that understanding changed or become less clear as time and technology are contemplated?

The Confrontation Clause of the Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right to... be confronted with the witnesses against him."⁹ Note that "all criminal prosecutions" carries its literal meaning in the Confrontation Clause, unlike in the right to a jury trial provision.¹⁰ The primary purpose of the Confrontation Clause was to prevent depositions or ex parte affidavits to be used against a defendant instead of personal cross-examination, as was common practice in civil trials.¹¹ The Confrontation Clause applies at trial to all witnesses making testimonial statements for any criminal offenses.¹² The federal right to confront witnesses is considered a fundamental right and applies to the states via the Fourteenth Amendment.¹³

The text of the Confrontation Clause speaks only of witnesses, not factfinders, indicating the possibility that factfinders may not need to be present for cross-examination to count. However, in a 1895 case, *Mattox v. United States*, the Court said the purpose of the confrontation right was to give the accused an opportunity to "compel [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."¹⁴ Although *Mattox* is dated, the Court has cited this statement several times in its more modern Confrontation Clause jurisprudence and it cannot be ignored.¹⁵

The relevant line of cases citing this statement from *Mattox* have involved remote witnesses, not juries. It is unclear whether factfinders are subject to the Confrontation Clause because this question has never been directly addressed. We must look to dicta for guidance on how the Court may rule if this issue was directly before it. In *Coy v. Iowa*, the Court emphasized that face-to-face confrontation was "essential to fairness," because "a witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts."¹⁶ Under this rationale, whether the jury sits in the courtroom or elsewhere on video is irrelevant to the confrontation right. But another rationale offered in *California v. Green*, that the jury who decides the defendant's fate should be able to

⁹ U.S. Const. Amend. VI.

¹⁰ Sanjay K. Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 520 (2011).

¹¹ *Mattox v. United States*, 156 U.S. 237, 243 (1895).

¹² See *California v. Green*, 399 U.S. 149, 159 (1970) (stating the Confrontation Clause does not grant the defendant the right to cross-examine the witness at the time of a prior statement, as long as the defendant gets cross-examination at the time of trial).

¹³ *Pointer v. Texas*, 380 U.S. 400, 400 (1965).

¹⁴ *Mattox v. United States*, 56 U.S. 237 at 243.

¹⁵ See e.g., *California v. Green*, 399 U.S. 149, 158 (1970); *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (quoting *Green* citing *Mattox*); *Maryland v. Craig*, 497 U.S. 836, 843 (1990); *Crawford*, 541 U.S. 36 at 36-37.

¹⁶ *Coy v. Iowa*, 487 U.S. at 1017.

observe the demeanor of the witness in making his statement, suggests the Confrontation Clause may apply to the factfinder as well.¹⁷ Based on the limited case law, whether the Confrontation Clause applies to the factfinder is an open question.

in *Maryland v. Craig*, the Supreme Court upheld the use of one-way closed-circuit television for child witnesses, where the defendant and jury could see the witness on screen but the witness could not see the defendant.¹⁸ Moving away from Justice Harlan's broad reading of the Confrontation Clause, the Court stated "the presence of other elements of confrontation – oath, cross-examination, and observation of the witness' demeanor – adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony."¹⁹ This statement implies that the presence of these other elements of confrontation actually fulfills the Confrontation Clause requirement despite the absence of a face-to-face meeting. *Craig* is distinct from *Coy* in that the defendant and jury were able to see the witness on closed-circuit television. According to *Craig*, this distinction allows the factfinder to observe the witness' demeanor.

In *Craig*, the court emphasized that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial *only* where denial of such confrontation is necessary to further an important public policy."²⁰ To determine whether this scheme was necessary to further an important state interest, *Craig* asked 1) is the procedure's use necessary to protect the particular child witness' welfare, 2) would the child be traumatized by the defendant's presence, and 3) would the emotional distress suffered by the child be more than *de minimis*.²¹

One important question going forward, beyond the pandemic, will be what constitutes a "public policy interest"? It is unlikely that the general constant interest in efficiency and juror convenience would be a sufficient "public policy interest" to outweigh the defendant's confrontation right. However, if there is opportunity to have greater juror participation and thus a more representative sample, perhaps that is a sufficient public policy interest to sustain the use of remote participation on a jury. As a foundational point, a jury is supposed to be comprised of one's peers. However, the manner in which jurors are summoned – the rolls from which prospective jurors are drawn – inherently excludes members of the public; peers of the defendant.

The Fifth Amendment and the Fourteenth Amendment guarantee that no one shall be "deprived of life, liberty, or property without due process of law."²² The Due Process clause affords a range of substantive and procedural rights for criminal defendants, including the Due Process rights to a representative panel of jurors, effective assistance of counsel, and a public trial. We will also focus on the Due Process right to

¹⁷ *California v. Green*, 399 U.S. at 158.

¹⁸ *Craig*, 497 U.S. at 837. Note that the Utah supreme court held *Crawford v. Washington* (which was decided 14 years later) did not overrule or implicate *Craig*. *State v. Henriod*, 131 P.3d 232, 239 (Utah 2006).

¹⁹ *Id.* at 851.

²⁰ *Id.* at 850 (emphasis added).

²¹ *Id.* at 838.

²² U.S. Const. Amend. V; U.S. Const. Amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

be present,²³ the Due Process right to have a person with jurisdiction presiding at trial,²⁴ and other considerations under the Due Process right to fundamental fairness.²⁵

Other Ways Courts Make Justice Remote

Courts were working on ways for the user to engage with the court remotely before COVID-19. It may be that we just took notice, out of necessity, because of COVID-19. It may also be that courts were talking about their efforts only insularly. But, they were and are working on it. One of the most celebrated ways is through Online Dispute Resolution (“ODR”), a tool widely used by online retailers in the private sector²⁶ that courts are attempting to adapt to their work. Unfortunately, we don’t know if it’s working. There’s a real lack of rigorous evidence to say one way or the other and, perhaps a product of the general excitement about remote engagement, there seems to be antipathy for developing a body of evidence. Will ODR crash and burn from over enthusiasm and fear of evaluation that is misplaced? Why is the justice system so afraid to learn something isn’t immediately awesome, but, rather, may need some iteration to be supremely useful?

ODR is the use of technology to automate some or all of the steps in a resolution process.²⁷ The Hague Institute for Innovation of Law (“Hiil”) suggests that ODR may be useful for at least three phases of resolving a legal problem: diagnosis, conciliation, and decision.²⁸ However courts are not primary drivers of thinking of this product in the diagnosis phase. There is a general shyness on the part of courts to think about engaging pre-filing, pre-jurisdiction. That’s not to say other justice system actors can’t lead the charge with courts serving as an active champion of that effort. Further the example given for the “decision” phase is often traffic cases²⁹, which seems like something that is long overdue for remote resolution.

The asynchronous nature of ODR has the potential to improve access to justice by removing the barriers that come with mandatory physical presence at a court facility. The legitimate litany of issues we can all rattle off by now – transportation and childcare challenges, missing work for an unpredictable amount of time, and recent concerns about public health both for individuals who are in high risk categories and those who may be unwittingly contagious.³⁰ Proponents of ODR also suggest that remote interactions with the justice system and opposing parties are less stressful than in-person interactions. The theory goes on to suggest increased resolution of cases by those who otherwise would be unlikely to proceed when met with stressful or anxiety-laced case events.³¹ When parties are able to distance themselves

²³ See *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934) (emphasis added).

²⁴ See *Gomez v. United States*, 490 U.S. 858, 876 (1989).

²⁵ See *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941)

²⁶ See generally Ayelet Sela, *The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions*, 21 Lewis & Clark L. Rev. 635 (2017); see also Ethan Katsh & Leah Wing, *Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future*, 38 U. Tol. L. Rev. 19, 41 (2006).

²⁷ Joint Technology Committee, *ODR for Courts*, 2 (2017).

²⁸ Hiil, *ODR and the Courts: The Promise of 100% Access to Justice?*, 37 (2016).

²⁹ *Id.*

³⁰ See, *Supra*, note 2 at 7.

³¹ *Id.* at 6.

from overwhelming and immediate emotion in their case, they may be able to use more caution in composing language.³²

However, there is not an overall consensus that asynchronous communication can deescalate high emotions. Some have found the asynchronous model to result in response delays, prolonged waiting periods, and sabotaging of conversations, all which serves only to heighten emotion.³³ Further, while some suggest power-imbalances among parties may be neutralized by ODR³⁴, others fear they will be exacerbated³⁵.

Courts of course are concerned about fairness but they also value efficiency. ODR is seen as a way to create efficiencies especially around high-volume dockets with little reimagining of the process altogether.³⁶ But is it wise to replicate the in-person process in an online setting, or should it actually be a problem that ODR allows for little reimagining of the existing process?

Has ODR worked in a way that courts can rely upon? There have been a handful of empirical studies that investigated user experiences in ODR processes, with particular focus on gender³⁷, hierarchical dynamics³⁸, availability of information³⁹, and small claims dispute resolution in construction cases⁴⁰. Most of these research efforts, however, rely on data from private ODR platforms or platforms operating outside of the United States. The body of research we have in the US relies mostly on self-

³² See, Zoe I. Barsness & Anita D. Bhappu, *At the Crossroads of Culture and Technology: Social Influence and Information-Sharing Processes During Negotiation*, *The Handbook of Negotiation and Culture*, 350, 354 – 57 (2004) (discussing that parties' ability to thoughtfully respond rather than reacting immediately limits conflict escalation in the context of e-negotiation); See also, Dafna Lavi, *No More Click – Click in Here: E-Mediation in Divorce Disputes – The Reality and the Desirable*, 16 *Cardozo J. Conflict Resol.* 479, 498 (2015).

³³ Lavi, *Supra*, note 7 at 502.

³⁴ Abraham Kuhl, *Family Law in the Twenty-First Century: Comment: Family Law Online: The Impact of the Internet*, 21 *J. Am. Acad. Ma Frimonia. L.* 225, 242 (2008).

³⁵ See e.g., Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 *Harv. Negot. L. Rev.* (2009) (emphasizing that dispute system design choices should take into account contextual and intuitional variables and particularly power imbalances in the process).

³⁶ Orna Rabinovich-Einy & Ethan Katsh, *A New Relationship between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution*, 32 *Ohio St. J. on Disp. Resol.* 695, 720 (2017).

³⁷ See, Martin A. Gramatikov & Laura Klaming, *Getting Divorced Online: Procedural Outcome Justice in Online Divorce Mediation*, 14 *J.L. & Fam. Stud.* 97 (2012) (finding high levels of satisfaction with online divorce procedures and quality of outcomes of both male and female divorcees in the Netherlands, although the former focused more on monetary and time costs while the latter focused on negative emotions).

³⁸ See, Katalien Bollen & Martin Euwema, *E-Supported Mediation: What do we Learn from the Field?*, paper presented at the National Mediation Conference: Emerging Dynamics in Mediation – New Thinking, New Practices, New Relationships (Sept. 10-13, 2012) (finding that a hybrid process combining online intake with face-to-face mediation had an equalizing effect in hierarchical labor settings on parties' fairness and satisfaction perceptions).

³⁹ See, Laura Klaming, Jelle van Veenen, & Ronald Leenes, *I Want the Opposite of what you Want: Reducing Fixed-pie Perceptions in Online Negotiations*, 2009 *J. Disp. Res.* 139 (finding that providing negotiators with incentives independent from the resources that have to be divided, as well as providing them with information about the opponent's preferences, led to more agreements in online negotiations).

⁴⁰ See, Udechukwu Ojiako, Maxwell Chipulu, Alasdair Marshall, & Terry Williams, *An Examination of the "Rule of Law" and "Justice" Implications in Online Dispute Resolution in Construction Projects*, 36 *International Journal of Project Management* 301, 311 (2018) (finding that the ODR process does not affect parties' satisfaction with the "rule of law" or "justice" in small claims ODR in construction projects, while suggesting further research on the cultural contexts around these concepts).

reported pre-ODR and post-ODR data, mostly compiled by courts and private platforms and unconfirmed by independent research.

And why is the pre-, post- analysis difficult to rely on? After all, we didn't have ODR before, and now we do, so it makes sense that whatever differences we see must be a result of ODR right? But, because we don't know what the effect is with ODR and, more importantly, without ODR, at the same point in time, we can't say for sure it was specifically ODR.

For example, if we implement a program where we provide farmers with fertilizer and the amount of crops seems to increase after implementation of the program, we could assume it is the fertilizer provision program that caused the increase in crops. But, it could also be all sorts of other things such as better rainfall that year, more farmers growing crops because they got the free fertilizer, better turning of the soil, or less invasive insects that year.

Thinking about this in the ODR context, if we implement ODR this year and see an increase in settlements from last year before we implemented ODR, it could be a direct result of the ODR platform. It could also be less high stakes cases being filed, a general increase in filings, more amicable parties, better lawyering, better self-help materials unveiled during that same year, turnover in mediators, and any number of other things.

So you see, while a pre-, post- analysis may give you a good hypothesis, it is not always reliable data. Further, with vendors and courts reporting their own data, there is a lack objectivity and an incentive to diminish or exclude failures.

As the third wave is upon us, and in-person justice becomes less and less the norm, courts should not only rush to add remote engagement opportunities, but they should also evaluate them rigorously. We should embrace a culture of celebrating failures because those failures allow us to recognize success. We can't say for sure if ODR is doing what we hoped it will. There's reason for optimism and there's reason for doubt.

Representative Sample and Marginalization of Users

In this closing section we will briefly touch on the mechanics behind juror summoning and how that can immediately limit the representativeness of jury pools. We will also discuss potential solutions to improve this and hope for some audience thoughts and insight. We will also talk about those pockets of the population who already disengaged with the justice system, think about why that may be, and how technology may solve the issue. We will also flip the coin and think about how technology may exacerbate the issue or change the make-up of the population who disengages. We'll end thinking about solutions. The goal of this talk is to issue-spot and then begin the work to solve problems, drawing on the collective knowledge and creativity of the group.