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ABUSE JUST OUT OF FRAME: THE IMPACT OF ONLINE DISPUTE RESOLUTION ON DOMESTIC VIOLENCE

Haley Benson¹

I. INTRODUCTION

“This is a[n] issue we didn’t have when we had live court.”²

It was a chilling day for prosecutor Deborah Davis when she discovered a victim of domestic violence was in the same apartment as her abuser during a session of Zoom court.³ In this case, the survivor had done the hardest part; she had made the decision to prosecute her abuser. As court began, Davis saw that her client had a similar virtual background to the alleged abuser and noticed that her client was looking away from the camera while answering questions.⁴ This prompted Davis to request that police be sent to her client’s location, where officers discovered that the abuser was indeed sitting in the same room as the victim during court.⁵ The judge in this case applauded the police for following up so quickly with the victim and taking the defendant into custody and marveled at the fact that something like this could never have happened during live court.⁶ The story involving prosecutor Deborah Davis is one of many harrowing tales that exemplify the faults with using online forums for survivors of domestic violence. This story also represents one of many in which abusers can and do attempt to control the actions of a survivor.

The effect of the COVID-19 pandemic has been felt in every aspect of life, and stay-at-home orders have forced our world to move online rapidly. Though these orders were meant to protect the population from the spread of disease, they also led many domestic violence victims to become trapped with their abuser.⁷ Victims were no longer able to safely connect to protective services, so the amount victims reporting domestic violence dropped drastically.⁸ The ability to safely contact someone regarding abuse is only part of the battle for survivors. Many survivors do not try to prosecute their abusers due to the trauma that re-living abuse can have when questioned in court.⁹

¹ B.A., University of Missouri, 2018; J.D. Candidate, University of Missouri School of Law, 2022; Associate Member, *Journal of Dispute Resolution*, 2021. I am grateful to Professor Amy Schmitz for her guidance and support during the writing of this Note, as well as the *Journal of Dispute Resolution* for its help in the editing process.

² MLive, *Domestic Violence Suspect Arrested at Accuser’s Apartment During Virtual Court Hearing*, YOUTUBE (Mar. 10, 2021), <https://www.youtube.com/watch?v=-8DApY7OE90&t=138s>, (from 1:53 to 1:58).

³ *Id.* (from 0:06 to 0:29).

⁴ *Id.*

⁵ *Id.* (from 0:57 to 1:40).

⁶ *Id.* (from 2:07 to 2:13).

⁷ Megan L. Evans et al., *A Pandemic within a Pandemic – Intimate Partner Violence during Covid-19*, 383 N. ENGL. J. MED. 2302 (2020).

⁸ *Id.*

⁹ Sarah Rogers, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence*, 24:2 OHIO STATE J. ON DISP. RESOL. 349, 352 (2009).

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Domestic violence is a pervasive problem that affects both women and men from all walks of life; it crosses the lines between poverty and wealth, education, gender, race, etc. Though this is an issue for people of any sex or gender, literature tends to focus on women. Approximately one in five women experience rape or attempted rape, and of those women, about 47.1% had perpetrators who were current or former intimate partners.¹⁰ Intimate partner violence comes in many forms, including sexual violence, physical violence, stalking, and psychological aggression.¹¹ This form of violence can cause victims injury, fear, safety concerns, and even a depletion of resources (e.g., food, water, shelter).¹² Unfortunately, many victims experience multiple forms of violence.¹³

The relationship between a victim of domestic violence and their abuser is a complicated one because the onset of violence is often slow.¹⁴ Women do not fall in love with abusers.¹⁵ The fact that the relationship started off good and then deteriorated is one of many factors why women stay in abusive relationships.¹⁶ When the abuse begins, the victim has already made a strong emotional commitment to the abuser.¹⁷ Once a victim is this deep into a relationship, it may be too late for the victim to escape easily.¹⁸ In fact, leaving an abusive relationship is often the most dangerous time for a victim.¹⁹ One study found that 75% of reported domestic violence incidents occurred after the women were separated from their abusive partners.²⁰

Online Dispute Resolution (“ODR”) could potentially eliminate the fear of facing one’s abuser in person and be a less traumatic experience for survivors who must relive their abuse in court. Not everyone has reliable access to the internet nor devices that would allow them to participate in ODR.²¹ However, ODR presents its own problems when it comes to domestic violence. Lawyers, mediators, adjudicators, and judges can only see what happens on-screen, meaning an abuser could still assert influence over a victim off-screen and unbeknownst to any advocate. Overall, though ODR provides a good format to protect survivors, it comes with myriad issues. ODR should only be implemented based on the circumstances of each particular case and if it is possible to ensure the safety of survivors.

This comment will examine how ODR could be implemented in situations involving domestic violence and the limitations using ODR in these situations. Section II will discuss the history of the law and domestic violence, which will showcase that survivors have not always fared well in court, contributing to their hesitance in bringing litigation against abusers. Section III will discuss the benefits of using ODR in these situations, such as providing that barrier so

¹⁰ D. KELLY WEISBERG, DOMESTIC VIOLENCE: LEGAL AND SOCIAL REALITY 31 (Wolters Kluwer eds., 2nd ed. 2019).

¹¹ *Id.*

¹² *Id.* at 32–33.

¹³ *Id.* at 33.

¹⁴ *Id.* at 44.

¹⁵ WEISBERG, *supra* note 9, at 44.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 45.

²⁰ WEISBERG, *supra* note 9, at 45.

²¹ *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/?menuItem=6d2e5a1d-0fea-4cff-84ef-5999713abe5e>.

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victims feel safer coming forward. Section IV will outline how ODR is severely limited due to current technologies.

II. HISTORY OF DOMESTIC VIOLENCE LAW IN THE U.S.

a. The treatment of men versus women in U.S. courts

Victims of domestic violence have not always been supported by the law of the time. The early common law view of marriage was that marriage combined husband and wife as one person under the law, meaning a husband could not be legally responsible to his wife for anything besides necessities (i.e., food, shelter, debts).²² There were many instances where a wife was considered to be inferior to her husband, and should the husband feel the need to provide correction to his wife's behavior, the correction was called "domestic chastisement."²³ However, despite allowing this domestic chastisement, a husband was still prohibited from using unreasonable violence to correct his wife's behavior.²⁴ Even as late as the nineteenth century, several U.S. courts upheld a husband's right to beat his wife, as long as certain limitations were in place.²⁵ Only by the end of the nineteenth century did judicial policy reject a husband's right of chastisement.²⁶

In 1910, the Supreme Court in *Thompson v. Thompson* heard the issue of whether a wife could bring a civil action to recover damages from her husband for assault and battery.²⁷ The issue was that a statute enacted by the District of Columbia changed the common law status of married women.²⁸ At common law, women were regarded as becoming merged with their husband upon marriage, and therefore they could not enter into contracts and neither were liable for torts committed by one against the other.²⁹ The statute at issue in this case gave married women authorization to sue for their property rights separately from their husband and to sue for torts committed against them.³⁰ However, the Court found the statute did not intend to go so far as to give a wife a right of action against her husband.³¹ The only remedy a wife has in this kind of case is through criminal or divorce proceedings.³²

Thompson is famous for creating the Interspousal Immunity Doctrine, by which one spouse was barred from maintaining an action against the other to recover damages for abuse.³³

²² WEISBERG, *supra* note 9, at 16.

²³ *Id.* at 17.

²⁴ *Id.*

²⁵ *Id.* at 19.

²⁶ *Id.*

²⁷ *Thompson v. Thompson*, 218 U.S. 611, 614 (1910).

²⁸ *Id.* at 615.

²⁹ *Id.* at 614–615.

³⁰ *Id.* at 616.

³¹ *Id.* at 617.

³² *Thompson v. Thompson*, 218 U.S. at 619; *See* WEISBERG, *supra* note 9, at 16 (Divorce was far less common in this time period and for several reasons: women were not seen as whole people once they married, they were considered to be merged with their husband; men often controlled the family's finances, making finding a divorce attorney difficult; divorce was not socially acceptable).

³³ WEISBERG, *supra* note 9, at 27.

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This doctrine continued to be recognized by U.S. courts as late as the 1970s.³⁴ The Court in *Thompson* based the rationale for their decision on the idea of family harmony, stating that allowing wives to sue their husbands for tortious acts would open the doors to “accusations of all sorts of one spouse against the other.”³⁵ Eventually, *Thompson* was overruled, but many legal theorists still criticize the doctrine for illustrating the lack of legal protection for women in the “private sphere” of family life.³⁶

b. The creation of the female private sphere and its impact on domestic violence

Throughout history, women have been relegated to the private arena of the family due to their limited ability to participate in more public venues like the marketplace and government.³⁷ These areas were left to men, and this separation created a divide between the societally acceptable arenas in which men and women were expected to operate. Men were expected to participate in the more public spheres of society while women were expected to tend to the private sphere of family.³⁸ Forcing women into this private sphere was enforced by societal expectations and sex-based exclusionary laws.³⁹ As the issue of domestic violence increased, courts initially refused to interfere because family relationships were considered to be within that private sphere.⁴⁰ This isolated women because the only domain they were allowed to exist in was the private family sphere. That meant if courts refused to regulate conduct occurring in that sphere, then women were essentially without the protection of the court.⁴¹

The implications of viewing domestic violence as a private affair affirms that it is a problem that is “individual, that only involves a particular male-female relationship, and for which there is no social responsibility to remedy.”⁴² In *McGuire v. McGuire*, the Supreme Court of Nebraska officially adopted the doctrine of nonintervention.⁴³ This doctrine stemmed from the court’s reluctance to disrupt marital harmony and family privacy by interfering with a husband’s authority.⁴⁴ In this case, the plaintiff brought an action against her husband to recover maintenance and support from her husband who, as she testified, had essentially cut her off financially and restricted her duties at their home.⁴⁵ Despite the plaintiff’s allegations, the court decided that she was not entitled to a remedy at law.⁴⁶ The opinion states that the “living standards of a family are a matter of concern to the household, and not for the courts to determine.”⁴⁷ The court went further to state that public policy requires this holding as long as the married couple is living at home, maintaining their relationship, and the husband is legally

³⁴ *Id.*

³⁵ *Thompson*, 218 U.S. at 617; WEISBERG, *supra* note 9, at 28.

³⁶ WEISBERG, *supra* note 9, at 29.

³⁷ *Id.* at 9.

³⁸ *Id.*

³⁹ *Id.* at 10.

⁴⁰ *Id.*

⁴¹ WEISBERG, *supra* note 9, at 10.

⁴² *Id.* at 15.

⁴³ *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953).

⁴⁴ WEISBERG, *supra* note 9, at 22.

⁴⁵ *McGuire*, 59 N.W.2d at 336–38.

⁴⁶ *Id.*

⁴⁷ *Id.*

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supporting his wife.⁴⁸ This doctrine of nonintervention meant that courts will rarely adjudicate spousal responsibilities in an ongoing marriage.⁴⁹

The issue of violence between husband and wife is not an old one. Spousal sexual abuse was only criminalized in the U.S. in 1993, and in many of the states, the bar for prosecuting sexually abusive spouses is higher than for rapes involving a non-marital assaulter.⁵⁰ In Missouri, for example, there is no legal distinction between rape and marital rape, however thirteen states still treat marital rape as having a higher standard for prosecution than non-marital rape.⁵¹ Currently, the solutions available to victims of domestic violence are civil protective orders.⁵² Victims have the choice of obtaining an ex parte order, which is a temporary measure that can be quickly issued by courts, or a full order, which can only be issued after a court hearing but can last longer than ex parte orders.⁵³ Protective orders are an accessible remedy for victims of abuse because they are not criminal, and therefore require a lower burden of proof.⁵⁴

For victims of abuse, protective orders have several downsides. First, they are generally only enforceable by threatening to hold the respondent in contempt.⁵⁵ This means that noncompliance with an order could increase if an abuser can evade being caught.⁵⁶ Second, protective orders need to be renewed every few years, which gives abusers the opportunity to argue against the order and places a heavy burden on victims, as they are responsible for reporting violations of the order to police.⁵⁷ Third, it can be difficult for victims of abuse to obtain protective orders since they require some semblance of familiarity with the legal system.⁵⁸ Though protective orders are not perfect, they are still the most effective and most commonly used method of protection for victims of domestic violence. These orders are effective because they prevent not only physical abuse to victims, but also psychological abuse, which can leave marks for far longer.

c. Domestic violence instills fear in victims via psychological abuse and coercive control.

The abuse that victims of domestic violence endure is not just physical or sexual; it is psychological. One of the most common ways an abuser asserts psychological control over their victim includes isolating them from family and friends, thereby increasing the likelihood

⁴⁸ *Id.*

⁴⁹ WEISBERG, *supra* note 9, at 22.

⁵⁰ Pat Pratt, *Marital Rape Cases Rare, Relatively New*, COLUMBIA DAILY TRIB. (Jun. 14, 2018), <https://www.columbiatribune.com/news/20180614/marital-rape-cases-rare-relatively-new>.

⁵¹ *Id.*

⁵² MO. ATT'Y GEN. ERIC SCHMITT, *DOMESTIC VIOLENCE: PROTECTING ADULT VICTIMS OF DOMESTIC VIOLENCE* 6 (Mar. 2019), <https://ago.mo.gov/docs/default-source/publications/domesticviolence.pdf?sfvrsn=4>.

⁵³ *Id.*; see WEISBERG, *supra* note 9, at 482. (The order will direct a respondent to do or refrain from doing specified acts in order to protect the petitioner from harm).

⁵⁴ Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43, 44–45 (1989).

⁵⁵ See WEISBERG, *supra* note 9, at 482.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ *Weiner v. Weiner*, 27 Misc. 3d 1111, 1117 (N.Y. Sup. Ct. 2010).

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the victim will stay in the relationship because, without reality checks from outsiders, it will be more difficult to assess the level of danger the abuser presents.⁵⁹ Many victims also experience guilt, that is then weaponized by their abuser, because abusers will often try to convince victims that violence would not occur if it weren't for their own incompetence and poor behavior.⁶⁰ This can lead to low self-esteem, because a victim in this situation may begin to believe they do not deserve better than this abuse.⁶¹ All of these issues can compound into mental illness, and due to negative social stereotypes, abusers may be able to convince victims they are crazy or making it all up.⁶² The most advanced form of psychological abuse comes in the form of Stockholm Syndrome, where a victim will bond with their abuser and become more sympathetic to the abuser's needs.⁶³

All of the various forms of psychological abuse that abusers engage in ultimately compound in the idea of coercive control. Coercive control describes "the pattern of sexual mastery by which abusive partners, typically males, employ different combinations of violence, intimidation, isolation, humiliation, and control to subordinate adult victims."⁶⁴ Coercive control happens over time and permeates every aspect of a victim's life.⁶⁵ It is based on exploiting the insecurities of victims and focuses on enforcing stereotypical sexual behaviors onto them.⁶⁶ The trauma of abuse results in this coercion by breaking down a victim's personality through severe threats and isolation, forcing victims to undergo extreme behavioral and emotional adaptations in order to survive.⁶⁷ These adaptations can look like guilt, loss of self-esteem, detachment, fear of escape, fear of planning for the future, overreaction to trivial incidents, and more.⁶⁸

Due to the fact that courts have historically been unlikely to protect women from their abusers and that abusers exert multiple kinds of control over their victims, victims of domestic abuse may not feel comfortable facing their abuser in court. In recent history, the U.S. has made significant strides in domestic violence. This support is now being extended to the online forum through online dispute resolution.

III. DISCUSSION

The next section will discuss ODR as a viable alternative in domestic abuse situations. An important thing to consider in this discussion is that ODR is a large field that encompasses many kinds of dispute resolution processes; however, this comment will focus solely on online mediation. Online media has been growing in popularity, even more so since the COVID-19 pandemic. ODR presents many benefits, especially with regard to allowing victims of domestic violence to prosecute their abusers. However, there are several limitations that come not only with online mediation, but with reliance on the Internet in general.

⁵⁹ Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 COLO. LAW. 19, 22 (1999).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 24.

⁶⁴ EVAN STARK, *ENCYCLOPEDIA OF DOMESTIC VIOLENCE* 166–67 (Nicky Ali Jackson ed. 2007).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 167.

⁶⁸ *Id.*

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a. Online media have become necessary forums for life due to the recent effects of COVID-19.

Internet usage and reliance is constantly expanding, making it necessary to design efficient and effective ways to resolve disputes using it.⁶⁹ The internet is an excellent means of resolving disputes because more traditional methods, such as litigation, can be expensive and time-consuming.⁷⁰ Dispute resolution, and the law in general, have been facing disruption as the internet becomes more popular and our society depends more heavily on technology.⁷¹ This disruption has come to the forefront in the past year due to the COVID-19 pandemic. Though each judicial district has been allowed to create and follow their own guidelines in response to the pandemic, almost all districts were forced to move online for at least a portion of the pandemic.⁷² Even the Supreme Court of the United States has been forced to hear oral testimony via teleconference.⁷³ This public health crisis has forced litigators across the country to practice remotely, resulting in all aspects of a case (e.g., examining witnesses, conducting mediations, etc.) being done virtually.⁷⁴ Judges, attorneys, and clients alike have all become familiar with various teleconference and videoconference platforms as a result of the pandemic.⁷⁵

The pandemic has had a substantial impact on victims of domestic violence. It has led to economic instability, lack of child support, lack of social support, unsafe housing, all of which can worsen an already tenuous relationship.⁷⁶ Economic independence is critical when it comes to abusive relationships, and victim's finances are often entangled with their abuser's finances.⁷⁷ The COVID-19 pandemic caused many to lose their jobs, which not only puts more stress on the relationship, but also means victims were forced to stay with their abusers out of necessity.⁷⁸ Barriers to reporting domestic violence are also heightened during a pandemic.⁷⁹ Since not all communities have the same access to the internet or to devices which can connect to the internet, victims had to choose between either not being able to report due to an inability to access the internet or file a report in person and risk becoming infected by COVID-19.⁸⁰

b. ODR could give victims of violence the chance to prosecute their abusers.

Despite the issues with access to the internet, ODR still presents a unique way to help victims of domestic violence. As domestic violence has been historically thought of as a private

⁶⁹ See Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2 DUKE LAW & TECH. REV. 1 (2003).

⁷⁰ *Id.*

⁷¹ Amy J. Schmitz & Leah Wing, *Beneficial and Ethical ODR for Family Issues*, 59 FAM. CT. REV. 3 (2021).

⁷² Andreas Frischknecht, *United States*, in IMPACT OF COVID-19 ON COURT OPERATIONS & LITIGATION PRACTICE, 110 (Int'l Bar. Ass'n Litig. Comm. 2020).

⁷³ *Id.*

⁷⁴ *Id.* at 112.

⁷⁵ *Id.*

⁷⁶ Evans et al., *supra* note 7.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

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matter, societal intervention has been limited.⁸¹ Courts have traditionally refused to intervene in this private sphere, and today that has translated into treating domestic violence as a separate type of violence.⁸² Today, the adversarial model of prosecution is male-dominated, meaning it takes into account male values and reasoning.⁸³ This means that taking an abuser to court can be especially difficult for female survivors due to the trauma they have already suffered and being forced to relive it in such an abrasive manner. Undergoing a criminal proceeding after being abused means having to sit in a room full of men while being asked incredibly intrusive questions to ascertain whether a victim is actually what she says she is.⁸⁴ Mediation has been thought of as a remedy to this situation because parties have more of a role in determining how the process goes and what is discussed in the mediation.⁸⁵ A core principle of mediation is party self-determination, which means that the parties involved must come to a voluntary, uncoerced decision as to the process of the mediation and the outcome.⁸⁶ Where litigation in a courtroom is focused on retribution, mediation is more akin to restorative justice, which focuses on compelling an offender to provide restoration for the damage or harm they have caused to the victim.⁸⁷ Restorative justice also addresses the unique psychological needs that many survivors will have following abuse, and in doing so, can decrease the anxiety and other negative aspects that survivors may experience during this process.⁸⁸

ODR is not simply conducting dispute resolution processes through an online forum; it covers using computers to aid in the negotiation or mediation of disputes and serving as adjudicators.⁸⁹ A computer as an adjudicator means that the computer may produce a decision to resolve a dispute as a judge or arbitrator.⁹⁰ Computers can do this in various ways, through pre-programmed decision trees or algorithms.⁹¹ As an aid to a negotiation or mediation, a computer can help participants connect or learn about the other's perspective or acquire information to help them resolve their conflict.⁹² While online claim filing and the ability to conduct resolution processes through an online forum is useful, it certainly does not encompass all that ODR can offer. ODR can even help fulfill the tenet of self-determination. This is because the ability to access a device not only provides parties with the ability to access and store important information; access to the internet connects parties to information that, when available, may help them reach more informed decisions.⁹³

⁸¹ Rogers, *supra* note 8, 352–53.

⁸² *Id.* at 353.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 354.

⁸⁶ Alyson Carrel & Noam Ebner, *Mind the Gap: Bringing Technology to the Mediation Table*, 2 J. DISP. RESOL. 1, 17 (2019).

⁸⁷ Rogers, *supra* note 8, at 354.

⁸⁸ *Id.* at 357.

⁸⁹ Jean R. Sternlight, *Pouring a Little Psychological Cold Water on Online Dispute Resolution*, 2020 J. DISP. RESOL. 1, 6 (2020).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Carrel & Ebner, *supra* note 85, at 18.

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Online mediation is advantageous because it can cost less than taking someone to court due to the mediator being able to lower their fees.⁹⁴ Moving mediation online automates much of the process, such as allowing parties to meet via an online forum, online claim filing, or using algorithms to solve smaller claims.⁹⁵ This automation means a mediator will be able to spend less time dealing with trivial aspects of a mediation, (e.g., set-up) and they can focus more on helping their clients in a timely and financially friendly manner.⁹⁶ This is especially important for survivors who have experienced some type of financial abuse by their partners, as they may not have enough money to be able to go to court or hire a well-respected mediator.⁹⁷ Additionally, the online part of mediation does not refer just to the ability to meet over an online forum. Computer software can be developed to take an active role in a mediation.⁹⁸ A mediator could use the online component of a mediation to analyze the situation and suggest possible outcomes.⁹⁹ This could mean anything from providing participants with a logic tree of questions so they may better frame their case to helping the mediator understand each of the party's arguments in less time.¹⁰⁰

Another advantage of online mediation is that it allows the mediator to adapt the process to address the specific needs of each client.¹⁰¹ Using the internet to resolve disputes gives a mediator greater flexibility, which can lead to more creative solutions too.¹⁰² Family conflict is complex and can lead to many ethical issues.¹⁰³ Online forums are thought to be beneficial because they help a participant with less power to not be intimidated into over-compromising or self-censoring.¹⁰⁴ This is essential because survivors of domestic violence have been subjected to an unequal power dynamic at the hands of their abuser, which is a dynamic that could easily be carried into the dispute resolution room if the mediator is not able to effectively control the room.¹⁰⁵ Online forums can also provide distance between the two parties that may reduce tension and increase comfort.¹⁰⁶ The parties involved in family issues may often not wish to see the other person and having an online barrier between them may help them to focus on finding a solution amenable to both parties.¹⁰⁷

c. Limitations of ODR in the domestic violence context

ODR may have many advantages, but there are several issues that need to be addressed especially in the case of domestic violence. The most obvious issue is that the

⁹⁴ Graham Ross, *ODR's Role in In-Person Mediation and Other 'Must Know' Takeaways About ODR*, MEDIATE (Mar. 2017), <https://www.mediate.com/articles/RossG2.cfm>.

⁹⁵ Sternlight, *supra* note 88, at 6–7.

⁹⁶ Ross, *supra* note 93.

⁹⁷ Buel, *supra* note 58, at 19.

⁹⁸ Ross, *supra* note 93.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Goodman, *supra* note 68, at 7.

¹⁰² *Id.*

¹⁰³ Schmitz & Wing, *supra* note 70, at 4.

¹⁰⁴ *Id.* at 5.

¹⁰⁵ *Id.* at 20.

¹⁰⁶ *Id.* at 6.

¹⁰⁷ *Id.*

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mediator or adjudicator will not be present in the same room as either the victim nor the abuser.¹⁰⁸ This means that during a session, a mediator will only be able to control the features of the platform they are using.¹⁰⁹ Mediators cannot see anything that does not appear on their own computer screen, nor can they see what the parties are seeing on their own monitors.¹¹⁰ Though a mediator can try to mitigate some of these risks by providing ground rules and asking parties to confirm that the conditions for the mediation have been met, they have no way of monitoring or enforcing those conditions unless any violations are visible or complained of by either party to the mediation.¹¹¹ This means that any intimidation tactics that the abuser could potentially employ may go completely unnoticed by even the most competent mediator simply because quite a bit of information can be hidden when using an online forum.

In addition to not knowing what is happening on the other side of the screen, ODR can feel impersonal.¹¹² Experts in mediation agree that mediation is most effective when the parties are physically present before a mediator.¹¹³ In-person mediation allows a mediator to create an atmosphere in which the parties can trust the mediator, which is essential to reaching a resolution.¹¹⁴ Parties are better able to listen, understand, and even empathize with one another during an in-person dispute resolution process.¹¹⁵ The internet puts a barrier between the parties and the mediator, which means important information may be miscommunicated or not communicated at all.¹¹⁶ The lack of personal presence can also make it more difficult for the mediator to maintain effective control over the parties in question.¹¹⁷ Online media can make it difficult for a mediator to manage the tone of interactions without sounding “controlling or judgmental.”¹¹⁸ The mediator, especially in the beginning, is just a disembodied voice.¹¹⁹ They cannot use their own physical “personhood” to set the parties at ease or create an environment focused on sustained problem-solving.¹²⁰

The impersonal nature of ODR impacts a mediation in more ways than the mediator experiencing less control over their process. Since the mediator and parties are not physically present, the mediator will not be able to monitor body language, facial expressions, or tone.¹²¹ This issue is clearly exemplified in the story about prosecutor Deborah Davis, who was luckily paying enough attention to her client to recognize that she was being coerced.¹²² In an in-person court session, Davis and the survivor would have been in the same room together, making it much harder for the defendant to coerce or abuse the survivor. However, because court had

¹⁰⁸ *Online Dispute Resolution and Domestic Violence*, BATTERED WOMEN’S JUST. PROJECT (Sept. 3, 2020), <https://www.bwjp.org/news/online-dispute-mediation-tipsheet.html>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Goodman, *supra* note 68, at 2.

¹¹³ *Id.* at 10.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 11.

¹¹⁷ Goodman, *supra* note 68, at 11.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² MLive, *supra* note 1.

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been recreated online. Davis had to pay attention not only to her duties as prosecutor, but to the fact that the survivor and the defendant appeared to be in the same room and that the survivor seemed to be listening to answers from someone off-screen.¹²³ Dispute resolution is reliant on the ability for a non-partisan party (i.e., a mediator) being able to listen and process oral information, something they cannot do as effectively in an online setting.¹²⁴

Another issue with using ODR processes has nothing to do with domestic violence and everything to do with the limitations of the modern day. The internet is a commodity that must be bought and paid for, and unfortunately not everyone has access to it. ODR is not possible without the internet, and about 15% of the population of the United States does not have access to the internet.¹²⁵ The percentage of people who have internet service increases as income levels increase, which means that those in poverty represent the largest group of Americans without access to the internet.¹²⁶ Internet access is not the only hindrance to using an exclusively ODR forum. In the United States, a little over 90% of the population owns one or more types of computing devices.¹²⁷ Of that portion, almost 10% of people only have a smartphone as their computing device.¹²⁸ Though phones can access the internet, they do not provide the best experience unless the online platform has been optimized for mobile use.¹²⁹

Online platforms are often designed to be user friendly so that they can be navigated by non-legal professionals;¹³⁰ however, the baseline for “user friendly” is not clear. For example, a high school graduate might not be able to navigate an online forum as easily as someone with an advanced degree from a higher institution. Though about 88% of the United States population has graduated high school, only about 32% has attained a bachelor’s degree or higher.¹³¹ Education level is something that would need to be taken into context when determining how well the average person can use an online platform, and more so, how well an uneducated person can use such a platform. These concerns are especially important in cases of domestic violence because often the victims of such violence will fall into one of these groups. Poverty and lack of higher education are compounding factors when it comes to likelihood of being in an abusive relationship.¹³²

IV. CONCLUSION

Due to the COVID-19 pandemic forcing the entire world to move largely online, the judicial system has also adapted by going online. This has normalized the use of online platforms and has forced these platforms to advance to be more efficient and effective. Though the pandemic has had a beneficial effect for increasing the amount of online forums, being forced to stay at home has been worse for victims of domestic violence. The COVID-19

¹²³ *Id.*

¹²⁴ Goodman, *supra* note 68, at 11–12.

¹²⁵ *Online Dispute Resolution in the United States*, AM. BAR. ASS’N. (Sept. 2020), <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odrvisualizationreport.pdf>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Online Dispute Resolution in the United States*, *supra* note 124.

¹³¹ *Id.*

¹³² Buel, *supra* note 58, at 20.

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pandemic is unique in that it is a public health crisis which has resulted in the need for the population to remain in the home. This means that victims of domestic violence will be stuck in the same space as their abuser, and they will have fewer options to escape if they don't want to risk contracting or spreading COVID-19.

Victims of domestic violence are plagued by fear throughout their entire relationship. Abusers cause this fear in many ways during the relationship (financial, psychological, and reproductive abuse, etc.) and often that fear will carry over despite there no longer being a physical threat. In a normal court setting, victims must face their abusers in person, which can bring back those memories of abuse. ODR can solve these issues by allowing victims to come forward without having to fear retribution because they can keep their location hidden, do not have to find childcare if children are an issue (nor bring kids to the courtroom), and do not have to relive their trauma in a courtroom.

There are many benefits to ODR, and protecting a victim's location is only one of them. Online forums are quickly advancing to not only serve as a platform for online mediation, but to take an active role in assisting the parties and the mediator to come to a satisfying resolution. Various programs are being developed so that the computer can assist a mediator in analyzing the party's arguments and provide suggested outcomes. This ultimately will help the mediator to be able to identify what is most important to each party and come to a resolution more quickly and efficiently. Despite many benefits, the limitations of an online forum cannot be forgotten. The very nature of being online brings up issues regarding internet accessibility, and until the issue of equal access to internet is resolved, ODR can never be a preferred method of resolution. The online forum can also come off as impersonal, which makes it difficult for a mediator to create an atmosphere of empathy and understanding. Additionally, mediators need to be able to maintain control of the parties. An online forum prevents a mediator from doing this as effectively because it can be difficult to stop a conversation without being in the room. Lastly, mediators need to be able to see the parties' body language and hear their tone to determine if this method of dispute resolution is working effectively. If an abuser is using the ODR process simply to further bully and harass the survivor, then a mediator needs to be able to step in and stop the discussions.

The limitations associated with an online forum for dispute resolution can be resolved via advancements in technology and online specific training for adjudicators. Communities should ensure equal access to broadband internet, which will not only help victims to file reports, but could provide them with access to information that may lead them to understanding the situation they are in and how best to get out of the situation.¹³³ This would be a critical step for domestic violence victims, as many choose to stay with their abuser simply because they are unaware of their options. However, many of the limitations associated with ODR will not be solved just by increasing access to the internet.

ODR can be an extremely effective tool when the mediator is able to maintain control of the situation. Traditional mediation includes a mediator meeting with parties individually to discuss the case and gain a more in depth understanding of the main issues.¹³⁴ This allows the parties to keep their locations hidden and means they do not have to meet in person to discuss the issues, as they can just go through the mediator. Online forums make this process easier, but it is also a lengthy process. A mediator using an online forum can conduct multiple

¹³³ Evans et al., *supra* note 6, at 2303.

¹³⁴ Ross, *supra* note 93.

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mediations at once. For example, a mediator using Zoom would be able to put the parties in separate rooms to discuss their positions individually and would be able to easily switch between rooms to discuss the outcome the other party preferred and then negotiate them to a point where each party is satisfied. This cuts down on the amount of time a mediator will have to log for an average mediation due to the efficiency of being able to use an online forum. This is an advantage for online mediation participants as it will cut down on costs and take less time. Ultimately, whether or not to implement ODR in situations of domestic violence should be decided on a case-by-case basis, as the safety of the survivor must be prioritized.